SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/191/2022
Hearing Date: 19, 20, 21 & 22 March 2024
Date of Judgment: 17th June 2024

Before

THE HONOURABLE MR JUSTICE CHAMBERLAIN
UPPER TRIBUNAL JUDGE OWENS
MR ROGER GOLLAND

Between

SALI BERISHA

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

FERGUS RANDOLPH KC (instructed by **Zaiwalla & Co.**) appeared on behalf of the Appellant

LISA GIOVANNETTI KC and **WILL HAYS** (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

ASHLEY UNDERWOOD KC and **ADAM STRAW KC** (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

Introduction

1 Dr Sali Berisha is an Albanian national. He qualified and practised as a physician, specialising in cardiology, and achieved a degree of eminence in that field. From 1992 to 1997, he was the first non-communist President of Albania. From 1997 to 2005, he was leader of the opposition in the Albanian Parliament. From 2005 to 2013, he was Prime Minister, then an MP and, since May 2022, leader of the Democratic Party. He is currently leader of the opposition in the Albanian Parliament.

2 On 21 July 2022, the Secretary of State for the Home Department ("SSHD") wrote to Dr Berisha to inform him that, on 19 July 2022, a decision had been taken to exclude him from the UK on the grounds of criminality and corruption. It was said that his presence in the UK was not conducive to the public good. The reasons were as follows:

> "…you have clear links to organised crime groups and criminals who have presented a threat to public safety in Albania and in the UK and that you are willing to use these links to further your political ambitions, and… you have used your elected positions to engage in corruption and criminal behaviour to enrich yourself and your inner circle, in particular your former election adviser Damir Fazlic, whom you then protected when evidence of criminality emerged."

3 It is now known that the decision to exclude Dr Berisha was one of a number taken in respect of Albanian nationals as part of the Crime State Nexus Project ("CSNP"), which was aimed at the disruption of links between politicians and organised crime in the Western Balkans and Albania in particular.

4 On 18 August 2022, Dr Berisha filed a notice of application for review with SIAC, pursuant to s. 2C of the Special Immigration Appeals Act 1997 ("the 1997 Act"). Thereafter, SSHD agreed to reconsider the decision, provided some materials upon which the decision had been based and invited representations on those materials. In the meantime, the application to SIAC was stayed. Dr Berisha took the opportunity to make representations, which were considered. On 27 February 2023, SSHD emailed Dr Berisha's solicitors to inform them that SSHD had decided to maintain the decision.

5 It is common ground that we should treat this second decision as the operative one for the purposes of this application for review under s. 2C of the 1997 Act. However, we note the submission of Fergus Randolph KC for Dr Berisha that the first decision, and what he says is the meagre material on which it was based, remains an important piece of the background against which the legality of the second decision falls to be judged.

The grounds of appeal

6 Amended Grounds of Application for Review ("Amended Grounds") were filed on 9 October 2023. They were:

(a) **Error of law**: As can be seen from the witness statements of Dr Berisha and his daughter Argita Malltezi and the material annexed to them, Dr Berisha does not have "clear links to organised crime groups and criminal groups" and has not "used his elected positions to engage in corruption and criminal behaviour to enrich

[himself] and [his] inner circle". Thus, SSHD has acted unlawfully by making findings which are unsupported by evidence and/or based on views which could not reasonably be held, given in particular: (i) the lack of direct evidence demonstrating wrongdoing in relation to the sale and purchase of land to Damir Fazlic; (ii) the lack of evidence demonstrating a personal link between Dr Berisha and Fation Dauti; (iii) the admission that diplomatic communications between HM Embassy Tirana and the FCDO in London were lost; (iv) the change of position between the first decision (where it was said that the video footage of a party storming the Democratic Party headquarters "showed" that Dr Berisha had organised and attended a violent protest involving several known criminals) and the second decision (where it was said that this had been "alleged"); (v) SSHD's admission that Dr Berisha had sought to combat corruption; (vi) the fact that, as now admitted, corruption allegations involving Dr Berisha's daughter (apart from the transactions with Mr Fazlic) were not a key aspect of the recommendation in 2022; and (vii) SSHD's admission that the sources relied upon do not provide concrete evidence for the connections alleged (**Ground 1**).

(b) **Irrationality**: The decision to investigate Dr Berisha and make an exclusion direction against him was irrational because it involved the making of an arbitrary distinction between Dr Berisha and others in an analogous position, for example the current Prime Minister of Albania Edi Rama (**Ground 2**).

(c) **Discrimination**: The decision involved unlawful discrimination contrary to the Equality Act 2010 (**Ground 3**).

(d) **Failure to have regard to relevant considerations**: In taking the decision SSHD failed to have regard to the fact that targeting someone who had not been in power for 10 years, and overlooking the person currently in power (Mr Rama) was liable to strengthen the sponsors of organised crime groups ("OCGs"), who have real and current power (**Ground 4**).

(e) **Taking into account irrelevant considerations**: The exclusion decision is based on two irrelevant considerations: first, the fact that any acts done while Dr Berisha was President or Prime Minister of Albania were covered by sovereign immunity (as to which see Ground 6); and second, the adverse reputational consequences that would be caused by withdrawing Dr Berisha's exclusion. In addition, the decision-maker took into account four factual matters that lacked a proper evidential foundation and, even if true, could not demonstrate that Dr Berisha poses a risk to the UK, namely: (i) the collapse of pyramid schemes in 1997; (ii) the allegation that an energy park was expanded to enrich Mr Fazlic; (iii) claims by Zafar Ansar that in 2008 Ms Malltezi tried to blackmail him, using her relationship with Dr Berisha; and (iv) the claim that Dr Berisha encouraged Fation Dauti to engage in violent behaviour (kicking in the door of the Democratic Party headquarters on behalf of Dr Berisha) (**Ground 5**).

(f) **Sovereign, head of State and head of Government immunity**: The decision was unlawful insofar as it relied on acts done or omissions during the period when Dr Berisha was head of State or head of Government of Albania (**Ground 6**).

7 Ground 3 is no longer pursued.

8 There were two preliminary issues to be decided. The first arose from an application made by the Special Advocates for disclosure of materials said to be relevant to Ground 2, pursuant to rule 4(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 ("the Rules"). The material in question was described in an OPEN version of a note from Adam Straw KC dated 7 December 2023 as follows: "any materials in [the] control of the Respondent on 12 July 2022 which suggest links with organized crime and corruption in relation to third parties". This application was initially listed before us at a CLOSED hearing in December 2023. We directed that it should be relisted on notice to the OPEN representatives and gave directions for an OPEN version of the Special Advocates' and SSHD's submissions to be served on Dr Berisha. It was heard at the start of the substantive hearing of the appeal. We refused to make any order under rule 4(3) and indicated that we would give our reasons together with those for deciding the substantive application.

9 The second preliminary issue arose from SSHD's submission that the three witness statements and the thousands of pages of accompanying evidential material filed on behalf of Dr Berisha on 7 February 2024 was inadmissible because it was not before the decision-maker and so was irrelevant on a review of that decision to which judicial review principles apply. We indicated that we would not shut out this evidence at the outset. Rather, we would allow Mr Randolph to direct our attention to the parts of this evidence on which he wished to rely and to explain why they were relevant in his oral submissions. We would therefore consider the question of admissibility alongside the substantive application.

SSHD's OPEN reasons for exclusion

10 SSHD's OPEN reasons for the decision on 27 February 2023 to maintain the exclusion decision, notwithstanding the representations filed on his behalf, can be found in a ministerial submission dated 21 February 2023, with annexes. The following summary appears in para. 42 of Annex D:

> "It is noted that it has not been possible to sufficiently prove that Berisha has personal connections to Dauti. However, the open-source media reports, internal reporting, US State Department reporting, and further evidence outlined in Annex E has provided substantive and reliable evidence implicating Berisha in serious and organised crime and corruption. This includes an assessment of a significant level of corruption occurring throughout Berisha's time as Prime Minister (either conducted by himself or by members of his party which, due to his level of control over the party, must have been done with his knowledge and/or authorisation) and an assessment that Berisha interfered with the investigation into Fazlic, and that Fazlic's acquisition of the land bordering the Porto Romano energy park more likely than not involved the use of insider knowledge. It is also assessed that Berisha has benefited from connections with criminals and criminal activity."

11 Ms Giovannetti submitted that this assessment could be broken down into the following key components:

(a) A significant level of corruption occurring throughout Berisha's time as Prime Minister. Annex B includes the following:

> "**Evidence of wider abuse of power as Prime Minister**
>
> 24. Internal reporting indicates Berisha's abuse of power in the appointment of corrupt officials, interference in Albania's judicial system to protect subordinates from investigation and judicial proceedings, and illegal surveillance of political opponents.
>
> **Pervasive corruption by Berisha and his government, particularly approaching the 2013 elections**
>
> 25. Internal reporting provides a consistent and clear picture of widespread corruption throughout Berisha's period of government, but particularly in the run-up to the 2013 elections. This was used to further his interests, aid his allies and buy political support.
>
> **Berisha's tight political control and dominance of his government**
>
> 26. Importantly, the internal reporting indicates that the widespread grand corruption of his government could not have occurred without Berisha's knowledge and authorisation given his personal control over his Government."

Dr Berisha's representations were considered, including in particular the steps he claimed to have taken to address corruption and the involvement of other politicians in corruption. This was assessed as not relevant, because even if it were true that others (such as his successor as leader of the Democratic Party, Lulzim Basha) had been involved in corruption, that did not mean that Dr Berisha had not (see para. 35 of Annex B).

(b) Interference with the investigation into Fazlic:

(i) OPEN source reporting about Fazlic, who was a friend and election adviser of Dr Berisha and a legal client of his daughter and was investigated in Albania for money laundering. There was reporting on the website Balkan Insight to the effect that the investigation was subject to "intense political pressure on the prosecutor's office from the government and [Dr Berisha]" and internal reporting to the same effect. The US State Department's 2008 report reached the same conclusion.

(ii) Dr Berisha did not in his first and second witness statements address the allegation that he had exerted pressure on the prosecuting authorities but did assert that the investigation into Fazlic has established no wrongdoing by him. The CSNP team did not accept that Fazlic had been exonerated, given open source reporting that the case was dropped because prosecutors were unable to access key documents, the conclusions of the US State Department about the difficulty of pursuing criminal cases against officials, politicians, judges and persons with powerful business interests and the open source

reporting that pressure was applied by the government and by Dr Berisha in particular.

(c) Fazlic's acquisition of land bordering Porto Romano energy park more likely than not involved the use of insider knowledge:

(i) Open source reporting shows that: Dr Berisha's daughter, Argita Malltezi, left a UN job a few months after Dr Berisha became Prime Minister in 2005, to open a law firm in Tirana; with the assistance of her husband, Ms Malltezi employed a middleman to buy land from villagers on the edge of an energy park; Ms Malltezi's husband admitted that he had information regarding the development of that area; Mr and Ms Malltezi received a financial benefit when the land was sold to Fazlic; and the land subsequently increased in value eight-fold when the government expanded the energy park nearby.

(ii) The CSNP team considered Dr Berisha's representations carefully. They rejected his explanation (that it would be "illogical and disproportionate" to expand an energy park for the purpose of procuring a benefit to Fazlic). It was clear that there was both an intention to increase the size of the energy park and to engage in corruption. Ms Malltezi's evidence that she had not benefited was not convincing, given that: it was contradicted by open source reporting; there was a document with her signature on it; large profits were made from the acquisition of the land which would subsequently increase in value.

(iii) The 2008 US State Department report provided a proper basis for the conclusion that Dr Berisha had protected Fazlic from prosecution.

(d) Dr Berisha benefited from connections with criminals and criminal activity:

(i) There is internal reporting showing Dr Berisha's ties to criminality and organised crime and his willingness to encourage political supporters to engage in violence. There is also open source reporting from December 2021 which shows video footage of known Albanian criminal Fation Dauti violently kicking in a door at the Democratic Party headquarters on behalf of Dr Berisha. Dauti has been excluded from the UK because he is assessed to have had a leading role in an organised crime group. SIAC has found that Dauti is an influential member of a UK-based group that imports and distributes Class A drugs in the UK and that he has engaged in extreme violence.

(ii) The CSNP team considered Dr Berisha's statement that he did not know Dauti, but rejected it on the basis of internal reporting and their own assessment of the video. The ministerial submission accepted that the proximity of Dauti to Dr Berisha in the video did not necessarily prove a personal connection between the two, even if it suggested the possibility of one. Nevertheless, the assessment was maintained that Dr Berisha had been connected to criminals and organised crime groups and that he had benefited from these connections. That Dr Berisha was willing to use criminal

connections for his benefit gained some support from the video, which showed that he was willing to take advantage of Dauti's violence.

The law

The power to exclude

12 It is common ground that SSHD has the power to direct a person's exclusion from the UK. There is a debate about the true source of the power. In *Cakani v SSHD* [2013] EWHC 16, Ingrid Simler QC (sitting as a Deputy High Court Judge) said that it was derived from the general powers conferred by the Immigration Act 1971. In *Geller v SSHD* [2015] EWCA Civ 45, at [1], exclusion was said to have been directed under the prerogative and also under the Immigration Rules. Whatever the source, the existence of the power is reflected in s. 2C of the 1997 Act, which confers the right of appeal to SIAC. The relevant paragraphs of the Immigration Rules (now paras 9.2.1 & 9.2.2) require an application for entry clearance, permission to enter or permission to stay to be refused where SSHD has personally directed that the applicant be excluded from the UK and any extant entry clearance or permission be cancelled where SSHD has so directed. As to the significance of the Immigration Rules as a potential source of the power to exclude, see SIAC's decision in *T2 v SSHD* (SN/129/2016), 5 January 2018, at [49]-[52] (Elisabeth Laing J, UTJ Gill and Neil Jacobsen OBE).

The Home Office guidance on exclusion

13 The Home Office issued guidance on the exercise of the exclusion power on 26 November 2021. It provides that exclusion decisions may be made on the ground of "criminality" or "corruption". As to the first, the guidance includes the following:

> "A conviction is not necessary in order to consider a person for exclusion. If the person's activities are capable of falling within the scope of UK criminal legislation (or conduct prohibited by law), whether or not the individual is charged with or convicted of an offence, then it may warrant exclusion."

14 As to corruption, the guidance includes the following:

> "There is no single accepted definition of corruption. A number of organisations including Transparency International define it as 'the abuse of entrusted power for private gain'.
>
> The types of activities associated with corruption include, but are not limited to the following:
>
> - tax evasion
> - money laundering
> - bribery and accepting kickbacks (part of an income paid to a person in return for an opportunity to make a profit, often by some illegal arrangement)
> - extortion
> - asset stealing
> - fraud

- match fixing in sport.

A person does not need to have been convicted of a corruption related offence in order to be excluded. Where there is substantive, reliable information that a person has been involved in corruption this should be taken into account." (Emphasis added)

15 Under the heading "Assessing cases", the guidance includes this:

"A recommendation to exclude an individual from the UK must be based on reliable evidence. This might include the use of criminal record checks, particularly where the recommendation is to exclude the person on the basis of criminality in the UK or overseas. In other cases, the evidence may not be so straightforward, and a greater degree of scrutiny and assessment may be required.

…

Websites can be useful sources of information, but you should exercise caution when using online research. For example, they might suggest that an individual has said or done something which would justify exclusion but the website information in fact only repeats allegations from other websites, which are wrong."

The approach to be applied by SIAC on an application for review of an exclusion decision

16 When reviewing a decision to exclude, SIAC is required by s. 2C of the 1997 Act to apply the principles which would be applied on an application for judicial review. SIAC recorded SSHD's submission as to what this meant in *T2* at [21]:

"We have to review the closed material with care, bearing in mind the possibility that there may be other, perhaps innocent, explanations to rebut it. We are not required to review all the material which could have been available to the official who wrote the submission to the Secretary of State which led to the direction, but rather, 'the underlying material on which [the author of the submission to the Secretary of State] actually relied in order to identify facts or reach the conclusion.' That material need not be exhaustive of what is known, but must be sufficient to justify the contents of the submission. A review is 'an analysis of the facts and the basis for the facts which led to the recommendation or conclusion, together with the decision and its reasoning. That material must be sufficient to permit challenge, if appropriate, 'the underlying rationality of any part of' the decision."

17 At [22], SIAC accepted that submission and said this:

"It follows that we are not concerned with whether the allegation made against T2 in open was true, but whether there was evidence before the Secretary of State on which it was open to her reasonably to conclude that the allegation was true. It follows that T2's evidence to us, denying the allegation, is irrelevant."

18 The case law on judicial review makes clear that the standard of review is sensitive to the context. Where the decision under challenge engages fundamental human rights, the court will apply "anxious scrutiny": see e.g. *Bugdaycay v SSHD* [1987] AC 514, 531 (Lord Bridge); see also *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455, [54] (Lord Mance).

19 At one stage, Mr Randolph suggested that the decision under challenge here had the effect of restricting Dr Berisha's liberty to enter the UK as well as having a substantial adverse effect on his reputation; and that accordingly, it interfered with his fundamental rights so as to make this a context in which anxious scrutiny of the kind referred to in *Bugdaycay* was required. In oral argument, we sought to test that proposition and we did not understand Mr Randolph to persist with it. In any event, it is in our view mistaken.

20 As a general matter, foreign nationals who are not UK nationals or residents here have no right to enter the UK, whether as a matter of domestic or international law. Albanian nationals (in common with those of other countries on the visa national list) require entry clearance for any visit to the UK, however short. An applicant has no legitimate expectation that the application will be granted; the decision is for the UK Government. The effect of an exclusion decision is simply to short-circuit the process of considering an application for entry clearance (or permission to enter) by providing in advance that it will be refused. Unlike a decision to deprive a UK national of his citizenship, or to deport an individual who is physically present in the UK, or to freeze assets, a decision to exclude a foreign national from the UK does not take away or interfere with any prior right or status held by the excluded individual.

21 We accept that the decision to exclude a foreign national from the UK may, in a particular case, have significant consequences for the excluded individual or for others. That may be the case if, for example, the individual has family in the UK. There is no evidence, however, to suggest that this is Dr Berisha's position; and Dr Berisha did not rely on any rights under the European Convention on Human Rights ("ECHR"), whether his own or those of others. On the face of it, since Dr Berisha is outside the jurisdiction, Article 1 ECHR imposes no duty on the UK to secure *his* Convention rights.

22 We also accept that an exclusion decision may have reputational consequences, but the same is true of many decisions taken by governments about foreign nationals. These reputational consequences do not, in our view, elevate exclusion decisions into the category of decisions involving interference with a fundamental right.

23 This does not mean that the decision is immune from the ordinary requirements of public law. It must still have an adequate evidential basis; it must be rational; it must not be vitiated by any material error of established fact or failure without good reason to follow applicable policy or breach of legitimate expectation; and the decision-maker must take into account all mandatorily relevant considerations and no irrelevant ones. But it does not attract the elevated level of scrutiny required of decisions which interfere with fundamental rights.

The Special Advocates' disclosure application

24 The Special Advocates' disclosure application was, as we have said, pursued largely in OPEN. This meant that Mr Randolph was able to make submissions in support of it. The target of the application was "any materials in [the] control of the Respondent on 12 July 2022 which suggest links with organised crime and corruption in relation to third parties". That was expanded to include materials in the control of the Respondent at the time of the second decision on 27 February 2023.

25 This material was said to be relevant to ground 2 – the contention that SSHD acted irrationally by distinguishing arbitrarily between Dr Berisha and others in an analogous position. Reliance was placed on *Bank Mellat v HM Treasury* [2013] UKSC 39, [2014] AC 700, a challenge to the imposition of financial restrictions amounting in practice to the freezing of hundreds of million pounds held by an Iranian bank. The challenge succeeded before the Supreme Court in part because the aim of the measure was to restrict the access of the Iranian regime to the international banking system, but the Government had not imposed restrictions on other Iranian banks. The distinction between Bank Mellat and other banks was arbitrary and irrational. The fact that lesser restrictions had been imposed on other banks in comparable positions meant that the restrictions imposed on Bank Mellat were unnecessary: see [25]-[27] (Lord Sumption).

26 Lord Sumption made reference to *A v SSHD* [2004] UKHL 56, [2005] 2 AC 68, on which the Special Advocates and Mr Randolph also placed reliance. In that case, the House of Lords held that the detention without trial of foreign terrorism suspects who could not be removed to their countries of origin was disproportionate given that the measure did not apply to UK terrorism suspects, who posed a comparable threat. The discriminatory aspect of the measure was the key to its disproportionality.

27 The Special Advocates and Mr Randolph submitted that these cases showed that a measure may be irrational at common law if its application to one individual, and not to others in a comparable position, involves an arbitrary distinction. This was particularly so where the failure to apply the measure to others showed, in the absence of an explanation, that it was not strictly required and the discriminatory character of the measure impaired its effectiveness as a means of achieving its aim.

28 It will be necessary to say something more about this argument substantively when we come to deal with ground 2. For present purposes, however, the question is whether SSHD is obliged to disclose material about third parties in a potentially analogous position. The Special Advocates say that we should order disclosure of this material pursuant to rule 4(3) of the SIAC Procedure Rules because such disclosure is necessary for the determination of ground 2. SIAC can only properly judge whether SSHD's decision is vitiated by arbitrariness if it can consider what evidence was available to the civil servants responsible for the CSNP team which advised SSHD.

29 Lisa Giovannetti KC for SSHD responds by reference to the evidence about the CSNP. It was started in March 2021 in order to disrupt the links between politicians and criminals in the Western Balkans. Officials selected a number of targets for exclusion having regard to the need to promote UK government objectives in Albania while minimising the risk to other UK Government priorities. An initial batch of persons was identified to be recommended for exclusion, of whom Dr Berisha was one. The batch

was politically balanced in the sense that it was chosen to ensure that UK action did not disproportionately target a particular political party. This is not, therefore, a case where SSHD has decided to target A but not B. Rather SSHD was provided with a list of individuals recommended for exclusion. The decision to exclude the first batch did not entail a decision *not* to exclude anyone else. On the contrary the CSNP team made clear that this was an initial batch. No-one else has been ruled in or out.

30 Ms Giovannetti submits that the logic of Dr Berisha's argument is that, before deciding whether to exclude person X, SSHD must consider the circumstances of all other people who might qualify for exclusion. SSHD did not do that – and any requirement to do so would be unworkable. But if that is really what public law requires, SIAC can say so without itself examining the evidence relating to others who are or might be in a comparable position.

31 In our view, the application for disclosure fails for the following reason. On the evidence before us, neither SSHD nor any official working for SSHD – whether in the CSNP team or outside it – ever considered the material held in relation to persons other than those in the initial batch. It can properly be assumed that SSHD holds material relating to persons not considered in the initial batch; it would be very surprising if he did not. If Dr Berisha's arguments on ground 2 are sound, the failure to consider that material will itself render the decision unlawful and the decision will fall to be set aside and remitted to SSHD so that the material can be considered. If not, that will be because SSHD is under no duty to consider material relating to third parties. Either way, we can see no circumstances in which SIAC would be assisted in this case by seeing for itself material which was not considered by the decision-maker or any member of SSHD's team.

Ground 1

Submissions for Dr Berisha

32 Under ground 1, Mr Randolph for Dr Berisha submitted that SIAC should conclude, on the basis of the matters set out in the Amended Grounds and the additional evidence submitted after the decision, that the allegations against Dr Berisha on which the decision was based are "false assertions" and "findings of fact that were unsupported by any evidence and/or are based on views that could not reasonably be held" (Applicant's Skeleton Argument, para. 55).

33 The matters set out in the Amended Grounds (at para. 12) were: (i) the lack of direct evidence demonstrating wrongdoing in relation to the sale and purchase of land to Damir Fazlic; (ii) the lack of evidence, direct or otherwise, demonstrating a personal link between Dr Berisha and Fation Dauti; (iii) the admission that the diplomatic communications between the UK Embassy in Tirana and the FCDO in London, on which substantial reliance was placed, were "lost"; (iv) the change of position relating to the video footage relied upon by the respondent (from initially saying that it "showed" Dr Berisha organising and attending a violent protest involving known criminals to "alleging" the same); (v) SSHD's admission that Dr Berisha had sought to combat corruption; (vi) the acceptance that corruption allegations against Dr Berisha's daughter were not a key aspect of the recommendation which led to Dr Berisha's exclusion; (vii) SSHD's admission that the OPEN sources on which he relies do not provide concrete evidence for these connections.

34 The post-decision evidence addressed in considerable detail: (i) the alleged pressure applied by Dr Berisha on the public prosecutor in connection with an investigation into Damir Fazlic; (ii) the storming of the Democratic Party headquarters; (iii) Dr Berisha's efforts to combat organised crime and corruption; (iv) the ties of other senior officials to organised crime and corruption; (v) Fazlic's involvement in a corrupt telecoms deal with Albtelekom; and (vi) the collapse of pyramid schemes.

35 Mr Randolph relied on the well-established principle that a decision reached without any evidence or on a view of the facts which could not reasonably be entertained is unlawful: *Edwards v Bairstow* [1956] AC 14. He also placed reliance on the decision of the Court of Appeal in *E v SSHD* [2004] EWCA Civ 49, [2004] QB 1044, which established what is commonly regarded as a new ground for judicial review: material error of established fact. SIAC could properly regard the evidence before it, including that which was not before SSHD, as sufficient to show that there was a material error of established fact.

36 As to the fact that the bulk of Dr Berisha's evidence post-dated the decision, Mr Randolph acknowledged that post-decision evidence is not generally admitted in judicial review proceedings. However, he submitted that evidence establishing objectively that a material part of the decision is factually erroneous was an exception to this principle and would be admissible to establish an error of established fact. In any event, applying the approach in *R v SSHD ex p. Turgut* [2001] 1 All ER 719, as cited with approval in *E's* case, in a case engaging fundamental interests such as these, the evidence is not strictly limited to that before SSHD.

37 Mr Randolph submitted that the new evidence was also admissible because, in a letter dated 8 March 2024 from the Government Legal Department ("GLD"), it was said that the new evidence had been considered "at a high level rather than in detail" and its "broad merits assessed" and "no material was identified which leads to the conclusion that the exclusion decision should be reconsidered". This could be treated as a new decision, based on all the material then before SSHD, including the new evidence relied upon by Dr Berisha.

38 Finally, in his reply submissions, Mr Randolph drew our attention to correspondence from which his instructing solicitors had understood that the representations being invited were limited to the OPEN material initially disclosed as the basis for the first decision of 19 July 2022, rather than the documents disclosed thereafter; and it was only after the second decision that large parts of the case against Dr Berisha became clear.

Submissions for SSHD

39 Ms Giovannetti for SSHD submitted that the operative decision under challenge was that of 27 February 2023. Dr Berisha had been sent a large quantity of OPEN material and had the opportunity to comment on it. SSHD was entitled to proceed on the basis that the representations received were the entirety of those Dr Berisha wished to make. The legality of the decision falls to be assessed on the basis of the evidence before the decision-maker when the decision was taken, not evidence which post-dated the decision. *E's* case establishes material error of established fact as a ground of review, but only where four conditions are satisfied. These were set out by Carnwath LJ at [66]:

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant or his advisers must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the... reasoning." (Emphasis supplied.)

40 In this case, the post-decision evidence does not show that the decision involved any error of "established" fact in the relevant sense. The letter of 8 March 2024 does not constitute a further decision. The decision challenged was taken by SSHD personally. The letter of 8 March 2024 does no more than show that the CSNP teams and Home Office officials continue to maintain the key assessments on which the decision of 27 February 2023 was based.

Discussion

Did Dr Berisha reasonably understand that the representations he was invited to make were limited to the materials sent with the letter of 6 October 2022?

41 The sequence of events was as follows.

42 The initial decision was taken on 19 July 2022. Dr Berisha's representatives complained that they had not been given the opportunity to make representations. On 6 October 2022, the Government Legal Department ("GLD") replied that SSHD maintained the position that there was no requirement to seek representations prior to exclusion but in all the circumstances indicated that he was minded to provide the further material attached and offer Dr Berisha an opportunity to provide representations on it. SSHD proposed that the appeal to SIAC be stayed in the meantime. The material attached consisted of open source articles.

43 There was then correspondence between Dr Berisha's solicitors, Zaiwalla & Co. ("Zaiwalla") and GLD about the timetable. Zaiwalla were pressing for a shorter timetable. This correspondence assumed that the materials on which Dr Berisha was being asked to comment were those attached to the letter of 6 October 2022.

44 On 20 October 2022, SIAC stayed the appeal until 14 November 2022 pending a reconsideration of the challenged decision.

45 On the same day, 20 October 2022, at 4.46pm, GLD emailed Zaiwalla "further to the parties' agreed stay, which has now been approved by the Commission". Attached to GLD's email were the further documents which (it was said) Dr Berisha would have received under para. 1 of the SIAC's Practice Note, namely, the OPEN summary of the ministerial submission recommending Dr Berisha's exclusion (complete with annexes) and an OPEN Scott schedule. In the email, it was said: "This will allow your client to consider the materials before SSHD."

46 Mr Randolph submitted, on instructions, that Zaiwalla assumed from this chain of correspondence that the representations they were being invited to file were limited to the open source materials attached to the 6 October 2022 letter, on the basis of which the

stay had been agreed, and did not include the further materials attached to the email of 20 October 2022.

47 We can quite see that the email of 20 October 2022 and its attachments came as a surprise. If, having received that email, Zaiwalla had said that more time was needed to consider the substantive decision-making materials attached to that email, there would have been a good case for extending the stay, which had been agreed and granted on the footing that Dr Berisha would be commenting on the much less substantial material attached to the 6 October 2022 letter. Once the email was received, however, any reasonable recipient would understand it to be attaching materials on which representations were invited. The suggestion that Dr Berisha was not being invited to make representations on the later materials is not supported by anything GLD said and is not plausible when the correspondence is considered as a whole. We do not understand for what other purpose anyone would reasonably think the material was being sent.

48 Dr Berisha manifestly had an opportunity to comment and make representations on the further material enclosed with the 20 October 2022 email. He did not avail himself of that opportunity. Accordingly, we consider that SSHD was entitled to proceed on the footing that Dr Berisha had received the decision materials for the purpose of making representations on them; and that the representations he subsequently made represented all he wanted to say about those materials. The remainder of our analysis proceeds on this basis.

What is the decision under challenge?

49 The next issue for us to decide is whether GLD's letter of 8 March 2024 constitutes a new decision, which makes it appropriate for us to consider that part of Dr Berisha's evidence which post-dates the decision 27 February 2023.

50 In our view, it does not. Exclusion decisions are taken by SSHD personally. That was the case with the original decision of 19 July 2022 and the subsequent decision to maintain exclusion on 27 February 2023. There is no suggestion in the letter of 8 March 2024 that SSHD personally considered (even at a high level) Dr Berisha's voluminous new evidence; indeed, the letter makes clear that he did not.

51 There are some circumstances in which it is appropriate to attribute the views of officials commenting on evidence filed in SIAC to SSHD and to treat these views as superseding or updating the decision under challenge: see e.g. *U3 v SSHD* (SC153/2018 & SC/153/2021), 4 March 2022, [38]. *U3,* however, was an appeal under s. 2B of the 1997 Act, which is designed to be a "one-stop procedure". Reviews under s. 2C are not so designed. They are required to be conducted according to the principles applicable in an application for judicial review. Those principles require the court to focus rigorously on a particular decision, especially where – as here – an opportunity has been given for representations to be made prior to the decision being made: see the *Administrative Court Judicial Review Guide* (2023), para. 7.11.4 and the case law cited there.

52 It follows that the decision under challenge here is that of 27 February 2023; and the legality of that decision falls to be assessed on the basis of the materials before the decision-maker when it was taken.

53 This means that the new evidence filed before SIAC after the decision of 27 February 2023 is strictly irrelevant insofar as it contains evidence that was not before the decision-maker. We consider this result to be consistent with the approach in [22] of SIAC's judgment in *T2*, cited at [17] above.

54 We have considered carefully Mr Randolph's submissions based on *Turgut* (which, as he points out, was cited with approval in *E's* case). However, we do not consider that it affects the position as set out above. *Turgut* was a case where the decision under challenge affected fundamental rights; and the court had to consider for itself whether removal of the claimant would be contrary to Article 3 ECHR (rather than simply reviewing the decision of SSHD on that question). In those circumstances, it is not surprising that the court should be willing to modify the usual judicial review rules to ensure that the evidence available to it was as up-to-date as possible. The present case has neither of these features. As we have pointed out, the decision under challenge does not remove any prior right of Dr Berisha's to enter the UK, because he had no such right; and because ECHR rights are not said to be engaged (and are not engaged), the primary decision-maker is SSHD, not the court.

The scope of review for material error of established fact

55 Given the submissions made to us, we consider it important to be clear about the limitations of material error of established fact as a ground of review. This new ground of review, recognised by the Court of Appeal in *E's* case, does not open the way for SIAC (or any court or tribunal applying judicial review principles) to reach its own view on matters of disputed fact which it was the decision-maker's task to determine. Nor does it sweep away the general principle that a court applying judicial review principles considers the adequacy of the decision under challenge on the basis of the material before the decision-maker. *E's* case allows challenge only when the decision-maker has made an error and only where the four conditions in [66] of Carnwath LJ's judgment (see para. 37 above) are met. In particular, the error must be "established" in the sense of being "uncontentious and objectively verifiable". Reasoning which involves such an error may be regarded as flawed, with the consequence that this ground of law can be regarded as a species of irrationality: *Law Society v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, [98] (Leggatt LJ and Carr J).

56 There may be a debate to be had at the margins about what counts as an "uncontentious" error, for example in a case where a claimant provides cogent, objective evidence on a binary issue suggesting on its face that the decision-maker has incontrovertibly erred and the decision-maker does nothing to indicate that the point is disputed. In this case, however, the matters which are said to constitute errors were the central conclusions of fact on which the decision was based. All of these findings were based on evaluations of the evidence, including what SSHD was entitled to assume were Dr Berisha's comprehensive representations. There was evidence going both ways; the facts were far from uncontentious or objectively verifiable. SSHD had to weigh that evidence and reach a view. Having seen the post-decision evidence from Dr Berisha, SSHD does not accept that there was any error of fact. The invitation to SIAC to decide these factual issues for itself ignores the limitations of review for material error of established fact. Accepting it would involve substituting SIAC for SSHD as primary decision-maker on the key factual issues underlying the decision, contrary to the express terms of s. 2C(3) of the 1997 Act.

The test to be applied when assessing the legal adequacy of the decision

57 It follows that the test to be applied when assessing the legal adequacy of the decision is whether the material before SSHD when the challenged decision was taken supplied an adequate evidential basis for the conclusions reached. We put the matter in that way deliberately. Since *Edwards v Bairstow*, it has been orthodox that a decision reached without any evidential basis will be unlawful. Equally, a court applying judicial review principles may intervene if, on the evidence before the decision-maker, the findings made were not rationally open to him or her. This is another way of saying that there will be some cases where the decision-maker has some evidence for the conclusion reached, but the evidence is so flimsy and unimpressive that it could not rationally support the finding made. The evidential basis must, in other words, be adequate. What constitutes an adequate evidential basis will be highly context-specific. In our view, this is one manifestation of the sliding scale of intensity of review. The evidence needed to meet the standard of adequacy may be weightier where the decision being taken is one which impacts on fundamental rights. The present decision does not fall into that category, though we accept that it has important reputational ramifications for Dr Berisha's reputation.

Did the evidence before SSHD supply an adequate basis for the decision to exclude?

58 If the materials before SSHD had been confined to open source articles from newspapers and websites, we doubt that these would on their own have supplied an adequate basis for the specific conclusions on which the decision to exclude was based. But the materials we have seen include also careful assessments of the reliability of the newspapers and websites, made by those with specific knowledge and experience of conditions in Albania. Reliance on the US State Department's conclusions was also, in our view, justified. The conclusions reported in these documents are the considered institutional product of the best-resourced administration of any friendly state.

59 Finally, and importantly, the decisions were based on a large quantity of internal reporting in the form of diplomatic telegrams, which are diplomatic communications from the Embassy in Tirana to the FCDO in London. These assessments are not prepared for the purposes of proceedings, or even to inform exclusion decisions; rather, they are prepared in real time and communicated in order to give the UK Government the most accurate possible insight into conditions in a particular country. They reflect not only open source reporting, but also other sources of information available to diplomats *sur place*. Consideration of a series of these reports over time can, in our view, provide an evidentially adequate source of information for the purpose of taking exclusion decisions.

60 The documents before SSHD when the decision of 27 February 2023 was taken seem to us to show careful engagement with Dr Berisha's representations; and that the CSNP's recommendations were themselves critically evaluated by SSHD's officials (see e.g. the acceptance of Dr Berisha's point that the proximity of Dr Berisha to Dauti in the video did not necessarily show a personal connection between the two). If and to the extent that Dr Berisha's submissions are properly understood as inviting us to apply the kinds of evidential standards that would be required if the allegations against him were being made in the context of a criminal trial, or indeed in civil proceedings, we reject those submissions.

61 In our view, each of the conclusions set out in para. 11 above was properly open to SSHD on the basis of the materials before the decision-maker when the decision was taken. In each case, the conclusion was the product of a holistic assessment of the available evidence, including open source and internal reporting and Dr Berisha's representations. We did not identify any respect in which the evidence was inadequate to ground the conclusion drawn.

62 As to the matters set out in the Amended Grounds (at para. 12), we conclude as follows:

(a) The internal reporting and the US State Department report provided an adequate evidential basis for the conclusion that Dr Berisha had protected Fazlic from prosecution.

(b) The video showing Dauti kicking in the door of the Democratic Party headquarters and a group which included Dr Berisha entering was properly used to corroborate other evidence reflected in the diptels that Dr Berisha uses criminal connections for his personal benefit.

(c) We are satisfied on the basis of the evidence available to us in CLOSED that the diplomatic communications available to SSHD provided a proper record of the observations and views of the Embassy in Tirana on questions relevant to this decision and could properly be relied on for the reasons we have outlined.

(d) The change of wording between the first and second decisions (from initially saying that it "showed" Dr Berisha organising and attending a violent protest involving known criminals to "alleging" the same) did not seem to us to be significant. In any event, we are satisfied that the limited conclusion eventually drawn from the video was a proper one on the evidence.

(e) That Dr Berisha had been responsible for some anti-corruption measures did not undermine SSHD's conclusions that he had also benefited from links to organised criminal groups.

(f) The acceptance that corruption allegations against Dr Berisha's daughter were not a key aspect of the recommendation which led to Dr Berisha's exclusion fortified rather than undermined our conclusion that the decision had a proper evidential foundation.

(g) The question for us is whether <u>all</u> the sources of information, taken together, provided an adequate evidential foundation for the connections which SSHD found to exist between Dr Berisha and organised criminal groups. The answer is "Yes".

63 Ground 1 therefore fails.

Ground 2

Submissions for Dr Berisha

64 Mr Randolph submitted that the material available to suggest corruption or criminal connections on the part of Dr Berisha was no greater than that available in relation to other Albanian politicians, including in particular Edi Rama, the present Prime Minister and Dr Berisha's bitter political rival. This, he said, meant that both the decision to investigate Dr Berisha and consider him for exclusion and the decision following this investigation to exclude him were irrational because they were based on an arbitrary distinction, following the reasoning in *Bank Mellat* and *A v SSHD*. Furthermore, there was no basis for thinking that the aims of the CSNP would not be better served by proceeding against Mr Rama, who after all was in power. Finally, SSHD has given no reason for singling out Dr Berisha and not proceeding against others in an analogous position.

Submissions for SSHD

65 Ms Giovannetti submitted that the present case was distinguishable from *Bank Mellat* and *A v SSHD*. In *Bank Mellat*, the Supreme Court proceeded on the basis that the problem the measure was designed to address was one which was common to it and also a small number of other Iranian banks, which had not been targeted. Here, SIAC cannot proceed on the basis that corruption is a problem affecting all Albanian politicians equally. There is no principle of public law which requires SSHD to conduct an individualised assessment of all Albanian politicians before proceeding to exclude any of them. In any event, as a matter of practicality, SSHD had to start somewhere. The process was to select an initial group for investigation (leading to decisions to exclude). That did not entail any decision that no others would be excluded.

Discussion

The law

66 The Supreme Court has made clear that the principle of equal treatment or non-discrimination (which has a freestanding existence in EU law and some other legal systems) is in English law simply an aspect of the doctrine of rationality: see *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2019] AC 96, [24]-[26]. A decision to take action against person X may, in some circumstances, be shown to be irrational by reference to the fact that no action was taken against person Y, but much will depend on the context.

67 The context of the decisions under challenge in *Bank Mellat*, as analysed by the Supreme Court, had a number of special features. In particular, the decision-maker was seeking to achieve the aim of restricting the access of the Iranian Government to international financial markets. There was a small number of Iranian banks with an international presence through which it could gain that access. The Supreme Court concluded that there was nothing which marked out Bank Mellat as inherently more likely to facilitate that access than other banks. This made the decision to single out Bank Mellat (while not taking actions against other banks) arbitrary and irrational, not least because the Iranian Government would still be able to access financial markets through the other banks.

There is no suggestion that it would not have been practically possible to impose financial restrictions on all of the small number of Iranian international banks.

68 The context of the present decision is fundamentally different in three key respects. First, the aim of addressing corruption in the Western Balkans and Albania in particular could, as a matter of logic, be adequately served by proceeding against some (not all) corrupt politicians. Second, the nature of the aim (deterring corruption in the future) necessarily meant that individual consideration would have to be given to the evidence about each potential candidate for exclusion. Third, it would not have been practically possible to give such individual consideration to every Albanian politician; the task would have been an unmanageable one.

69 The rationality of the decision to exclude Dr Berisha must, in our view, be considered in stages. First, there was the decision to select a number of candidates for exclusion in a "first batch". The decision to proceed in this way seems to us to be perfectly rational. Indeed, we find it difficult to see how else SSHD could have proceeded. As we have said, and unlike in *Bank Mellat*, it would not have been practical to conduct an investigation into every Albanian politician against whom allegations of corruption have been made, or even every prominent one. Such a course would have involved a disproportionate deployment of SSHD's limited resources. And, again unlike in *Bank Mellat*, the decision to start with an initial batch did not undermine the aims of the CSNP, which was to deter corruption in the future. That aim would be advanced by making clear to anyone considering involvement in corruption in the future that he or she might be the subject of exclusion.

70 Next, there was the decision about how to select the candidates for inclusion in the initial batch. We can say a little more about this in CLOSED. What can be said in OPEN, however, is that the first batch of individuals selected for investigation and ultimately exclusion was intended to be – and was in fact – politically balanced. That seems to us to be a rational desideratum.

71 Finally, no decision has been made that SSHD will not proceed to investigate and exclude anyone else. It remains possible that others will in future be investigated and excluded. This seems to us to be an important feature in considering whether the decision to proceed against Dr Berisha, and not others, was arbitrary.

72 For these reasons, we conclude that there was no arbitrariness or irrationality of the kind alleged in the decision-making process which led to Dr Berisha's exclusion. We add that if there had been, it is by no means clear that it would have required us to allow Dr Berisha's application for review. If, contrary to our conclusions, SSHD had acted irrationally in not proceeding against others, one possible consequence might have been that rationality required him to proceed against those others, rather than vitiating his decision to proceed against Dr Berisha.

Ground 4

Submissions for Dr Berisha

73 Mr Randolph submitted that SSHD had failed to have regard to the fact that targeting someone who had not been in power for 10 years, and overlooking the person currently

in power (Mr Rama) was liable to strengthen the sponsors of OCGs, who have real and current power.

Submissions for SSHD

74 Ms Giovannetti submitted that this ground was misconceived. Its premise was that the exclusion of Dr Berisha would be ineffective. In fact, SSHD considered carefully whether excluding the first batch of candidates would be effective and concluded that it would. The decision was based on, inter alia, considerations of foreign policy on which SSHD is entitled to a wide discretionary area of judgment.

Discussion

75 As we have indicated, we can say a little more in CLOSED about the basis on which the initial batch of candidates were selected. Our review of the entirety of the evidence, OPEN and CLOSED, convinces us that careful consideration was given to the selection criteria. We have seen nothing to indicate that any of the criteria was irrational or otherwise unlawful. The assessment as to whether exclusion of those in the initial batch (and not others) would be effective in deterring future corruption took into account all relevant factors. We accept SSHD's submission that this kind of assessment is one for which those giving advice to SSHD had particular institutional competence and with which we should therefore be slow to interfere: see e.g. *R (Carlile) v SSHD* [2014] UKSC 60, [2015] AC 945.

Ground 5

Submissions for Dr Berisha

76 Mr Randolph submitted that SSHD took into account irrelevant considerations. In particular, that any acts done while Dr Berisha was President or Prime Minister of Albania were covered by sovereign immunity and the adverse reputational consequences that would be caused by withdrawing Dr Berisha's exclusion. In addition, the decision-maker took into account four factual matters that lacked a proper evidential foundation and, even if true, could not demonstrate that Dr Berisha poses a risk to the UK, namely: (i) the collapse of pyramid schemes in 1997; (ii) the allegation that an energy park was expanded to enrich Mr Fazlic; (iii) claims by Zafar Ansar that in 2008 Ms Malltezi tried to blackmail him, using her relationship with Dr Berisha; and (iv) the claim that Dr Berisha encouraged Fation Dauti to engage in violent behaviour (kicking in the door of the Democratic Party headquarters on behalf of Dr Berisha).

77 Mr Randolph accepted that, insofar as it relied on sovereign immunity, this ground overlapped with ground 6. If the latter succeeded, it would be unnecessary to say in addition that the decision-maker had relied on matters that were irrelevant for that reason. If not, the premise for the contention that the acts done qua President or Prime Minister were irrelevant would fall away.

Submissions for SSHD

78 Ms Giovannetti submitted that the premise for the suggestion that SSHD had taken into account the reputational damage that would be caused by withdrawing the decision was a passage in Annex G to the ministerial submission dated 21 February 2023. On a close

inspection, that passage did not show that anticipated reputational consequences were part of the reasons for the decision. As to the identified factual matters, there was no proper basis for concluding that any of them was irrelevant.

Discussion

79 We have considered carefully the passage relied on to show that the decision-maker took into account the reputational consequences of withdrawing the decision. We do not consider that it shows that such considerations were taken into account as part of the reasons for the decision. The ministerial submission directed SSHD to "take into account the information in Annex D… as part of the decision-making process". The possible reputational consequences of withdrawing the decision were not in Annex D, but in Annex G, headed "Stakeholder views". That recorded the view of the British Embassy in Tirana that the exclusions had not detrimentally affected UK-Albanian relations (para. 1) and went on say that the success of Dr Berisha's appeal would lead to reputational damage (para. 4) and that withdrawal of the decision in advance of an appeal would lead to greater reputational damage (para. 5).

80 Viewed in context, the passage relied upon does not show that the likely reputational damage was part of the "reasons for the decision". As SSHD submitted, if the exclusion decisions had themselves given rise to an adverse impact on UK-Albanian relations that might have been a reason to revoke them. As they had not, the ministerial submission was carefully drafted to limit the reasons for the decision to those in Annex D. We consider that we can properly conclude that SSHD did not regard the British Embassy's view about the likely reputational damage of revoking the exclusion decisions as part of those reasons.

81 Even if we were wrong about that, we do not consider that a reference of this kind to reputational risks would invalidate the decision in the context of a submission whose main point was to emphasise that there was a proper factual and legal case for exclusion. The position might have been different if SSHD had been advised that the factual and legal basis for exclusion was weak but revoking the earlier decisions would be reputationally problematic. But that is not what happened.

82 As to the factual matters said to constitute irrelevant considerations, our conclusions overlap with those in relation to ground 1. Addressing the identified matters in turn:

(a) On the totality of the evidence, including the internal reporting, there was an adequate evidential basis for the conclusion that Dr Berisha was culpably implicated in the fraudulent pyramid schemes which collapsed causing a national scandal while he was President.

(b) The conclusion that Dr Berisha committed misconduct in relation to the energy park was based on inferences. These inferences had an adequate evidential foundation.

(c) The allegation that Dr Berisha's daughter had benefited from Zafar Ansar's $100 million investment in a power plant was evaluated with care, together with Ms Malltezi's denial. The conclusion that the original allegation could still be relied upon had an adequate evidential foundation.

(d) The connection to Dauti relied upon in the ministerial submission was not that Dr Berisha personally knew him, but rather that the video showed that Dr Berisha was willing to use criminal connections for his own benefit. That was an inference which was open on the evidence. The connection to Dauti was therefore not an irrelevant consideration.

Ground 6

Submissions for Dr Berisha

83 Mr Randolph's submissions on ground 6 developed during the course of the hearing. At our invitation, he reduced these submissions to a note filed on 22 March 2024, after the hearing.

84 Mr Randolph submits that the doctrine of state immunity operates as an international norm which upholds the sovereign equality between states. Both the head of State and head of Government benefit from immunity *ratione personae* so long as they occupy those positions and no relevant exception applies; none applies here. Once they leave office, they retain an immunity *ratione materiae* in respect of acts done while in office. This immunity is complex and subject to caveats; again, however, none of the caveats applies here.

85 Mr Randolph notes that, according to SSHD's own policy, findings of corruption must relate to conduct which would be contrary to UK criminal law. But SSHD has conceded that no criminal prosecution could be brought against Dr Berisha in respect of acts done while in office as President or Prime Minister. Therefore, the relevant acts must be excluded from consideration under SSHD's policy.

86 The UK is of course entitled to refuse entry to foreign Heads of State and Heads of Government. This flows from the UK's sovereign right to control its own borders. But this does not mean that an actual or former head of State has no immunity in relation to proceedings commenced by SSHD, predicated on findings of criminality or corruption, which lead to an exclusion decision. In such a situation, the excluded individual is in the position of a person *de facto* convicted of those offences. These findings could be used by Dr Berisha's home State – Albania – to prosecute Dr Berisha. In that regard, it is to be noted that Dr Berisha is presently under house arrest and cannot leave Albania.

87 Mr Randolph placed reliance on the judgment of the International Court of Justice in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)*, ICJ Reports 2002, para. 61 as authority for the proposition that a former head of State or head of Government continues to enjoy immunity from criminal prosecution in another state in respect of acts done as head of State or head of Government. See also paras 83-85 in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal.

Submissions for SSHD

88 Ms Giovannetti also at our invitation supplemented her submissions by a note dated 21 March 2024, filed after the conclusion of the hearing. She submits that the principle of state immunity "facilitates the performance of public functions by the state and its officials by preventing them from being sued or prosecuted in foreign courts": see Brownlie's Principles of International Law (9th ed., 2019), p. 470. There is no tension between this and states' equally well-recognised sovereign right to control aliens' entry into and residence in their territory. Thus, "although heads of State are entitled to extensive privileges and immunities, they do not have the right to enter a foreign State without the consent, implied or otherwise, of that State": Foakes, *The Position of Heads of State and Senior Officials in International Law* (2014), p. 17.

89 Foakes gives examples of States exercising their sovereign right to exclude foreign heads of State, in particular the decisions of the US to bar President Waldheim of Austria in 1987, of France to bar President Mobutu of Zaire in 1993 and of Slovakia to bar the President of Hungary in 2012. As she points out, the latter decision was challenged before the European Court of Justice, which held that the sovereign's right to exclude heads of State from its territory was unaffected by the free movement provisions of the EU Treaties: see Case C-364/10 *Hungary v Slovakia* [2013] 1 CMLR 21, at [45]-[52].

90 State immunity is a reflection of the principle of the sovereign equality of States, which is sometimes encapsulated in the maxim *par in parem non habet imperium*: Denza, Diplomatic Law (4th ed., 2016), p. 235. Former heads of State and heads of Government enjoy immunity *ratione materiae* from the criminal and civil jurisdiction of other States, but this does not affect in any way the right of those States to control entry into their territory.

Discussion

91 In our view, this ground of appeal proceeds on a fundamental misconception as to the legal characterisation of the decision under challenge. As we have said at paras 18-23 above, Dr Berisha never enjoyed any right to enter the UK, whether as a matter of domestic law or as a matter of international law. That was so even when he was serving as head of State and head of Government and, *a fortiori,* after he ceased to hold the second of those positions. As a matter of international law, the decision whether to admit him to the UK is an exercise of the UK's sovereign right to control entry to its territory: see Foakes, *op. cit.* In our view, the decision to exclude Dr Berisha was also, in international law terms, an equivalent exercise of the UK's sovereign right to control entry to its territory, although it determined the question of his permission to enter in advance of any application by him.

92 Mr Randolph's submission that a decision taken on the basis of things done by Dr Berisha as head of State or head of Government infringes the immunity *ratione materiae* which Dr Berisha enjoys as a former holder of those positions would have surprising results, if correct. As we pointed out during the course of argument, it would mean (for example) that, if the former head of a hostile State wished to come to the UK, the UK would be obliged, when deciding whether to admit him, to leave out of account anything he had done as head of that State, however injurious to the UK's interests. But, as Prof. Foakes

explains, a State is not obliged to admit even a *serving* head of State or head of Government. The examples she gives include cases where the decision to refuse entry was plainly taken on the basis of acts done by the head of State in that capacity. That being so, it would be anomalous if international law affected the considerations a State may take into account when deciding whether to admit a foreign national who once held, but no longer holds, those positions.

93 In our view, the fundamental error in Mr Randolph's submission is to regard SSHD's decision to exclude Dr Berisha, based in part on his conduct as President and Prime Minister, as akin to subjecting him to criminal or civil proceedings in respect of that conduct. It is well-established that, subject to limited exceptions (see *R v Bow Street Metropolitan Stipendiary Magistrate ex p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147), states cannot subject former foreign heads of State or Government to criminal proceedings in their courts in respect of acts done as head of State or Government. The imposition of civil liability in respect of such acts is also prohibited, subject to exceptions. But this is because in both cases the state proceedings amount to an exercise of jurisdiction over the other State, in breach of the *par in parem non habet imperium* principle. Excluding someone who is not a national or resident from the territory of a State is not an exercise of jurisdiction in any similar sense, because it does not involve any interference with or alteration of existing rights.

94 The decision to exclude has, of course, given rise to legal proceedings before SIAC, but these proceedings were brought by Dr Berisha himself. It was he who decided positively to invite SIAC to pronounce on the legality of the exclusion decision. The proceedings do not, in our view, involve any exercise of "jurisdiction" over him in the sense in which that term is used in international law.

95 Accordingly, in our view, neither the doctrine of state immunity, nor (to the extent that it is distinct) any immunity which Dr Berisha may enjoy *ratione materiae* in respect of acts done as head of State or head of Government, has any application to this appeal. We should also record that there has been no suggestion, either from Dr Berisha himself or from the Government of Albania (which is aware of the proceedings), that the doctrine of foreign act of State is implicated in this appeal.

Conclusion

96 For these reasons, and those contained in our CLOSED judgment, the application for review of SSHD's decision to exclude Dr Berisha from the UK is dismissed.