Trinity Term
[2025] UKSC 30
On appeal from: [2024] EWCA Civ 172

JUDGMENT

Shvidler (Appellant) *v* Secretary of State for Foreign, Commonwealth and Development Affairs (Respondent); Dalston Projects Ltd and others (Appellants) *v* Secretary of State for Transport (Respondent)

before

Lord Reed, President
Lord Sales
Lord Leggatt
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
29 July 2025

Heard on 15 and 16 January 2025

Appellant – UKSC 2024/0045
Lord Anderson of Ipswich KC
Malcolm Birdling
Alastair Richardson
(Instructed by Peters & Peters Solicitors LLP)

Respondent – UKSC 2024/0045
Sir James Eadie KC
Jason Pobjoy
Rayan Fakhoury
(Instructed by Government Legal Department)

Appellants – UKSC 2024/0055
Philip Goeth
Ali Al-Karim
(Instructed by W Legal Ltd)

Respondent – UKSC 2024/0055
Sir James Eadie KC
Jason Pobjoy
Emmeline Plews
Tom Watret
(Instructed by Government Legal Department)

LORD SALES AND LADY ROSE (with whom Lord Reed and Lord Richards agree):

1. Introduction

1. These appeals raise important questions about the operation of the sanctions regime put in place by the United Kingdom government to put pressure on the Russian Federation to end its aggressive war against Ukraine. The primary legislation, the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"), confers extensive powers on Ministers to make regulations allowing the imposition of stringent restrictions on individuals and businesses. The people who can be subject to sanctions are not alleged to have committed any criminal offences or to have otherwise engaged in any wrongdoing either here or overseas. Ministers may target any individuals and businesses falling within broadly defined classes. Those people can then be subject to severe restrictions on their ability to travel, to deal with their own assets, to do business and to engage in many everyday activities. Their friends and colleagues are at risk themselves of committing criminal offences if they engage with the sanctioned person in any of a wide range of different ways. The decisions taken by Ministers in the exercise of those powers can therefore have a prolonged and potentially devastating effect on the individuals and their families.

2. The Minister's decision to sanction a person is subject to a statutory right of review for the person affected before the High Court or, in Scotland, the Court of Session. In deciding whether to set aside the decision, the court must apply the principles applicable on an application for judicial review. In accordance with those principles, the sanctioned person can challenge the decision to impose sanctions on the ground that the measures interfere with his or her human rights, in particular their rights under article 8 of the European Convention on Human Rights ("the Convention") to respect for their private and family life and under article 1 of the First Protocol to the Convention ("A1P1") concerning the protection of property. Part of the exercise that the court must carry out in determining whether the sanctions infringe the target's rights is to decide whether the interference with those rights is proportionate to the aim for which the sanctions are imposed. That test of the proportionality of the interference with the sanctioned person's rights is at the centre of both these appeals.

3. The appellants in these two appeals have been made subject to sanctions. The sanctions were imposed on them in the exercise of powers conferred on Ministers by the Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019/855), as amended in 2022. Eugene Shvidler has been designated by the Secretary of State for Foreign, Commonwealth and Development Affairs ("the Foreign Secretary"). He was designated on 24 March 2022, a month after Russia invaded Ukraine. The effect of this is to freeze his assets worldwide and to make it a criminal offence for other people to deal with him in either a private or commercial capacity, subject to a few exceptions.

4. Dalston Projects Ltd owns a yacht called M/Y Phi ("the Phi") which has been detained in the London Docks, pursuant to a decision by the Secretary of State for Transport ("the Transport Secretary") taken first on 28 March 2022. The effect of this is that the Phi has been moored in London since then, and its owners say they have been prevented from earning a substantial income from chartering the yacht out during the spring and summer Mediterranean sailing season.

5. Mr Shvidler and Dalston Projects both challenged the decisions imposing sanctions on them. Those challenges were brought not by way of ordinary judicial review proceedings but under the special procedure set out in Part 79 of the Civil Procedure Rules. There is no permission stage for such proceedings. Their challenges were dismissed at first instance in two judgments. The judgment in the *Dalston Projects* case was given by Sir Ross Cranston (sitting as a High Court judge) on 21 July 2023 ([2023] EWHC 1885 (Admin)) and the judgment in the *Shvidler* case was given by Garnham J on 18 August 2023 ([2023] EWHC 2121 (Admin)).

6. Both judgments focused on the proportionality of the sanctions imposed. They applied the test for proportionality set out by the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700 ("*Bank Mellat*") at para 20 (Lord Sumption); see also para 74 (Lord Reed). That test as set out by Lord Sumption in *Bank Mellat* requires the court to consider four stages:

> "(i) whether [the measure's] objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether [the measure] is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

7. The appeals brought against the dismissal of the claims by the High Court were heard together by the Court of Appeal and a judgment dealing with both appeals was handed down on 27 February 2024: [2024] EWCA Civ 172; [2024] 1 WLR 3327. Singh LJ gave the main judgment with which the Master of the Rolls and Whipple LJ agreed. The appeals were dismissed.

8. In the opening section of his judgment, Singh LJ addressed two questions which he said were common to both appeals. Those questions concerned, first, the principles that the first instance court should apply when reviewing a decision of the executive on

grounds of proportionality; and, secondly, what principles an appellate court should apply when reviewing a decision of the first instance court. Singh LJ said (para 2):

> "Neither of these questions is new. Far from it: a great deal has been said about them both by the Appellate Committee of the House of Lords and the Supreme Court. Nevertheless, … the principles are not always as well understood as they need to be and so it will be helpful to summarise them here, to assist first-instance and appellate courts from hereon."

9. This court agrees with that sentiment and with the importance of clarifying the position in relation to both these questions. Section 7 of this judgment, therefore, addresses the issue of how a court should carry out a proportionality assessment. Section 8 addresses the issue of the proper approach to be adopted by an appellate court where there is a challenge to the proportionality assessment conducted by a lower court. This judgment then considers the question of proportionality in detail in each case (sections 9-14). Finally, other issues which arise in the *Dalston Projects* appeal are addressed, namely whether the Transport Secretary stated proper grounds for the detention of the Phi (section 15) and whether he committed the tort of conversion (section 16).

2. The Sanctions and Anti-Money Laundering Act 2018 and the Russia (Sanctions) (EU Exit) Regulations 2019

10. Section 1(1) of SAMLA confers on the Secretary of State and HM Treasury a power to make sanctions regulations where the relevant Minister considers that it is appropriate to do so either to comply with an international obligation or for a purpose within subsection (2). The regulations which are relevant to this appeal are not imposed pursuant to an international obligation, so the following description of the regime does not address those powers.

11. Section 1(2) of SAMLA lists nine purposes for which sanctions regulations may be made. The two purposes relevant to these appeals are where it would be in the interests of international peace and security and where it would further a foreign policy objective of the UK government (section 1(2)(c) and (d)).

12. Sections 3 to 8 of SAMLA set out the kinds of sanctions that can be imposed, including financial sanctions, shipping sanctions and aircraft sanctions as defined.

13. The most severe form of financial sanction is that set out in section 3(1)(a) whereby the funds or economic resources owned, held or controlled by the sanctioned person are frozen. Other financial sanctions can prevent financial services from being provided to,

or procured from, the sanctioned person or can prevent funds or economic resources being made available to or received from the sanctioned person. According to section 3, regulations which empower the imposition of the most stringent, asset-freezing, sanctions can only do so if those funds are owned, held or controlled by a person who has been designated by the Minister pursuant to the regulations. Other financial sanctions such as preventing funds or economic resources from being made available to or for the benefit of a person can, by regulation, be imposed not only on designated persons but also on persons "connected with a prescribed country" and/or on a prescribed description of persons "connected with a prescribed country".

14. Sections 6 and 7 refer to aircraft and shipping sanctions respectively. Broadly, they empower the Secretary of State to make regulations for imposing prohibitions or requirements for detaining or controlling the movement of certain aircraft or ships, for preventing them from entering the UK, preventing them from leaving the UK or preventing them from being registered in the UK. Regulations made under sections 6 and 7 of SAMLA can impose sanctions on aircraft and ships owned, chartered or operated not only by designated persons, but also by persons connected with a prescribed country or a prescribed class of persons so connected: see the definitions of "disqualified" aircraft or ships in sections 6(6) and 7(8) respectively.

15. As to the potential territorial scope of the regulations, section 21 of SAMLA provides that prohibitions or requirements may be imposed in relation to conduct in the UK by any person and on conduct elsewhere in the world but only in relation to the conduct of "a United Kingdom person". That term as applied to an individual is defined to mean a United Kingdom national including a British citizen.

16. The provisions of SAMLA were substantially amended by the Economic Crime (Transparency and Enforcement) Act 2022 ("the 2022 Act") as from 15 March 2022, that is shortly after Russia invaded Ukraine and shortly before the sanctions at issue in this appeal were imposed. The amendments changed in some respects how sanctions are imposed, reviewed and challenged.

17. These changes are discussed in more detail below. The Explanatory Notes to the 2022 Act state that one of the aims of the Act was "to enable Ministers to impose sanctions quicker". The main amendments to SAMLA made in Chapter 2 of Part 3 of the 2022 Act introduced an urgent procedure for making regulations for designating persons either individually or by description. They also removed many of the obligations which required the Minister making the regulations to report to Parliament on various aspects of the regulations either at the time the regulations were laid before Parliament or periodically whilst the regulations had effect.

18. Section 15 of SAMLA provides that regulations made under section 1 can create exceptions to any prohibition or requirement and may provide for licences to be issued by an appropriate Minister authorising activity that would otherwise be prohibited.

(a) The power to designate persons conferred by SAMLA

19. Since regulations may empower the imposition of more intrusive sanctions on designated persons than on other people, the criteria for designating a person are important. Section 11(2) and (2A) of SAMLA provides that regulations which authorise an appropriate Minister to designate persons by name must prohibit the Minister from doing so unless the Minister "has reasonable grounds to suspect that that person is an involved person". Section 11(3) stipulates that the regulations must provide that "an involved person" includes, so far as individuals are concerned, a person who is or has been involved in an activity which is specified in the regulations, or is associated with a person who is or has been so involved. As well as specifying the relevant activities, the regulations may also provide for what amounts to being "involved" in that activity and also what amounts to being "associated with" another person for this purpose: section 11(5) and (6).

20. SAMLA stipulates that regulations must contain certain other provisions for the protection of the target of the designation. The regulations:

(1) must require the Minister to take reasonable steps without delay to inform the designated person that he has been designated: section 10(3);

(2) must require the person designated to be given information which includes a statement of reasons: section 11(7). A statement of reasons is defined in section 11(8) as a brief statement of the matters that the Minister knows, or has reasonable grounds to suspect, in relation to the person which have led the Minister to make the designation.

(3) must not authorise the Minister to provide no statement of reasons though they may authorise the exclusion of material for certain reasons such as in the interests of national security or in the interests of justice: section 11(9).

21. Chapter 2 of Part 1 of SAMLA deals with powers to vary or revoke a designation. A designation may be varied or revoked by the Minister at any time and must be revoked if the conditions for imposing it are not met: section 22.

22. Section 23 of SAMLA provides the designated person with a right to request a variation or revocation at any time while the designation has effect. Where a request has been made, then no further request can be made "unless the grounds on which the further request is made are or include that there is a significant matter which has not previously been considered by the Minister": section 23(2).

23. In SAMLA as originally enacted, section 24 required the Minister to carry out a review every three years of all the designations then in effect which imposed an asset freeze or an immigration ban and consider whether to vary or revoke them. That section was repealed by section 62(1)(a) of the 2022 Act.

24. Section 38 of SAMLA provides for the High Court or the Court of Session to review a decision taken by the Minister, in response to a request by a designated person under section 23. The court may not review a designation unless there has first been a request made to the Minister under section 23. Section 38 makes clear that the object of review by the court is the decision taken under section 23 to maintain the designation rather than the original decision to designate. Section 38(4) provides that in determining whether the decision should be set aside, the court must apply the principles applicable on an application for judicial review.

25. Section 39 as originally enacted provided that if, in the absence of section 39(2), the court would have power to award damages, there is no such power unless either the tort of negligence has been committed or the decision concerned was made in bad faith. The 2022 Act amended this provision to omit the reference to negligence so that the court can only award damages if there has been bad faith. The 2022 Act further inserted subsection (2A) which empowered the Minister to set a cap on the amount of damages that can be awarded. The Sanctions (Damages Cap) Regulations 2022 (SI 2022/1092) came into force on 26 October 2022 and set that cap at £10,000. However, regulation 2(2) of those regulations provides that the cap must be disapplied where its application would breach a person's Convention rights.

26. Section 60 of SAMLA sets out definitions of some of the key terms used in the Act. The terms "funds", "economic resources" and "freezing" are given very expansive meanings. For instance, "economic resources" is defined as including assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services. The breadth of this definition is designed therefore to capture all elements of an individual's wealth. "Freezing" funds is widely defined as preventing funds from being "dealt with". That includes using, altering, moving or transferring them or allowing access to them or doing anything with them "in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination": section 60(3).

27. Section 17 of SAMLA deals with the provision the regulations may make for enforcement of the prohibitions imposed by them and for preventing any such prohibitions from being circumvented. In particular, the regulations may create criminal offences which are punishable on conviction on indictment with imprisonment for up to ten years.

28. Section 62 provides that some of the key terms are to be defined in the regulations themselves. The regulations may define when funds and economic resources are regarded as being "owned" or "held" or "controlled" by a person (section 62(4)). Importantly, it is the regulations rather than SAMLA itself which establish the criteria "as to the connection that is required between a person … and a country in order for the person to be regarded as 'connected with' that country for the purposes of any provision of the regulations": section 62(6).

(b) The making of the 2019 Regulations and their amendment

29. The Russia (Sanctions) (EU Exit) Regulations 2019 ("the 2019 Regulations") are very lengthy and complex. As their name suggests, they were adopted to ensure that the UK had the necessary powers to adopt sanctions following its exit from the European Union. There are many other sets of regulations made under SAMLA empowering the imposition of sanctions in respect, for example, of Iran, Mali, Yemen and Zimbabwe.

30. The EU has imposed restrictive measures on Russia since 2014 in response to the illegal annexation of Crimea, Russia's war against Ukraine, and the purported annexation of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson regions. There are three existing EU sanctions regimes set out in Council Decisions adopted in 2014 relating to Russia. Before the end of the Brexit transition period on 31 December 2020, EU sanctions were directly incorporated into UK law. That meant that if someone was designated at the EU level, they would automatically be designated at the UK level. At the end of the transition period, the adoption of the 2019 Regulations ensured that EU designations were carried over into UK law where appropriate.

31. Regulation 4 sets out the purpose of the 2019 Regulations. As at March 2022 when the measures at issue in this appeal were imposed, regulation 4 provided:

> "4. The regulations contained in this instrument that are made under section 1 of the Act [SAMLA] are for the purposes of encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine."

32. The 2019 Regulations that came into force after the end of the Brexit transition period were substantially amended by the Russia (Sanctions) (EU Exit) (Amendment) (No 4) Regulations 2022 (SI 2022/203) ("the 2022 Amendment Regulations"). It was those amendment regulations in 2022 which introduced into the 2019 Regulations the shipping sanction powers under which the measure against the Phi was taken in the *Dalston Projects* case.

33. Regulation 4 has more recently been amended by the Russia (Sanctions) (EU Exit) (Amendment) (No 2) Regulations (SI 2023/665), which came into effect on 20 June 2023. This inserted regulation 4(b), which provides for an additional purpose, namely the purpose of "promoting the payment of compensation by Russia for damage, loss or injury suffered by Ukraine on or after 24th February 2022 as a result of Russia's invasion of Ukraine". This is relevant to the appeal because, the appellants submit, it postpones yet further into the future the time at which the regulations will cease to be needed and hence prolongs the likely application of the sanctions imposed on them.

34. The 2019 Regulations were laid before Parliament on 11 April 2019 and came into force on 31 December 2020. At the time the 2019 Regulations were laid and also at the time that the amendments were made in 2022, there were requirements in SAMLA as to the process for the making and reviewing of regulations made under section 1 of that Act. For example, SAMLA as originally enacted required the following steps:

> (1) Section 2 of SAMLA required the Minister, before making regulations, to lay before Parliament a report explaining why he or she considered that there were good reasons to pursue the section 1(2) purpose and why the imposition of sanctions was a reasonable course of action for that purpose.
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> (2) Section 18 required the Minister, at the same time as laying the regulations before Parliament, also to lay before Parliament a report on the criminal offences created by the regulations explaining why there were good reasons for creating such offences.
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> (3) Section 30 obliged the Minister to review each set of regulations every year to consider whether the regulations were still appropriate for the purpose stated in them.
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> (4) Section 32 required the Minister as soon as reasonably practicable after the end of each annual reporting period to lay before Parliament a report specifying any sanctions regulations that were made in that period.

(5) Section 43 required the Minister who made regulations to issue guidance about the prohibitions and requirements imposed by the regulations.

(6) Section 46 provided that, where any amendments had been made to regulations already in force, the Minister was required to lay before Parliament a report which explained why the Minister believed such amendments would still satisfy the relevant criteria to be considered sanctions regulations within the meaning of sections 1(3) and 1(5).

35. All of these sections, aside from section 43, have now been repealed.

36. Since the 2019 Regulations were made before those repeals took effect, the Minister did lay a report before Parliament pursuant to section 2(4) before they were laid before Parliament in April 2019. The report explained why the imposition of sanctions was a reasonable course of action to pursue for the purposes of sections 1(2)(c) and (d):

> "11. Sanctions can be used to change behaviour; constrain damaging action; or send a signal of condemnation. The UK believes sanctions can be an effective and reasonable foreign policy tool if they are one part of a broader foreign policy strategy for a country…
>
> 12. The gravity of the situation in Ukraine means that putting sanctions in place is a reasonable measure to take. Russia continues to undermine Ukrainian security, most recently by its actions in the Black Sea. Sanctions will put pressure on Russia to implement the Minsk Agreements fully, end its illegal annexation of Crimea and Sevastopol, withdraw its troops from Ukrainian soil, end its support for the separatists, and enable the restoration of security along the Ukraine-Russia border under effective and credible international monitoring. Sanctions send a clear political signal intended to drive behavioural change by the Russian state as a whole towards Ukraine."

37. Having described the sanctions covered by the 2019 Regulations, the report continued:

> "14. These sanctions are not an end in themselves. They are one element of a broader strategy to achieve the UK's foreign policy goals to change the Russian Government's policy

> towards Ukraine. Direct lobbying alone has not proved sufficient. The UK is therefore combining sanctions with diplomatic measures, individual visa denials or blocking Russian membership of the G8, cancelling the annual EU-Russia Summit, and reducing access to European Bank for Reconstruction and Development project funding, as well as bilateral lobbying, lobbying through international frameworks, and supporting UN resolutions."

38. A further report pursuant to section 18 of SAMLA accompanied the 2019 Regulations when they were laid, explaining why the Secretary of State considered it was appropriate to include criminal offences to enforce the measures. The report described the categories of criminal offences created by the 2019 Regulations, including breaching an asset-freeze financial sanction or trade restriction or trying to circumvent those prohibitions.

39. An annual review into the 2019 Regulations was completed on 11 November 2021 and concluded that the situation in Ukraine had further deteriorated since the 2019 Regulations were made.

40. So far as the detention of vessels is concerned, Part 6 of the 2019 Regulations as first enacted was limited to conferring a power to prevent British vessels from entering ports in Crimea following its annexation. The 2022 Amendment Regulations were laid before Parliament at 2 pm on 1 March 2022 and came into force an hour later at 3 pm on 1 March 2022. When the 2022 Amendment Regulations were laid before Parliament a report was laid under section 46 of SAMLA describing the new maritime measures as "designed to cause significant short-term disruption to Russian shipping, thereby restricting their economic interests and further holding the Russian government to account." The amendments, the Government said:

> "… will send a clear political signal to Russia that we are aligned with international partners and would signal to the wider international community that territorial expansionism is unacceptable and should be met with a serious response."

41. A further section 18 report was laid before Parliament accompanying the 2022 Amendment Regulations. It said:

> "19.a There are good reasons for each of the prohibitions and requirements set out in the Regulations to be enforceable by criminal proceedings. The ability to enforce these measures by criminal proceedings is an effective deterrent, it is consistent

> with existing legislation and it enables the government to take a proportionate response to potentially serious acts and omissions which would undermine the purpose of the sanctions regime."

42. On 18 July 2022, the 2019 Regulations were amended again by the Russia (Sanctions) (EU Exit) (Amendment) (No 13) Regulations 2022 (SI 2022/814) to amend the ownership provisions in regulation 57I(1)(a) (and elsewhere), to provide expressly for the piercing of the corporate veil.

(c) The 2019 Regulations relevant to Mr Shvidler

43. As regards the designation of Mr Shvidler the relevant regulations are regulations 5 and 6.

44. Regulation 5 empowers the Secretary of State to designate persons by name for the purposes of imposing any or all of the sanctions set out in subsequent regulations. The purposes for which a person may be designated under regulation 5 include for the purpose of regulations 11 to 15, which is described as an "asset-freeze".

45. Regulation 6 then provides, pursuant to section 11 of SAMLA, the designation criteria and what it means to be an "involved person" for the purposes of those criteria. At the time of Mr Shvidler's designation, regulation 6 provided so far as relevant:

> "6.—(1) The Secretary of State may not designate a person under regulation 5 (power to designate persons) unless the Secretary of State—
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> (a) has reasonable grounds to suspect that that person is an involved person, and
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> (b) considers that the designation of that person is appropriate, having regard to—
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> (i) the purposes stated in regulation 4 (purposes), and
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> (ii) the likely significant effects of the designation on that person (as they appear to the Secretary of State to

be on the basis of the information that the Secretary of State has).

(2) In this regulation, an 'involved person' means a person who—

(a) is or has been involved in—

(i) destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine, or

(ii) obtaining a benefit from or supporting the Government of Russia,

(b) is owned or controlled directly or indirectly (within the meaning of regulation 7) by a person who is or has been so involved,

(c) is acting on behalf of or at the direction of a person who is or has been so involved, or

(d) is a member of, or associated with, a person who is or has been so involved."

46. The terms used in regulation 6(2) are then defined in subsequent provisions:

(1) Regulation 6(3) sets out ten different circumstances in which a person is regarded as "involved in destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine" for the purposes of regulation 6(2)(a)(i). These include being responsible for or promoting any policy or action which destabilises Ukraine, obstructing the work of international organisations in Ukraine or assisting in the contravention or circumvention of a relevant prohibition.

(2) Regulation 6(4) defines when a person is regarded as "involved in obtaining a benefit from or supporting the Government of Russia" for the purpose of regulation 6(2)(a)(ii). These include "carrying on business in a sector of strategic significance to the Government of Russia".

(3) Regulation 6(6)(a) provides that being "associated with" a person for the purposes of paragraph (2)(d) includes obtaining a financial benefit or other material benefit from that person.

(4) Regulation 6(7) defines the terms "Government of Russia" and "sector of strategic significance to the Government of Russia".

47. Part 3 of the 2019 Regulations deals with what happens when a designated person is designated under regulation 6 for the purpose of an asset-freeze. Regulation 11(1) provides that a person ("P") must not deal with funds or economic resources owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such funds or economic resources. Regulations 12 to 15 then expand further the restrictions that apply where a designated person is subject to an asset-freeze.

48. A person who contravenes that prohibition commits an offence: regulation 11(3). Further:

(1) It is a criminal offence for a person to make funds or economic resources available directly or indirectly to a designated person, if that person knows, or has reasonable cause to suspect, that they are making the funds or economic resources so available: see regulations 12(1), 12(3); and 14(1), 14(3).

(2) It is a criminal offence for a person to make funds or economic resources available to any other person for the benefit of a designated person, if that person knows, or has reasonable cause to suspect, that they are making funds or economic resources so available: see regulations 13(1), 13(3); and 15(1), 15(3).

(3) It is a criminal offence for a person to participate intentionally in activities knowing that the object or effect of them is (whether directly or indirectly) to circumvent any of the prohibitions above, or to enable or facilitate the contravention of any such prohibition: see regulation 19(1) and (2).

(d) The 2019 Regulations relevant to Dalston Projects

49. The shipping sanctions provisions relevant to the *Dalston Projects* appeal are found in regulations 57A to 57I of the 2019 Regulations (inserted by the 2022 Amendment Regulations effective as from 1 March 2022).

50. Regulation 57C(1)(b) empowers the Secretary of State to give a "movement direction" to the master of a ship owned, controlled, chartered or operated by persons connected with Russia. The movement direction can require the ship to leave a port, to proceed to a specified location or to remain where it is. It is an offence for a person to whom a direction is given to fail to comply with the direction: regulation 57C(3).

51. Regulation 57D(3)(b) similarly empowers the Secretary of State to give a "detention direction" requiring the detention of a ship at a port or anchorage in the UK if the ship is owned, controlled, chartered or operated by persons connected with Russia. Regulation 57D(5)(c) requires that a detention direction "must state the grounds on which the ship is detained".

52. A movement direction or detention direction can be of indefinite duration or a defined duration: regulation 57H. Regulation 57I(5)(a) defines the circumstances in which a person is regarded as "connected with Russia" for the purpose of the shipping sanctions. These include where the person is an individual that they are ordinarily resident in Russia, or if the person is not an individual that they are domiciled in Russia.

(e) Exceptions and licensing of activity which is otherwise prohibited

53. There are many exceptions set out in Part 7 of the 2019 Regulations from the prohibitions imposed by an asset-freeze, or by trade sanctions or by the sanctions imposed on shipping and aircraft. For example, regulation 60D (inserted by the 2022 Amendment Regulations) provides that the prohibition on providing technical assistance to ships is not contravened if a failure to provide that assistance would endanger the lives of persons on board the ship.

54. As mentioned earlier, section 15 of SAMLA envisages that licences may be issued by a Minister authorising conduct that would otherwise be prohibited under sanctions regulations. Regulation 64(1) of the 2019 Regulations provides that various prohibitions, including the asset-freeze in regulations 11 to 15, do not apply to anything done under the authority of a licence issued by the Treasury. According to regulation 66 a licence may be general or may authorise acts by a particular person or persons of a particular description.

55. Regulation 64(2)(a) provides that in respect of acts which would otherwise be prohibited by an asset-freeze, the Treasury may issue a licence authorising acts by a particular person if it is appropriate to do so for a purpose set out in Part 1 of Schedule 5 to the Regulations. The purposes set out in Schedule 5 include enabling the basic needs of a designated person or his dependent family member to be met. Paragraph 2 of Schedule 5 defines what is meant by "basic needs". For an individual, these include food, medical needs, the payment of insurance premiums, tax, mortgage and rent and utilities

all in respect of the designated person but also his or her dependants and family members. Other paragraphs specify other purposes for which a licence may be granted, including payment for legal services and extraordinary expenses and the satisfaction of judicial decisions.

56. The Treasury licensing system is operated by the Office of Financial Sanctions Implementation ("OFSI") which is part of HM Treasury and was established in March 2016. The operation of OFSI was recently considered by the Court of Appeal in *Khan v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWCA Civ 41; [2025] 1 WLR 2009 ("*Khan*"). The claimant in *Khan* was designated on the grounds of her association with Mr German Khan who was himself designated under the 2019 Regulations because of his investments and businesses in Russia. The Court of Appeal in *Khan* recorded the evidence of the respondent in that case to the effect that:

> (1) OFSI has made increased use of the power to issue general licences to address a range of recurring issues. Since the invasion of Ukraine OFSI has issued 50 general licences, including the general licences for legal fees and for payments to utilities companies for gas and electricity from which Ms Khan has benefited.
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> (2) OFSI is "in the process of developing streamlined procedures for assessing licence applications and prioritising cases appropriately".
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> (3) OFSI "has committed significant additional resources to its licensing functions, with a large increase in the number of staff now dedicated to assessing licence applications and queries arising from the conflict in Ukraine".

57. The Court of Appeal in *Khan* also referred to a note provided by the Secretary of State concerning the recent issue of a general licence (INT/2025/5632740) exempting certain conduct from the prohibitions imposed by many different sanctions regulations including the asset freeze regulations. In summary, the interim licence allows a person (such as a bank) to make funds available to or for the benefit of a UK designated person up to a permitted maximum of £350 per month in each of the two months following the date of their designation. It envisages that that will be replaced by an individual licence specific to the sanctioned person.

58. OFSI has also issued a set of principles which will govern its licensing decisions in relation to designated individuals. These include the following:

> (1) Licensing should permit basic needs, which OFSI considers include a reasonable standard of living as compared to a person receiving the net UK median

wage. This will generally be satisfied by granting a designated individual the net UK median wage: Principles 4 and 4(a).

(2) In most cases and unless there are mitigating factors or extenuating circumstances, licences will not enable a designated person to continue the lifestyle or business activities they had before they were designated. In particular, high-net-worth individuals should not expect licences to allow continuation of their previous lifestyle: Principle 5.

(3) OFSI will not generally license activity which can reasonably be provided by the State (for example healthcare or education). It will also not generally license activity that can be carried out at a more basic level (for example, using public transport rather than a private driver): Principle 14.

59. The Court of Appeal in *Khan* expressed concern about the operation of the system at para 57 and discussed it in some detail at paras 134 onwards. Singh LJ said that he was prepared to accept that if the Foreign, Commonwealth and Development Office ("FCDO") knew or perhaps ought to have known that the OFSI licensing system was not functioning, or at least not functioning reasonably, that could vitiate a decision to designate or maintain designation. However, he said that on the facts of that case, and in relation to a decision taken on 28 February 2023 to maintain the designation, the evidence established that it was by that stage possible for appropriate licences to be applied for and that licences were obtained by the claimant from OFSI (para 137). Dingemans LJ gave a concurring judgment in which he criticised the stance initially adopted by OFSI in failing to issue a general licence to enable designated persons to buy food (the general licences issued covered utilities but not ordinary living expenses): paras 152 to 155. Underhill LJ agreed with both judgments and endorsed what Singh and Dingemans LJJ had said about the licensing regime.

3. The facts and the proceedings below in the *Dalston Projects* appeal

(a) Mr Naumenko's background and the detention of the Phi

60. Mr Naumenko is a Russian businessman and the beneficial owner of the Phi. He owns another yacht called the Phi Phantom and used to own a third, the Aurelia. At the time of the measures taken against the Phi, Mr Naumenko was living in Ekaterinburg in Russia. There is no evidence that Mr Naumenko holds any political or administrative position in Russia or has ever engaged in any sort of political activity. Nor is there any evidence that he has ever had any connection with President Putin or his circle. He has not been designated under the 2019 Regulations. The evidence is that the FCDO has specifically considered and rejected a designation in his case.

61. The first appellant, Dalston Projects Ltd, is a special purpose vehicle incorporated in St Kitts and Nevis which currently holds the legal title to the Phi. The third appellant is a Maltese company to which ownership of the Phi would have been transferred but for the events giving rise to this claim.

62. The Phi has been moored at South Dock in the West India & Millwall Docks in London since December 2021. According to the facts set out in the claim form, London was her first port of arrival following her delivery as a newly built vessel by the Royal Huisman Shipyard in the Netherlands. The invoice from the Dutch shipyard showed the value of the ship for customs purposes as over €44 million. She came to London partly for tax reasons (she was to be onward exported into the EU), and partly at the invitation of a British magazine to participate in the World Superyacht Awards. Following that winter stopover, she was due to leave London for Malta on 28 March 2022, followed by post-delivery warranty works in Mallorca, prior to being chartered out commercially in the Mediterranean.

63. A direction was made by the Transport Secretary on the evening of 28 March 2022 in exercise of the powers conferred by regulation 57C(1) and 57D(1)(a) of the 2019 Regulations: The Phi (Russia (Sanctions) (EU Exit) Regulations 2019) Direction 2022 ("the Phi Direction"). The Phi Direction contains a detention direction that the Phi is detained at South Dock, West India & Millwall Docks and a movement direction that it must remain there. The Direction was delivered to the Master of the Phi at South Dock on the morning of 29 March 2022. According to the evidence filed on behalf of the Transport Secretary, this was the first maritime detention in the UK under the 2019 Regulations.

64. The fact that Mr Naumenko is the ultimate beneficial owner of the Phi and that he is a Russian national was confirmed shortly after the Direction was served on the vessel when the yacht consultant surveyors ("the Consultants") acting on behalf of Mr Naumenko contacted the Department for Transport.

65. There is no formal mechanism in SAMLA for the review of a direction made under regulations 57C or 57D, as there is for designation under section 23. But there was an exchange of correspondence between the Consultants and the maritime security department within the Department for Transport ("DfT"). The Consultants were seeking the release of the Phi so she could proceed to the Netherlands as planned. They raised various technical concerns arising from the continued detention of the vessel.

66. The Transport Secretary (Grant Shapps MP) departed from the communication plan prepared for him by officials and made a public statement that was untrue that the Phi belongs to someone who is a "friend of Putin". But Mr Naumenko is not in fact assessed to be a friend of President Putin. The Court of Appeal were rightly critical of Mr

Shapps' statement: para 86. However, they endorsed the view of Sir Ross Cranston that this did not ultimately affect the decision under review. The decision to issue the Phi Direction was in accordance with the recommendation made to Mr Shapps by his officials with supporting reasons and thereafter two further decisions were taken by the Transport Secretary in relation to the Phi. On 11 April 2022, following another submission made by his officials, Mr Shapps decided to maintain the Phi Direction in place. A further review was carried out by a new Transport Secretary (Mark Harper MP) in December 2022. The submission provided to Mr Harper, dated 13 December 2022, expressly considered the proportionality of continued detention. The submission also recommended exploring the possibility of making a movement direction allowing the Phi to move to Southampton for full repairs and continued detention there. On 3 January 2023 the DfT emailed the Consultants confirming that the detention was to continue and noting that the Transport Secretary had agreed to explore the option of moving the vessel to Southampton for repairs.

67. Two applications for licences for repairs to the Phi have been made since the Phi Direction was imposed. In support of an application made in May 2022 the Consultants appended information from Mr Booth, the Captain of the Phi, listing the technical concerns that, he said, demonstrated the urgency of them receiving expert technical assistance. A licence was granted on 29 November 2022 for paint repair works. On 16 March 2023, a licence was granted to allow certain works to be undertaken. However, no movement direction has been granted to allow the Phi to relocate to Southampton.

(b) Dalston Projects' claim under section 38 of SAMLA

68. Dalston Projects issued its claim on 27 March 2023 pursuant to section 38 of SAMLA applying for the decision to detain the Phi to be set aside. Prior to the issue of the claim, the Transport Secretary disclosed the ministerial submissions preceding the giving of the Phi Direction in March 2022 and the decisions to continue detention in April 2022 and January 2023. The claim form set out a detailed critique of those submissions.

69. Evidence was provided in opposition to the claim in two witness statements of Mr James Driver, who is a Deputy Director of the DfT's transport security directorate and head of the Maritime Security & Resilience Division. He has responsibility for policy relating to the security of UK ports and British-flagged shipping.

70. Mr Naumenko did not provide a witness statement in the proceedings himself; evidence was given on his behalf by the Master of the Phi describing the service of the Phi Direction, the impact of the detention of the vessel, the commercial prospects for chartering the vessel and the risk that a prolonged detention might result in the Phi no longer being considered by the market as "state-of-the-art". He said that the commercial prospects for the Phi (relevant to the part of the claim in which damages were sought)

were that she could be chartered at a fee of between €450,000 and €650,000 per week during seven months of the year. There was also a witness statement from the Consultants describing the ownership structure.

71. In his judgment in *Dalston Projects*, Sir Ross Cranston dealt with a number of issues that do not arise in the appeal before this court. One of the main grounds of challenge was that the power to detain had been used for an improper purpose because, amongst other reasons, the power could only be used against ships involved in the transport of goods and personnel for the purposes of trading with Russia. The Phi had never been and would never be involved in Russian trade. Sir Ross rejected this argument, holding that the power was not limited to disrupting Russian maritime trade and so not limited to vessels involved in the transport of goods and personnel to and from Russia: paras 65 to 69.

72. Turning to the proportionality of the detention and the four limbs of the test, Sir Ross recorded that there was no challenge to the legitimate aim of the detention: para 81. As to rational connection, Sir Ross said that it was reasonable to infer from Mr Naumenko's undoubted wealth that he was involved in significant economic activity in Russia which would be beneficial to the regime:

> "84 … It is sufficient in this context to accept [the Transport Secretary's] submission that given the likely direct and indirect links between Mr Naumenko's wealth, economic activities, and the Russian state, it is rational to consider that Mr Naumenko is the sort of individual economic actor on whom sanctions could effect the 'broad and deep impact' which Parliament intended via the 'connected with Russia' powers in, at the least, weakening their tacit support for the regime."

73. The phrase "broad and deep impact" used there was a phrase that had been used by Lord Ahmad of Wimbledon, the Minister of State for the Commonwealth and the UN, in a letter to Lord Pannick KC during the passage of the Bill which became SAMLA: see para 72 of the Court of Appeal's judgment.

74. Sir Ross also accepted the Transport Secretary's submission that it was not necessary to demonstrate that each individual detention decision contributed by itself to the achievement of the aim; all that was needed was a rational connection between the sanctions measure and the aim: para 86.

75. On fair balance, Sir Ross recognised that the interference with Mr Naumenko's property rights in the Phi was significant. But on the other side of the scales were the community interest in the UK's foreign policy response to events in Ukraine and the wider

geopolitical instability this has caused. He concluded that there was no financial hardship in the detention of a luxury superyacht and the Transport Secretary was entitled to a broad margin of discretion in this regard: paras 87 and 88. Finally, he held that there had been no tortious conversion of the vessel: para 91.

76. Sir Ross granted permission to appeal on the ground that there was a compelling reason to do so in view of the importance of the issues, rather than because he thought any of the grounds of appeal had a real prospect of success.

77. In the Court of Appeal, Singh LJ addressed the issues specific to the *Dalston Projects* appeal at paras 38 onwards of his judgment. He upheld Sir Ross's rejection of the submission that the power to detain had been used for an improper purpose. The power to detain vessels was not limited to detentions which would disrupt Russian shipping or inhibit Russian trade as the appellants contended: para 71. That ground of challenge is not renewed before this court.

78. The Court of Appeal rejected the submission that the Phi Direction had failed adequately to state the grounds for the detention: see paras 90 to 100. We consider this ground in section 15 below.

79. Turning to proportionality at para 109, Singh LJ considered whether, in relation to each of the four criteria specified in the proportionality test, Sir Ross had been wrong in the conclusions he arrived at. He noted that it was common ground that the Phi Direction had a legitimate aim and that there were no less intrusive means of attaining that aim.

80. On the question of rational connection, Singh LJ rejected the argument that detaining the ship of one wealthy Russian who had no association with politics in Russia had no rational connection to the legitimate aim. In doing so at paras 119 to 125, Singh LJ relied on the evidence of Mr Driver about the system of patronage in Russia, to which we refer below.

81. Finally, at para 126, Singh LJ regarded the fair balance between the appellants' individual rights and the interests of the community as straightforward:

> "There can be no doubt that the interference with the claimants' property rights is significant. Even if this is not strictly a deprivation of property case, the claimants are deprived of the *use* of the Vessel for a significant and indefinite time. There are, however, as the Judge observed at paras 87-88 of his judgment, weighty public interest factors on the other side of the balance, in particular the need to bring to an end the illegal

use of force by Russia and the violation of the territorial integrity of Ukraine. Further, as the Judge noted, the individual burden on the claimants is not as great as it would have been if, for example, they suffered particular hardship. The fact that this is the detention of a luxury superyacht is of relevance in that context."

4. The facts and the proceedings below in the *Shvidler* appeal

(a) Mr Shvidler's background

82. Mr Shvidler was born in the USSR in 1964 and graduated from the Moscow Institute of Oil and Gas with a master's degree in applied mathematics in 1986. He then worked at the Oil Research Institute in Moscow. He was granted permission to emigrate as a stateless person in November 1988 and was granted refugee status in the USA. After obtaining further post-graduate qualifications he worked for an accountancy firm in New York. In 2004 Mr Shvidler was granted a British visa under the Highly Skilled Migrant Programme and was naturalised as a British citizen in 2010. He has five children, all of whom are British. As he left the USSR in 1989 before the Russian Federation was formed, he has never been a citizen of that state. He has owned a house in Surrey since 1999 and his former wife and the children have lived in that area since 2001. They own a number of other properties in London and overseas. He has not visited Russia since 2007.

83. Mr Shvidler has been a friend of Roman Abramovich, a leading Russian businessman, since 1986. In the early 1990s, Mr Shvidler and various friends visited Russia seeking to take advantage of the new open business environment there. He went into business with friends and contacts in Moscow led by Mr Abramovich and was engaged in organising finance for the group's businesses.

84. Mr Shvidler has for many years in the past had extensive and highly lucrative business connections with major Russian entities, partly as a result of his connections with Mr Abramovich. In 1988 he was granted permission to leave the USSR as a stateless person and in January 1989 he moved to the United States where he was granted refugee status. From 1996, whilst living in the USA, Mr Shvidler was Vice-President for Finance of Sibneft, a listed oil company which was majority owned by Mr Abramovich. Mr Shvidler was President of Sibneft from 1998 until 2005, when the company was sold.

85. In 2011, after Mr Shvidler and his family had moved to live in the UK, he was appointed to the board of Evraz plc, a UK listed FTSE 100 company with subsidiaries in Russia, the United States, Ukraine, Canada and the Czech Republic. From 2018, Mr Shvidler held that role as the nominee of Greenleas International Holdings Ltd, a British

Virgin Islands entity controlled by Mr Abramovich. The business of Evraz plc is mining and steel manufacturing.

86. On 10 March 2022, Mr Abramovich was designated under the sanctions regime by the Foreign Secretary. On the same date, Mr Shvidler resigned from his position as a non-executive director of Evraz plc, as did its other eight directors. Trading in Evraz plc's shares was suspended by the London Stock Exchange on that date.

(b) Mr Shvidler's designation

87. Mr Shvidler was designated pursuant to regulation 5 of the 2019 Regulations on 24 March 2022. His designation was one of 65 sanctions measures taken that day by the Foreign Secretary. According to the press release announcing those measures, they targeted strategic industries, banks and business elites. In addition to Mr Shvidler, other individuals sanctioned included the Russian Foreign Minister's step-daughter and Galina Danilchenko who had been installed by Russia as the "mayor" of the Ukrainian city of Melitopol. The press statement went on to say that the UK Government "will continue to tighten the screw and use sanctions to degrade the Russian economy on a scale that the Kremlin, or any major economy, has never seen before."

88. Mr Shvidler was made subject to an asset-freeze under regulations 11 to 15 of the 2019 Regulations and to specific transport sanctions. His solicitors wrote to the FCDO at the end of March asking for written reasons which were supplied on 16 June 2022 when he was sent a sanctions designation form ("Designation Form") together with a Sanctions Designation Form Evidence Pack ("Designation Evidence Pack").

89. The original March 2022 designation was stated by the Government to be based on two grounds. The first was that Mr Shvidler was a business partner of Mr Abramovich and had "maintained a close relationship for decades" with him. Mr Abramovich had been designated on 10 March 2022 on the basis that he was a person who was or had been involved in destabilising Ukraine and undermining and threatening the territorial integrity of Ukraine as well as being a person who obtained a benefit from or supported the government of Russia.

90. The second reason was that Mr Shvidler was a former longstanding non-executive director of, and continued to hold shares in, Evraz plc, a company involved in the extractives sector which was of strategic importance to Russia. As such, Mr Shvidler had obtained a benefit from or supported the Russian government.

91. Applying the criteria set out in regulation 6 of the 2019 Regulations, the Foreign Secretary at that stage had reasonable grounds to suspect that Mr Shvidler was associated

with an "involved person" and so fell within regulation 6(2)(d), 6(2)(a)(ii) and 6(3)(b) because of his association with Mr Abramovich and also by the fact that he had obtained a financial benefit from Mr Abramovich through their business relationship. Further, he fell within regulation 6(4)(c) because of his involvement in Evraz plc. Evraz plc was designated under the 2019 Regulations on 5 May 2022.

(c) The review under section 23 of SAMLA and the Government's response

92. Mr Shvidler's solicitors wrote to the FCDO on 14 July 2022 in response to receiving the original Designation Form and Designation Evidence Pack. They requested the revocation of the designation, pursuant to section 23(1) of SAMLA. Amongst other points made in that letter, Mr Shvidler pointed out that there were other individuals with much larger shareholdings in Evraz plc who had not been designated. In singling out Mr Shvidler, who was in the same position as a number of others and held significantly fewer shares than others, the Government had, he asserted, acted in an unjustified and disproportionate manner. The letter also recorded that Mr Shvidler had said publicly on 12 March 2022, 12 days prior to his designation, that he was "hoping and praying for peace and an end to the senseless violence in Ukraine" and that he hoped that the war could be brought to an immediate end. Further, Evraz plc had issued a statement on 9 March 2022 stating that it was deeply concerned and saddened by the Ukraine-Russia conflict.

93. In that letter, Mr Shvidler also described the effect of the designation on his family. We consider the points made later in this judgment. We note here that his solicitors stated that he had applied for a licence to permit him to settle expenses relating to the family home and on behalf of his dependents and for an urgent licence to settle utility bills. At that point he had had no substantive response.

94. Mr Shvidler has summarised his position in these terms:

> "Mr Shvidler and his family established their life in the UK years ago, encouraged by this Government and its policies to settle here, put down roots, form communities, invest and engage in philanthropic activities as set out above. They now find that, through no fault of their own, and owing to actions taken by a foreign government, and which they abhor, they are treated as pariahs by the government in the country they have made their home."

95. He also asked to engage with the FCDO over what steps he could take to have his designation withdrawn. He stated that he considers the Russian invasion of Ukraine to be "a calamitous event" and he condemns the actions of the Russian government.

96. On 11 November 2022 the FCDO wrote notifying Mr Shvidler that the Foreign Secretary had decided to vary the designation and enclosing an amended Designation Form and amended Designation Evidence Pack. The new statement of reasons sets out the grounds on which the Foreign Secretary currently relies in these proceedings to designate Mr Shvidler. The variation of reasons reflected a change in the Foreign Secretary's position in two important respects. First, Mr Abramovich, though remaining designated, was no longer considered to be a person involved in destabilising Ukraine for the purposes of regulation 6(2)(a)(i). This meant that Mr Shvidler's association with him for the purposes of regulation 6(2)(d) was not an association with such a person. But Mr Shvidler still remained designated on the basis that he himself had been involved in obtaining a benefit from the Russian government and was associated with Mr Abramovich who had also obtained such a benefit. Secondly, Mr Shvidler's relevant involvement with Evraz plc was limited to his directorship of that company and did not extend to his shareholding.

97. The reasons now relied on by the Foreign Secretary are therefore stated to be as follows:

> "(1) Mr Shvidler is a business partner of Mr Abramovich, with whom Mr Shvidler has maintained a close relationship for decades and from whom he has obtained financial benefit. Mr Shvidler is therefore associated with a person (Mr Abramovich) who is involved in obtaining a benefit from or supporting the Government of Russia by owning or controlling various companies including Evraz plc. On this basis he falls within regulation 6(2)(d) and 6(2)(a)(ii); and
>
> (2) Mr Shvidler has been involved in obtaining a benefit from or supporting the Government of Russia through working as a nonexecutive director of Evraz plc, which carries on business in the Russian extractives sector. On this basis he falls within regulation 6(4)(d)(ii) and 6(4)(c)."

98. The letter informed Mr Shvidler that having made a request for his designation to be revoked under section 23 of SAMLA, he could not make a further request under that section unless there was a significant matter that had not previously been considered.

(d) Mr Shvidler's claim under section 38 SAMLA

99. Mr Shvidler issued his claim under section 38 of SAMLA on 24 February 2023, challenging the Foreign Secretary's decision under section 23 not to revoke his designation. The claim was supported by a witness statement from Mr Shvidler. In

response, the Foreign Secretary filed a witness statement by Mr David Reed, the Director of Sanctions Directorate at the FCDO.

100. The judgment at first instance in the *Shvidler* proceedings was handed down by Garnham J on 18 August 2023: [2023] EWHC 2121 (Admin). He recorded at para 64 that Lord Anderson KC accepted on Mr Shvidler's behalf that he met the criteria for designation by virtue of his former non-executive directorship of Evraz plc. At that stage Mr Shvidler disputed the first basis for designation, namely that he received financial benefit from Mr Abramovich. Garnham J rejected this challenge and held that the Foreign Secretary had reasonable grounds to suspect that Mr Shvidler had received significant financial benefits from Mr Abramovich: paras 98 to 105.

101. Mr Shvidler also contended that the designation was unlawful because it was disproportionate and discriminatory: para 67. The approach adopted by Garnham J to reviewing the proportionality of Mr Shvidler's designation and his reasons for dismissing the claim are considered in more detail below where they are relevant to the issues before this court. For present purposes we can summarise his decision as follows.

102. As in *Dalston Projects* there was no challenge to the existence of a legitimate aim: see para 81. Garnham J considered the issue of rational connection at paras 106 to 128. There was evidence to show that there was a continuing relationship of trust and confidence between President Putin and Mr Abramovich (para 112) and that it was reasonable to suppose that Mr Shvidler might be able to put pressure on Mr Abramovich to try to influence President Putin. The sanctions imposed on Mr Shvidler might discourage others from involving themselves in Russian businesses and they sent a signal to Mr Shvidler and others that there were negative consequences to their involvement with Russian business.

103. Garnham J rejected the argument that there were less intrusive measures which could achieve the Government's aim. He said that the court could not second guess the FCDO's judgement as to the relative benefits, disadvantages and effectiveness of different measures taken in pursuit of foreign policy objectives: "All that can properly be said is that the Government's analysis is not self-evidently irrational or outside the range of reasonable responses" (para 131).

104. On the question of fair balance, he recorded that after the conclusion of the hearing, the parties had drawn his attention to the judgment of Sir Ross Cranston in the *Dalston Projects* case. Quoting a passage from that judgment in which Sir Ross had dealt with rational connection, Garnham J said that point was relevant also to the fair balance stage of the proportionality test. The effectiveness of any sanctions regime depends, not on the effect of a particular measure directed at a single individual, but on the cumulative effect of all the measures imposed under that regime, together with other types of diplomatic

pressure: para 137. Although the effects of the designation on Mr Shvidler and his family were severe and caused them significant hardship, particularly because Mr Shvidler is a British citizen, it could not be said that the Secretary of State had failed to strike a fair balance between Mr Shvidler's rights and the interests of the community: para 144. He therefore rejected the challenge to the proportionality of the decision.

105. Garnham J went on to reject the complaint of discrimination based on the fact that a number of other non-executive directors of Evraz plc had not been designated and those that had were those of Russian ethnicity. Garnham J described the discrimination case as hopeless because Mr Shvidler's designation was justified by the combination of his role with Evraz plc and his relationship with Mr Abramovich (para 151).

106. The Court of Appeal's judgment dealt with the appeal in the *Shvidler* case at paras 136 onwards. Singh LJ first addressed the submission that Garnham J had erred in considering that the court's task was limited to assessing whether the Secretary of State's ultimate conclusion on proportionality was properly open to the executive rather than conducting the exercise for himself. He concluded on a detailed analysis of the words used by the judge that he had fallen into that error: para 169. He decided, however, that the court should not remit the case but conduct the proportionality analysis itself on a proper basis.

107. Singh LJ recorded that Mr Shvidler accepted, as he had in the court below, that he met the criteria for designation by virtue of his former non-executive directorship of Evraz plc. The court went on to conclude that the first basis for his designation, namely his association with Mr Abramovich, was also made out: para 185.

108. Turning to rational connection, Singh LJ set out eight ways in which the Foreign Secretary explained the rational connection. Singh LJ emphasised that it was an objective test which the court must apply itself but there did not have to be "a perfect fit" between the legitimate aim and the means chosen to achieve it. He said (para 192):

> "… the Secretary of State does not have to establish all eight of the factors which were argued about extensively both before him and before this court. Some of those factors may have been weaker than others. What is crucial at the end of the day is whether there is a rational connection between the legitimate aim and the means chosen to achieve it. In my judgment, the answer to that question is obvious: there clearly is."

109. Singh LJ did not elaborate further on what that connection was or which of the eight factors he regarded as stronger and which as weaker. Instead, he described and dismissed Mr Shvidler's complaint that his designation was arbitrary because other

people in a similar position to him had not been designated. Singh LJ described this argument as attempting to bring in the discrimination argument which had been rejected by Garnham J and for which permission to appeal had not been granted.

110. Singh LJ then rejected the contention that less intrusive measures could have been adopted against Mr Shvidler without unacceptably compromising the achievement of the Government's objective. The third limb of the proportionality test was therefore satisfied: para 203.

111. Finally, Singh LJ considered whether a fair balance had been struck. He accepted that the sanctions imposed on Mr Shvidler were "both severe and open-ended" but concluded at para 210 that:

> "If sanctions are to be effective, a serious price has to be paid by those who are within the definition of people to be designated under the 2019 Regulations. On the other side of the balance is Russia's very serious violation of international law and the need to bring the invasion of Ukraine to an end."

112. He recognised the disruption to Mr Shvidler's family, in particular his children, whose school education was disrupted because they had to be removed from their private schools in the UK. However, Singh LJ noted that they had been able to continue their education in the USA, where their father is now living, and that, if they had stayed in the UK, they would have had access to the publicly funded education system here. Singh LJ also referred to the OFSI licensing system. He said that if Mr Shvidler or his family had reason to complain about the way in which the licensing system is operated in practice in relation to them, they have a remedy available against HM Treasury; that would not throw into question the lawfulness of the designation.

113. In his final comment on fair balance, Singh LJ returned to the relevance of the cumulative effect of the sanctions, as he had discussed in the section of the judgment dealing with the *Dalston Projects* appeal. Mr Shvidler had criticised Garnham J for adopting the remarks of Sir Ross Cranston in the *Dalston Projects* case and submitted that the issue of fair balance fell to be demonstrated by reference to individual designation decisions and not by reference to the cumulative effect of all the measures imposed under that regime, together with other types of diplomatic pressure. Singh LJ rejected that submission, saying that as a matter of law and common sense, the cumulative effect of individual measures does have to be taken into account. Were it otherwise, no particular individual could ever be the subject of designation: "The purpose of the designation scheme is to make a real contribution: each individual designation does make a contribution to the overall impact": para 214.

114. Whipple LJ and Sir Geoffrey Vos MR agreed with the judgment of Singh LJ, with Sir Geoffrey adding some brief comments on the proper approach to the question of proportionality to be adopted by an appellate court.

5. The framework for analysis of the proportionality of the sanctions

115. The designations and directions in these appeals are measures adopted by government Ministers, who are public authorities. Section 6(1) of the Human Rights Act 1998 ("the HRA") provides: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." The appellants complain that the Transport Secretary and the Foreign Secretary have acted unlawfully, in breach of their duty under section 6(1), because the measures have a disproportionate impact on their Convention rights under article 8 and A1P1 in the *Shvidler* case and under A1P1 in the *Dalston Projects* case.

116. Article 8 provides:

> "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."

The requirement that an interference with article 8 rights should be "necessary in a democratic society" carries with it a requirement that a measure which interferes with rights under article 8(1) should be proportionate to one of the specified aims.

117. A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Any interference with rights under A1P1 is required to be proportionate to an aim which is regarded as legitimate for the purposes of the article, as appears from case law in which the article has been applied. There is no dispute in this case that the aim pursued by the measures is a legitimate aim.

118. As we have mentioned, assessment of the proportionality of a measure which interferes with a Convention right involves the application of a four stage test which has been identified in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 ("*Huang*"), para 19 (Lord Bingham of Cornhill), *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621 ("*Aguilar Quila*"), para 45 (Lord Wilson), and *Bank Mellat*, para 20 (Lord Sumption) and para 74 (Lord Reed), among many other authorities, affirmed recently in *In re JR123* [2025] UKSC 8; [2025] 2 WLR 435 ("*JR123*"), paras 41-42, as follows: (i) is the aim sufficiently important to justify interference with a fundamental right? (ii) is there a rational connection between the means chosen and the aim in view? (iii) was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) has a fair balance been struck between the rights of the individual and the general interest of the community? A significant question may arise regarding the margin of appreciation to be afforded to the decision-maker in making the relevant judgment about what measure or measures are appropriate to deal with the particular matter of concern being addressed.

6. The issues in the appeals

119. In the light of this discussion, the issues in the appeals are as follows:

(1) The proper approach to be adopted by a court assessing proportionality: section 7 below.

(2) What is the approach to be adopted by an appellate court to the assessment of proportionality? See section 8 below.

(3) Did the sanctions measures pursue a legitimate aim (proportionality analysis, stage (i))? See section 9 below.

(4) Was there a rational connection between the sanctions measures and an identified legitimate aim (proportionality analysis, stage (ii))? See section 10 below.

(5) Could the legitimate aim have been pursued by less intrusive means (proportionality analysis, stage (iii))? See section 11 below.

(6) Did the sanctions measures strike a fair balance between the rights of the appellants and the general interest of the community (proportionality analysis, stage (iv))? See section 12 below.

(7) Capriciousness, discrimination and absence of guidance: section 13 below.

(8) The reasons/grounds issue: section 15 below.

(9) The tort of conversion in respect of the Phi: section 16 below.

7. The approach to assessment of proportionality

(a) The court's task is to assess proportionality for itself

120. The Court of Appeal stated the law in relation to assessment of proportionality correctly. It is well established that the court has to make its own assessment whether a measure is proportionate to a legitimate aim. If a measure is not proportionate to a legitimate aim, it will be incompatible with the relevant Convention right and its adoption by the relevant public authority will be unlawful as contrary to section 6(1) of the HRA. The question of whether the action taken by the public authority is lawful or not is what the court has to decide on a challenge. As Singh LJ put it in his judgment (para 11), citing *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19; [2007] 1 WLR 1420 ("*Miss Behavin' Ltd*"), paras 13-15, the question whether an act is incompatible with a Convention right is a question of substance for the court itself to decide; the court's function is not the conventional one in public law of reviewing the process by which a public authority reached its decision. As Lord Hoffmann explained in *Miss Behavin' Ltd* (para 15), the question is whether there has actually been a violation of Convention rights "and not whether the decision-maker properly considered the question of whether [the applicant's] rights would be violated or not". Other recent authorities which make this point include *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765, para 69, and *R (AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42; [2023] 1 WLR 4433 ("*AAA (Syria)*"), paras 56-57 and 71. In this sense, it can be said that the court's function is not merely a secondary, reviewing,

function dependent on establishing that the primary decision-maker misdirected itself or acted irrationally or was guilty of procedural impropriety.

121. However, in a challenge based on Convention rights under the HRA to action by a public authority, it is not accurate to say that the court becomes the primary decision-maker in the full sense of that term: see *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532 ("*Daly*"), paras 26-28; *Huang*, para 13 ("although the Convention calls for a more exacting standard of review, it remains the case that the judge is not the primary decision-maker"); *Bank Mellat*, para 21 (Lord Sumption) and paras 70-71 (Lord Reed: "[t]he intensity of review varies considerably according to the right in issue and the context in which the question arises"); *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945 ("*Lord Carlile*"), paras 20, 22, 31 and 34 (Lord Sumption: "no review, however intense, can entitle the court to substitute its own decision for that of the constitutional decision-maker"; "a court of review does not usurp the function of the decision-maker, even when Convention rights are engaged"). The court's role is to assess the lawfulness of the authority's action against the substantive legal criteria which are inherent in the Convention rights, including the criterion of proportionality. The public authority decides on the action it will take, and hence is the primary decision-maker; but the court makes its own assessment whether such action is proportionate, and hence lawful, or not.

122. Accordingly, although the court will have regard to and may afford a measure of respect to the balance of rights and interests struck by the public authority in assessing whether the test at stage (iv) 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: see *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 ("the *Belmarsh* case"), paras 40-42 and 44 (per Lord Bingham, with whom a majority of the nine-member appellate committee agreed); *Huang*, para 11; *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100, paras 29-31 (Lord Bingham) and 68 (Lord Hoffmann); *Aguilar Quila*, paras 46 (Lord Wilson), 61 (Baroness Hale of Richmond) and 91 (Lord Brown of Eaton-under-Heywood) (Lord Phillips of Worth Matravers and Lord Clarke of Stone-cum-Ebony agreed with Lord Wilson and Baroness Hale); *Bank Mellat*, para 124 (Lord Reed); and *In re Abortion Services (Safe Access Zones)(Northern Ireland) Bill* [2022] UKSC 32; [2023] AC 505 ("*Safe Access Zones*"), paras 30-32 (Lord Reed). 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.

123. This account explains how it is that, in the context of the proportionality assessment to be carried out by the court, there is room for appropriate respect and weight to be given to the views of the executive or the legislature as to how the balance between the interests of the individual and of the general community should be struck, depending on the nature of those respective interests. This too is a point which has been made many times at the highest level: see, in particular, *Bank Mellat*, para 21 (Lord Sumption: in the area of judgments in respect of foreign policy and national security involved in that case, the nature of the issue required the executive to be allowed "a large margin of judgment") and para 98 (Lord Reed); *Lord Carlile*, paras 20-34 (Lord Sumption), para 68 (Lord Neuberger of Abbotsbury) and para 88 (Baroness Hale); and *U3 v Secretary of State for the Home Department* [2025] UKSC 19; [2025] 2 WLR 1041 ("*U3*"), paras 65-82 and 94-107 (Lord Reed). As Lord Sumption said in *Lord Carlile*, para 34, "the court is entitled to attach special weight to the judgments and assessments of a primary decision-maker with special institutional competence" (and, we would add, is required to do so).

124. We endorse the statement of the proper approach to proportionality assessment given by Singh LJ in his judgment at paras 11-21, drawing on an uncontroversial part of the judgment of Lord Sales in *Director of Public Prosecutions v Ziegler* [2021] UKSC 23; [2022] AC 408 ("*Ziegler*"), para 130, and some of the authorities referred to above. As Singh LJ said (para 21), reflecting Lord Sumption's observations in *Lord Carlile*, para 34, the context relevant to determining the measure of respect to the balance of rights and interests struck by a public authority will include the importance of the right, the degree of interference and the extent to which the courts are more or less well placed to adjudicate, on grounds of relative institutional expertise and democratic accountability.

125. It is fair to say that this approach to the assessment of proportionality, bringing into account as it does the respective constitutional responsibilities of the courts and the public authority whose actions are under challenge and their respective institutional competencies, and involving a spectrum between elements of substantive decision-making and elements of review on the part of the courts, can on occasion lead even experienced judges into error. In the *Shvidler* case the Court of Appeal concluded that Garnham J had erred by leaning too far towards a form of rationality review, thereby suggesting that he had not carried out the substantive review of proportionality required for the proper application of article 8 and A1P1. A judge conducting a proportionality assessment needs to take care in the language they use to explain how they have approached the task overall and also their consideration of the particular elements which are relevant to that assessment. It is to be hoped that the recapitulation of the proper approach in this section of our judgment will provide clear guidance.

(b) The width of the margin of appreciation in the context of the sanctions

126. In deciding whether the measures are proportionate the court has to consider the balance to be struck between two incommensurate values: the Convention rights engaged

and the interests of the community relied on to justify interfering with them: see *Lord Carlile*, para 34 (Lord Sumption). The court is able to assess for itself the evidence regarding the impact of the measures on Mr Shvidler and his family and on Dalston Projects and Mr Naumenko. The Foreign Secretary and the Transport Secretary do not have any special claim by reference to their constitutional responsibilities and institutional competence to be in a superior position than the court to be able do that.

127. However, the context of these cases is such that the Foreign Secretary and the Transport Secretary do have special constitutional responsibilities, by contrast with those of a court, in relation to steps taken in an effort to respond to and contain Russia's invasion of Ukraine. They also have superior institutional competence to make the relevant assessment whether the sanctions imposed in these cases may serve some useful purpose in responding to and containing Russia's actions.

128. The sanctions have been imposed in a context involving important issues of national security and the conduct of the UK's international relations. It is well established that such issues are central to the constitutional responsibilities of the Government. It is the executive government, as represented by the relevant Ministers, which has the democratic authority to take decisions in these areas, because it is important that those doing so should be responsible to the public for the effective protection of national security and for upholding the interests of the country in the conduct of international affairs: see, eg, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153 ("*Rehman*"), paras 50-54 and 62 (Lord Hoffmann); *Huang*, para 16; *Bank Mellat*, paras 93 and 129 (Lord Reed); *Lord Carlile*, paras 22-34 (Lord Sumption), paras 67-72 (Lord Neuberger) and para 88 (Baroness Hale); *U3*, paras 65-82 (Lord Reed).

129. It is also well established that the executive government has superior institutional competence to make the relevant judgments regarding the possible impact of sanctions such as those in issue in these cases, since the Government has access to relevant experts and a wide range of information, some of which may be secret: see, eg, *Rehman*, paras 57-58 and 62 (Lord Hoffmann); *Bank Mellat*, para 21 (Lord Sumption: "[t]his is pre-eminently a matter for the executive"), paras 98 and 129 (Lord Reed), paras 165 and 173 (Lord Neuberger) and para 200 (Lord Dyson); *Lord Carlile*, paras 22, 24, 26 and 32-34 (Lord Sumption), paras 67-72 (Lord Neuberger) and para 88 (Baroness Hale); and *U3*, in particular at para 66 (Lord Reed).

130. On these grounds, the Foreign Secretary and the Transport Secretary should be accorded a wide margin of appreciation in making their judgments about whether the objectives of the measures, in terms of responding to and seeking to restrain Russia's actions in Ukraine, are sufficiently important to justify the limitation of a fundamental right; whether there is a rational connection between the measures and those objectives; whether a less intrusive measure could have been used; and whether a fair balance has been struck between the relevant Convention rights of the individuals and others

concerned and the interests of the community, in so far as the balance between the incommensurate elements referred to above involves bringing the public interest factors relied on by the Foreign Secretary and the Transport Secretary into account. In section 12 below we consider the question of fair balance in the light of all the elements which are relevant.

(c) Reliance on reasons given after the sanctions were first imposed

131. Lord Anderson, for Mr Shvidler, submits that although normally weight is to be given to the executive's judgment in relation to matters of foreign policy, little weight is to be afforded to reasoning which departs from or builds on that which was adopted at the relevant time by the decision-maker. The reasons given by the Foreign Secretary by way of public statement when introducing the sanctions in relation to Mr Shvidler were not as full as those which were put forward in the evidence filed on behalf of the Foreign Secretary when responding to the challenge brought by Mr Shvidler. The suggestion is that the late reference to matters of foreign policy to justify the decision to impose sanctions in Mr Shvidler's case means that, contrary to the usual approach referred to above, the Foreign Secretary is not entitled to claim that the margin of appreciation applicable in this case is widened by this policy context. Also, less weight is to be afforded to the reasons given in the FCDO's CPR r 79.11 response to the legal challenge, because they were formulated by officials or lawyers acting for the FCDO without reference to the Foreign Secretary. Lord Anderson cites *In re Brewster* [2017] UKSC 8; [2017] 1 WLR 519 ("*Brewster*"), para 52 (Lord Kerr of Tonaghmore), and *Bank Mellat*, para 22 (Lord Sumption), in support of this submission regarding late reasons. Counsel for Dalston Projects and Mr Naumenko made similar points in relation to the changing reasons given by the Transport Secretary for issuing the Phi Direction.

132. *Brewster* concerned a decision by the administrator of a public sector occupational pension scheme refusing to pay a survivor's pension to the unmarried partner of the scheme member, on the grounds that it had not received a nomination form required under the relevant regulations from the scheme member before he died. The claimant challenged the part of the regulations imposing such a notification requirement on cohabiting partners but not on married or civil partners as constituting unlawful discrimination contrary to her Convention rights. The defendants maintained that the notification requirement was objectively justified on various grounds but adduced no evidence of any evaluation before it was introduced of the need for it in reliance on such grounds. This court held that the notification requirement was not objectively justified and that the claimant was entitled to a survivor's pension. Lord Kerr gave the judgment, with which the other members of the court agreed.

133. Lord Kerr observed (para 39) that in assessing whether the nomination requirement was a proportionate measure which was objectively justified it was necessary for the court to consider the grounds put forward in the proceedings, even though not relied on at the

time of the introduction of the requirement in the regulations. This reflects the position explained above that the court is required to make its own assessment of proportionality on the evidence available to it. Lord Kerr acknowledged (para 49) that the legislator was usually to be regarded as better placed than the courts to appreciate what is in the public interest on an issue of socio-economic policy, giving rise to a significant margin of appreciation. However, that margin is liable to be reduced if it is clear that a particular measure is sought to be defended on grounds that were not present to the mind of the decision-maker at the time the decision was taken, making the court's role in assessing proportionality correspondingly more pronounced: para 50. He cited *Miss Behavin' Ltd*, paras 46-47, where Lord Mance said that in such circumstances the court is deprived of the assistance and reassurance provided by the primary decision-maker's considered opinion on Convention issues and observed that "[t]he court's scrutiny is bound to be closer, and the court may … have no alternative but to strike the balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider".

134. The claimant submitted that where the decision-maker has not made any judgment in advance of its decision about the factors which it later deploys in support of that decision, no institutional deference can be given to its post hoc reasoning, but Lord Kerr was not prepared to accept this submission without qualification (para 52): although reasons advanced after a decision is made will call for closer scrutiny (ie the margin of appreciation may be reduced), "[e]ven retrospective judgments … if made within the sphere of expertise of the decision-maker, are worthy of respect, provided they are made bona fide" (see also paras 59 and 64). In the event, this issue did not affect the outcome of the appeal, since even applying the wide margin of appreciation normally applicable in relation to legislative policy choices in the field of socio-economic policy no good objective justification was made out: paras 55 and 64-65.

135. It is significant that the measure under challenge in *Brewster* was a legislative provision. The legislative judgment on which it was based was necessarily something fixed in the past. Even then, as Lord Kerr made clear, a genuine up-to-date account of the public interest in favour of having such a provision by relevant public authorities with superior democratic and institutional expertise would carry weight in the court's assessment of the proportionality of the measure. Such an account might constitute reasons why the Government considered the law satisfactory and defensible, so that in their judgment it was not necessary to seek amendment of it. This would not carry the full force of a positive democratic judgment by Parliament itself when enacting primary legislation (as to which, see *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223), but would still be a judgment of persons who are accountable to the legislature and to the public for promoting the public interest.

136. The position is materially different in the present appeals. In each case, the measure in question was introduced on the basis of a decision by the relevant Minister (the Foreign Secretary in the *Shvidler* appeal and the Transport Secretary in the *Dalston*

Projects appeal), who later maintained the measure in place when asked to remove or vary it and who then authorised the defence of it in the current proceedings on the basis of the grounds of defence and evidence filed on his behalf. The challenge to the measures in terms of their compatibility with Convention rights was determined by the courts below on the basis of the position set out in the evidence and grounds relied upon by the parties at the time of the hearings in those courts. Unlike in *Brewster*, the Ministers' judgment regarding the compatibility of the measures with those rights was not fixed in time at the point when the measures were first introduced, but has been subject to constant review since then and in the course of these proceedings. The relevant Ministers' assessment that the measures are compatible with the appellants' Convention rights is that as at the time of the hearings below, which was set out in the evidence and grounds filed by them to meet the challenges which had been brought. That evidence and those grounds are not reasons introduced after the relevant assessment had been made by the decision-makers, but are themselves the considered reasons for maintaining the measures in place which are contemporaneous with the decision to do so which is the subject of proportionality analysis by the court.

137. There is therefore no basis for the suggestion in this case that the Ministers are not entitled to the usual margin of appreciation to be allowed on constitutional and institutional grounds in respect of assessment of national security and the conduct of foreign policy. The nature of the challenge to the measures, in terms of their compatibility with Convention rights at the time of the hearings, means that it is a different type of case from a challenge to a decision on conventional domestic public law grounds, where the focus is on the reasoning and decision-making process at the time the decision was taken. In that type of case the nature of the challenge means that it is generally not permissible for the decision-maker to defend its decision by reference to reasons which were not in its mind when the decision was taken, but were brought forward only afterwards (see, eg, *R v Westminster City Council, Ex p Ermakov* [1996] 2 All ER 302, CA). By contrast, the position in these appeals is analogous to that considered in *U3*, where (unlike the position in an ordinary judicial review case) the decision by a Minister which was under challenge was kept under review during the course of proceedings up to a hearing before the Special Immigration Appeals Commission, and the challenge fell to be determined in the light of all the evidence filed by that time: see paras 45-47.

138. Also, as in *U3* (see para 46), the *Carltona* principle applies in relation to the measures in question in these appeals, so that decisions and judgments made and reasons formulated by civil servants on the Ministers' behalf have the same status as decisions, judgments and reasons of the Ministers themselves (*Carltona Ltd v Comrs of Works* [1943] 2 All ER 560). Accordingly, the reviews carried out and the reasons given by the Foreign Secretary's and the Transport Secretary's officials are, in law, reviews carried out and reasons given by those Ministers.

139. Lord Sumption's judgment in *Bank Mellat*, para 22, does not support Lord Anderson's submission. The sanctions direction against the bank in that case was required

to be made by statutory instrument laid before Parliament and approved by it under the affirmative resolution procedure: paras 4-7. Lord Sumption stated at para 22 that the justification for the sanctions direction which the courts below had relied upon in upholding the proportionality of the direction, as involving considerations of foreign policy and national security, was problematic because it did not explain nor justify singling out Bank Mellat to be the target of a special direction and also because the justification "was not one which ministers advanced when laying the direction before Parliament, and was in some respects inconsistent with it". He expanded on this at paras 23-27. In explaining the sanctions direction to Parliament ministers suggested that there was a problem with Bank Mellat's internal procedures which justified singling it out from other Iranian banks which might be used to channel funds for Iran's nuclear weapons programme, which were not the subject of sanctions. However, in the case presented by ministers in the proceedings that position was abandoned and a more general argument was presented, regarding the risk of channelling funds inherent in the banking system more widely. But on that new argument, no explanation was given why ordinary compliance with general financial sanctions and relevant risk warnings regarding transactions with Iranian entities, which was judged to be a sufficient response to the problem so far as other banks were concerned, would not be a sufficient response in the case of Bank Mellat as well; accordingly, Lord Sumption concluded that the sanctions direction was irrational in its incidence and disproportionate to any contribution it could rationally be expected to make to its objective: para 27.

140. Lord Sumption did not say that the Secretary of State was not able to rely on the later reasons advanced in support of the sanctions direction, nor that he was fixed with trying to justify the measure on the basis of the reasons given to Parliament. This accords with basic principle. The proportionality of a measure, including a legislative provision, is to be assessed by reference to the circumstances prevailing when the issue of its compatibility with Convention rights has to be decided rather than when it was promulgated: "[i]t is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force" (*Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40; [2004] 1 AC 816 ("*Wilson*"), para 62 per Lord Nicholls of Birkenhead; see also para 144 per Lord Hobhouse of Woodborough: "[t]hose who are seeking to justify the use of the statutory provision have to do so as at the time of that use"). In line with this principle it was common ground in the present appeals that the court which makes the assessment of proportionality should have regard to all the evidence available at the time of the hearing. Very often there is no relevant change in circumstances between the passage of the legislation and its application, which was the position in *Wilson* and in *JR123* and appears to have been the position in both *Brewster* and *Bank Mellat*.

141. It might be said that, since the measure in *Bank Mellat* had to be affirmed by Parliament in a vote which was not subject to later review, it was the reasons given to Parliament which would have been relevant to any widening of the margin of appreciation which depended upon Parliament's endorsement of the measure, as distinct from the Secretary of State's judgment that it should be maintained in place: cf *JR123*, para 58,

and *Bank Mellat*, para 123 (Lord Reed). However, consideration whether there might be any such widening did not feature in Lord Sumption's reasoning and Lord Reed, at para 123, observed that it was not a relevant factor in the case. On the contrary, Lord Sumption examined each of the justifications offered at different points in time and found that they were both unsustainable. In the proceedings the Secretary of State did not seek to defend the justification offered to Parliament; and the general reasoning which was relied upon instead was inadequate to explain why a sanctions direction had been made against Bank Mellat whereas other, lesser measures were judged to be sufficient in relation to other banks similarly situated to deal with the same problem. In section 13 below we address Mr Shvidler's attempt to construct a similar proportionality argument based on alleged capriciousness and inconsistency of treatment of Mr Shvidler as compared with other wealthy Russian businessmen.

8. The approach of an appellate court to the assessment of proportionality

142. A significant issue in these appeals is the proper approach to be adopted by an appellate court to the assessment of proportionality. Two different approaches are identifiable in the authorities. In some cases the appellate court treats its role as confined to a review to check whether the first instance court's assessment in relation to the proportionality of a measure was arrived at on the basis of a proper self-direction as to the test to be applied and whether the result arrived at was reasonable, in the sense of being within the legitimate parameters of judgment for the judge; if it is satisfied on these points, the appellate court will not intervene, even though it thinks that it might have reached a different view if it had been deciding the issue for itself. This approach gives particular weight to the assessment made by the judge. As explained in *R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079, para 64, where this approach is followed an appellate court will only intervene if the lower court has made a significant error of principle or there is "an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of such material factor, which undermines the cogency of [their] conclusion". In other cases, the appellate court does not treat its role as so limited, but instead, in order to decide whether the appeal should be allowed, it makes its own fresh assessment of the proportionality of the measure in question. This approach gives priority to the authority vested in the appellate court to decide and give guidance on legal questions.

143. Each approach is justified in the proper context. The review approach puts emphasis on the dispute-resolution effect of the first instance judgment on a determination of the facts, militates against repetition of arguments up through the legal system by the loser seeking without sufficient reason to have a second bite at the cherry, and protects appellate courts from being over-burdened by appeals. In deciding which issues should be open for debate in the higher courts it is well recognised that there is a need to ensure that the limited resources of those courts are employed in a focused and efficient way which is proportionate to what is required for them to fulfil their constitutional role to provide guidance and to resolve significant issues of principle, and which minimises the

scope for delay and unnecessary duplication of effort and re-litigation of issues: see *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 WLR 475, in particular paras 48 and 54-56; *R (Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663, in particular paras 57 (Baroness Hale), 89 and 92-94 (Lord Phillips), 99-100 (Lord Brown), 104-105 (Lord Clarke) and 122-124 and 130-131 (Lord Dyson); and *The Father v Worcestershire County Council* [2025] UKSC 1; [2025] 2 WLR 155, paras 89-91.

144. The fresh determination approach is appropriate where it is important that the appellate court should give its own opinion about the proportionality of a measure and its compatibility with Convention rights, rather than defer to the assessment of the first instance judge. This is likely to be an important consideration in cases where the decision will provide guidance for other cases or where the subject matter has major social or political significance so that the public will rightly expect the senior judges in the appellate court to exercise their own judgment as to whether the measure in question is proportionate and lawful or not. Leading examples are the compatibility with Convention rights of the law criminalising assistance of suicide (*R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657), of a law permitting internment without trial of foreigners suspected of involvement in terrorism where British nationals similarly suspected could not be (the *Belmarsh* case) and, we would add, of a government's flagship policy such as the proposal to remove asylum seekers to Rwanda for processing (*AAA (Syria)*). In *AAA (Syria)* the issue was whether there was a real risk of ill-treatment of the claimants contrary to their Convention rights if they were so removed. The Court of Appeal and this court were invited to adopt, and did adopt, the review approach set out above, albeit it transpired they found that the first instance court had erred in its approach. In light of that error at first instance, the Court of Appeal did consider the question of compatibility with Convention rights for itself and made its own assessment, which this court held it was entitled to do and accepted as determinative (although at the same time stating that it agreed with that assessment: para 73). But in our view in a case regarding such an important issue for society it would have been appropriate for each of the appellate courts to proceed to exercise their own judgment even if the first instance court and the Court of Appeal had each approached its assessment in the right way.

145. Where compliance with Convention rights is in issue and turns on an assessment of proportionality, a first instance court and an appellate court each has a responsibility to assess whether there is a violation. The question whether a measure is proportionate is a question of law calling for assessment in the light of the facts of the case: *Safe Access Zones*, paras 30-34 and 66, and *JR123*, para 35. As Lord Reed explained in *Safe Access Zones*, para 30, "[i]t involves the application, in a factual context … of the series of legal tests [set out in relevant authority: see para 118 above], together with a sophisticated body of case law …".

146. As was pointed out in *JR123*, para 36, the type of measure in relation to which the question of proportionality may arise is very wide, ranging from individual action by a

state official to provisions of general law enacted by the legislature. The factual contexts in which a question of proportionality may arise also vary widely; and, we would add, so can the social or political salience of the measure under consideration. Where a first instance court has made an assessment of proportionality the question for an appellate court is whether that court's assessment is wrong: *R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327 ("*Z v Hackney*"), para 74; *Safe Access Zones,* para 33; *JR123*, para 36. As Lord Reed explained in *Safe Access Zones*, this is a standard which is capable of being applied flexibly, depending on the nature of the measure and the circumstances of the case: para 33, referring to *Ziegler*, paras 102-103 (Lady Arden) and paras 129-140 (Lord Sales).

147. It may be that what is in issue is a one-off decision which only affects persons involved in the proceedings, there is no controversy about the content and Convention compatibility of the general law which is applicable and the case turns essentially on a factual assessment of the circumstances which the lower court was particularly well placed to make. In such a case it will be appropriate for the appellate court to adopt an approach according to which it asks whether the lower court directed itself correctly, has had due regard to relevant matters and has reached a conclusion reasonably open to it, without any need to second-guess that court's proportionality assessment if it has: *JR123*, para 36. But, as pointed out there, in other situations – in particular where matters of general principle are in issue or the question concerns the Convention compatibility and proportionality of general rules set out in legislation – it is the proper function of the appellate court to determine the question of proportionality for itself without deferring to the assessment made by the lower court, even if that court has directed itself correctly and its decision cannot be said to be unreasonable. It may be that it is only by adopting this approach that the appellate court can fulfil its constitutional function of providing general guidance on the law: *Safe Access Zones*, para 33. So, for example, this was determined to be the proper approach for the appellate courts to follow in the circumstances of *JR123*: see para 37.

148. However, as is implicit in the account above, the need for an appellate court to provide guidance as to the law or to determine matters of social importance according to its own exercise of judgment varies with the circumstances of the case and with the state of the law at the time the issue of proportionality arises. The question of proportionality of a measure may have wide significance on the first occasion it arises, but then the relevant determination may be made at appellate level and the answer to be given in general terms becomes clear. On the next occasion the issue arises the circumstances will be materially different: a first instance court has to follow and apply the guidance given previously, there is no significant need or justification for an appellate court to re-assess the matter afresh and it is likely to be appropriate to leave the application of the general law in the light of that guidance to the judgment of the lower court (subject only to review that it has directed itself correctly according to that guidance and has reached a reasonable conclusion within the relevant parameters for its assessment). Similarly, in matters of wide social concern, it is only necessary that the appellate courts examine them in order to exercise their own judgment as they first arise, not on every occasion thereafter.

149. This analysis emphasises the need for flexibility in the approach to be adopted by an appellate court, depending on the circumstances. But only up to a point. The choice has to be made on a principled basis, so that the parties and the appellate courts have a reasonable idea of the correct approach to be adopted in any given case. The choice to be made is significant in terms of the arguments properly to be addressed to the appellate court and the reasons it should give for its decision, and the choice may of course affect the conclusion to be arrived at on the merits of the appeal. Also, the approach adopted ought to be the same at each appellate stage. If it is appropriate for the Court of Appeal to make its own fresh proportionality assessment without the need to examine whether the first instance court erred in its approach, then it is appropriate for this court to do the same. Conversely, if it is appropriate for the Court of Appeal to adopt the review approach to determine an appeal, it will be appropriate for this court to adopt the same approach. Therefore, the principles governing the choice of approach have to be capable of providing reasonably clear guidance for appellate courts at each level.

150. In the Court of Appeal, at paras 22-37, Singh LJ discussed the proper approach for an appellate court to adopt in light of *Safe Access Zones* and *Ziegler*. He considered that these cases establish that there are three distinct categories of case: (i) where there is an appeal on a point of law by way of case stated, as in *Ziegler*, an appellate court can only interfere with the first instance court's assessment of proportionality on the grounds that the lower court has misdirected itself in law or has reached a conclusion which was not reasonably open to it; (ii) a category comprising "primarily those cases which concern the compatibility of a rule (including primary legislation, as in [the *Belmarsh* case]) or policy with Convention rights", rather than "where there has simply been an assessment of proportionality on the facts of an individual case", where the appellate court will not accord any deference to the assessment of proportionality by the courts below but will carry out its own proportionality assessment: paras 25-26; and (iii) a category in which there has been an assessment of proportionality on the facts of an individual case, where a more flexible approach is required to determine whether the assessment of the first instance court was "wrong", involving deference to its decision particularly where it is based on conclusions of primary fact from disputed oral evidence (see the judgment of Lord Neuberger in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 ("*In re B*"), paras 80-94), but in which there may be scope for the appellate court to make its own assessment (ibid, paras 93-94).

151. Singh LJ considered that *Shvidler* and *Dalston Projects* fell within category (iii), because neither of them involved a challenge to the 2019 Regulations or any policy: paras 26-28. Applying the flexible approach he identified, he held that the judge in the *Dalston Projects* case had not misdirected himself and that his conclusion regarding proportionality was not wrong, but was in fact one Singh LJ agreed with: paras 111 and 131.

152. On the other hand, in the *Shvidler* case, Singh LJ concluded that the judge had misdirected himself regarding the proper role of the court in assessing proportionality and

gave too much weight to the judgment of the Foreign Secretary: paras 162-168. The result was that the judge's assessment of proportionality could not stand and, since no party asked for the case to be remitted, the Court of Appeal had to make its own assessment: para 169.

153. In para 169 Singh LJ also stated that "this court is still only conducting an appeal by way of review, not by way of rehearing", although it is not entirely clear what he meant by that. He said that this was in accordance with the principles he had identified earlier in his judgment, in particular as appeared from *In re B*. The language used is taken from CPR Part 52 rule 11 (now rule 21) which states that an appeal in the Court of Appeal takes the form of a review rather than a rehearing, save in exceptional cases. In *In re B* Lord Neuberger said (para 87) that an exceptional case calling for a rehearing includes one in which it is determined that the first instance judge has misdirected him- or herself. In fact, we consider that there is no good reason to mix up the reference in the rule to appeal by way of review of the decision and appeal by way of rehearing in this way, since it is inherent in the concept of an appeal by way of review that if the review reveals a material error the appellate court will make its own determination of the matter (unless, instead, it decides to remit the case for a fresh determination by the lower court). Also, it is difficult to describe a case where an appeal succeeds on the review approach and then the appellate court proceeds to re-make the decision itself as "exceptional", since it happens often. However that may be, on any view, once it was decided that the judge in *Shvidler* had misdirected himself, and since there was no request for the case to be remitted, the Court of Appeal was required to make its own assessment of proportionality, going beyond a simple review approach. In fact, in what followed Singh LJ did make his own assessment of proportionality, albeit on various points saying that he agreed with the judge.

154. By setting out the three categories, Singh LJ was seeking to provide a degree of determinate guidance for appellate courts as to how they should decide whether to adopt an approach involving review of the decision of the first instance court or one involving a fresh assessment of proportionality by the appellate court. However, with respect, we do not consider his categorisation to be correct as a matter of law or principle.

155. Singh LJ's proposed category (i), based on the majority judgment in *Ziegler*, does not survive the guidance given by Lord Reed in *Safe Access Zones* with the unanimous agreement of the other six members of court in that case. Lord Reed's guidance in *Safe Access Zones*, para 33, regarding the required flexibility of approach is as applicable in a case of appeal by way of case stated as in any other appeal. There are no good grounds for adopting different appellate approaches to the assessment of proportionality based solely on the route by which the appeal comes before the appellate court, rather than by reference to the nature of the issues arising on such an assessment and the circumstances of the case. As Lord Reed explained in *Safe Access Zones*, para 30, the assessment of proportionality is a question of the application of legal standards in a particular factual

context, and not a simple question of fact (as Singh LJ characterised it at para 24 of his judgment, in relation to his category (i)).

156. The distinction drawn by Singh LJ between his proposed category (ii) and his proposed category (iii) is also unsustainable. A Convention rights-based proportionality challenge to a legal rule or a policy involves a challenge to the application of the rule or policy on the particular facts of a case (see para 140 above), so there is no simple dividing line between a challenge to the rule or policy and an assessment of proportionality on the facts of an individual case. The difficulty of drawing such a distinction underlies a disagreement between Singh LJ and Sir Geoffrey Vos MR in the Court of Appeal about whether *Bank Mellat* was a category (ii) case (as Singh LJ thought) or a category (iii) case (as Sir Geoffrey Vos thought): see paras 27 and 220-221, respectively. Again, on a proper reading, the guidance in *Safe Access Zones* is applicable across all cases where the challenge is to the proportionality of the legislation or policy, however that issue comes before the court.

157. What is significant about the fact that a case may involve a matter of general legal principle or a challenge to the application of a legal rule or a general policy which covers many cases is that this may be a powerful reason for an appellate court to adopt an approach requiring that court to make its own assessment of proportionality. But this will not necessarily be appropriate in all such cases.

158. For example, a previous appellate decision may already have provided relevant guidance about the proportionality of the general rule or policy so that all that is necessary on appeal is for the appellate court to check that the lower court has directed itself correctly by reference to that guidance and has reached a conclusion reasonably open to it. Or the particular circumstances of the claimant's case may mean that their claim that the rule or policy has produced a disproportionate outcome in their specific situation is on any view limited to those circumstances, meaning that the case cannot be regarded as an appropriate vehicle for wider evaluation of the Convention compatibility of the rule or policy in other cases such as would justify anything other than a review approach on appeal. Or it may be appropriate for the appellate court to modify its approach according to the nature of different issues which are relevant to the overall assessment of proportionality, so as to adopt a review approach where a relevant factor is heavily dependent on an evaluation by the lower court of oral evidence or detailed and extensive written evidence (see, eg, *In re DB's Application for Judicial Review* [2017] UKSC; [2017] NI 301, para 80; *Z v Hackney*, paras 56 and 73-74, approving the approach of the Court of Appeal in that case; *Smech Properties Ltd v Runnymede Borough Council* [2016] EWCA Civ 42, paras 29-30; *R (PN (Uganda)) v Secretary of State for the Home Department* [2020] EWCA Civ 1213, para 62), but making its own overall assessment at appellate level in the light of such factors as determined by the lower court (assuming it has directed itself correctly and has reached a reasonable conclusion on them). This is simply to say that in a complex proportionality assessment it may appear that some factors which feed into the overall assessment are for particular reasons best assessed by one

body (be it a minister or the legislature, on grounds of their democratic authority or institutional expertise, or a lower court, if it had a superior opportunity to assess the evidence) even though the overall proportionality assessment is made by another body (a review court or, as the case may be, an appellate court): see paras 123-129 above.

159. The fact that the law in this area seeks to accommodate competing concerns regarding the use of appellate court resources in light of the guidance function and authority of such a court and the appropriate functions of a first instance court, means that it is difficult and potentially misleading to lay down hard and fast categories to determine which of the two appellate approaches should be adopted in any given case. As the analysis above indicates, we consider that Singh LJ's attempt to do so was misplaced.

160. Instead, the best guidance which can be provided is that within the spectrum of cases referred to in *Safe Access Zones* and *JR123* there are certain paradigm cases which are likely to require an approach involving a fresh proportionality assessment by the appellate court (but treating this as defeasible if there appear to be sufficient good reasons for a departure from this approach as a general matter or in relation to particular factors relevant to the assessment) and other paradigm cases where it is likely that a review approach on appeal is appropriate. An example of the former paradigm situation would be a case involving the first consideration at appellate level of a new legislative regime of general application, especially one with considerable significance for society. An example of the latter would be a one-off decision of a judge or an official which depends entirely on the application of well-established law and principles to the facts of the individual case.

161. As we have explained in para 145 above, with reference to *Safe Access Zones*, para 30, proportionality assessments involve elements of both fact and law. The relative significance of those elements varies from case to case. This court gave general guidance in *In re B* which indicates that the appropriate provisional starting point for an appellate court in deciding between the review approach or the fresh decision approach on an appeal is that the former is likely to be appropriate. Lord Clarke emphasised (para 137) the statement about domestic civil procedure in *In re Grayan Building Services Ltd* [1995] Ch 241, 254: "generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards have been met, the more reluctant an appellate court will be to interfere with the trial judge's decision". Reflecting this general point, ordinarily the review approach in relation to an appeal in respect of a proportionality assessment will reflect a fair and appropriate division of responsibilities between the first instance court and the appellate court.

162. The adoption of a more intensive role by the appellate court in terms of proceeding to make its own fresh assessment (even though there has been no error by the first instance court) requires to be justified by special factors as being constitutionally appropriate in the public interest and to uphold the rule of law. The main factors which are likely to be

relevant to justify adoption of such an approach are (i) the relevance of the assessment of proportionality across a range of cases, whether in terms of establishing a point of general principle or approach, the proper interpretation of legislation or the proper development of the common law; (ii) the nature of the measure in question, since the constitutional responsibility of the senior courts is likely to be engaged in a more acute way in relation to challenges to primary or secondary legislation; (iii) whether the case involves a claim that legislation or proposed legislation of any of the devolved legislatures is outside competence by reason of incompatibility with Convention rights (since such an important question should again be resolved by a senior court); (iv) whether the case involves a claim that there is significant incompatibility between primary legislation and Convention rights (since such a claim invites the court to critique what Parliament has done and also because a determination of that issue may later fall to be scrutinised on an application to the European Court of Human Rights, which is likely to be assisted to the greatest degree by a domestic determination of proportionality by a senior court); (v) the need to resolve differences between divergent strands of authority which may have emerged in the lower courts; and (vi) the high importance for society of the issue to be resolved and the concomitant public interest in its being directly determined by a senior court. This is not an exhaustive list and in some situations there may be some other compelling reason for the appellate court to adopt the fresh assessment approach in order to fulfil its constitutional responsibilities.

163. Unfortunately, the fact that simple categories do not exist in this area may mean that in circumstances where it is unclear which appellate approach is correct, and there is the prospect of an onward appeal to this court, an intermediate appeal court may find it prudent to make an assessment of proportionality according to both approaches. In fact, it is noticeable that this is frequently done by the Court of Appeal (including in these cases), in which it often explains that not only could it not be said that the judge went wrong in their assessment, but that the court agrees with the assessment they made. The Supreme Court sometimes expresses its view on proportionality in a similar way: see, eg, *Z v Hackney*, para 75, and *AAA (Syria)*, para 73.

164. In the light of this discussion, we consider that the appropriate appellate approach in the *Shvidler* case was that the Court of Appeal should have made its own assessment of the proportionality of the sanctions measures and this court should do the same. In the Court of Appeal this was essentially a test case regarding the proportionality of sanctions measures in respect of Russia in the context of its invasion of Ukraine, directed against a British citizen and his family and involving very serious detrimental effects for them. The sanctions regime affects a significant number of people. It has high significance for society since it constitutes an important aspect of the UK's conduct of foreign policy in response to Russia's actions in Ukraine.

165. We also consider that the appropriate appellate approach in the *Dalston Projects* case was that the Court of Appeal should have made its own assessment of proportionality and this court should do the same. This conclusion is perhaps not so obvious as in *Shvidler*

because, as discussed below, the impact on Mr Naumenko is very much less severe and the proportionality challenge is to that extent correspondingly weaker. However, the *Dalston Projects* case provides a good test of another significant point of general principle in the context of the sanctions regime, namely whether sanctions directed against someone like Mr Naumenko simply on the basis of their great wealth and their connection to Russia, but in relation to whom there is no evidence to indicate that they have any kind of political role or connections in the Russian government, are proportionate for the purposes of the application of Convention rights. This, too, is a matter which makes it appropriate for an appellate court dealing with the point for the first time to exercise its own judgment on the question of proportionality, without deferring to the view of the first instance court.

9. Proportionality analysis stage (i): Legitimate aim

166. Although neither Mr Shvidler nor Mr Naumenko denies that the 2019 Regulations pursue a legitimate aim, it is necessary to bear in mind what that aim is when addressing proportionality. The importance of the aim pursued is relevant not only to the first limb of the proportionality test but also affects how the court should approach the other limbs too. For example, when considering rational connection, an aim which is of vital importance to the UK's national interest may justify taking action affecting the rights of individuals in circumstances where connection is less direct; a more direct connection may be needed in order to justify a measure which pursues a less vital aim.

167. Mr Reed's evidence on behalf of the Foreign Secretary in the *Shvidler* proceedings described Russia's actions in invading Ukraine in unsurprisingly trenchant terms. He rightly describes Russia's aggression as representing a most egregious violation of international law and the UN Charter. Russia's invasion of Ukraine constitutes the most serious threat to European security and the international order since the end of the Second World War:

> "It has brought large-scale, high intensity land warfare to Europe, and generated a refugee and energy crisis in the region. It has caused enormous loss of life and human suffering. Russia's barbaric and continued targeting of Ukraine's civilians and civilian infrastructure has precipitated a dire humanitarian crisis and has caused at least 22,607 civilian casualties to date including 8,541 civilian deaths. At least one child has been killed in Ukraine in each day of the conflict. Women have been subjected to trafficking and conflict-related sexual violence. The human cost on the battlefield has been devastating, with at least 100,000 soldiers killed or wounded on each side."

168. Mr Reed quotes from the statement issued by the nations making up the Group of Seven nations ("G7") on the first anniversary of the invasion of Ukraine:

> "In the past year Russian forces have killed thousands of Ukrainians, caused millions to flee, and forcibly deported many thousands of Ukrainians, including children, to Russia. Russia has destroyed hospitals, schools, and energy and critical infrastructure, and left historic cities in ruins. In areas liberated from Russian forces, there is evidence of mass graves, sexual violence, torture and other atrocities. We strongly condemn all of Russia's outrageous acts [...]. We reaffirm our commitment to strengthening the unprecedented and coordinated sanctions and other economic measures the G7 and partner countries have taken to date to further counter Russia's capacity to wage its illegal aggression."

169. A later statement from the G7 also referred to the international sanctions regime as imposing "unprecedented and coordinated economic and financial sanctions against Russia that impose a significant cost on its economy." It emphasised the need for increasing economic pressure on Russia and Belarus and on coordinated additional measures to stop attempts to circumvent sanctions or to aid Russia by other means.

170. In response to Mr Shvidler's challenge on proportionality, Mr Reed addresses the four limbs of the proportionality test. As regards the legitimate aim of the measures he notes that Russia's actions to destabilise Ukraine and undermine or threaten its territorial integrity, sovereignty, or independence have had devastating effects on Ukraine and its people:

> "As of 10 February 2023, the United Nations Office for the Coordination of Humanitarian Affairs estimated that within Ukraine, over 5 million people remained displaced by the war while 8 million refugees from Ukraine have been recorded across Europe. There are credible reports that war crimes have been committed by Russian forces. Russia's invasion of Ukraine is in breach of fundamental rules of international law, and in particular Article 2(4) of the UN Charter."

171. Mr Driver giving evidence for the Transport Secretary in the *Dalston Projects* proceedings also describes the grave effect of the war on the people of Ukraine. He sets out the assessment of the Independent International Commission of Inquiry on Ukraine which reported in March 2023 on the number, the geographic spread, and the gravity of human rights violations and corresponding international crimes which it has documented

during its mandate. These have affected men, women, boys and girls of all backgrounds and ages.

> "It has concluded that Russian authorities have committed numerous violations of international humanitarian law and violations of international human rights law, in addition to a wide range of war crimes, including the war crime of excessive incidental death, injury, or damage, wilful killings, torture, inhuman treatment, unlawful confinement, rape, as well as unlawful transfers and deportations. The Commission has also found that the Russian armed forces' waves of attacks, starting 10 October 2022, on Ukraine's energy-related infrastructure and the use of torture by Russian authorities may amount to crimes against humanity."

172. He also describes the coordination of international efforts to undermine Russia's ability to fight the war and to isolate President Putin. On 7 April 2023 G7 Foreign Ministers issued a message condemning the atrocities committed by Russian forces in Ukrainian towns including civilian deaths, torture, sexual violence and the destruction of civilian infrastructure.

173. There can be no doubt that the aim of limiting and deterring Russian aggression in Ukraine is one of the most vital aims that the UK government has been called upon to pursue in recent years.

10. Proportionality analysis stage (ii): Rational connection

174. The Court of Appeal's reasoning on rational connection was set out at paras 187 to 196 of Singh LJ's judgment. We find that a helpful and persuasive account. However, in line with what we have said above about the proper approach for an appellate court in relation to the proportionality analysis in this case, we have considered this point afresh.

175. At base, both Mr Naumenko and Mr Shvidler argue that the likelihood of the sanctions imposed on them having any effect whatever on the prosecution of the war in Ukraine is so vanishingly small that it cannot justify the interference with their rights.

176. The requirement for rational connection was discussed by the Supreme Court in *Lord Carlile*. That concerned a challenge to the decision of the Home Secretary to refuse entry to the United Kingdom to a dissident Iranian politician invited to attend an event organised by some members of the House of Commons and House of Lords. The issue was whether the interference with the claimants' right to freedom of expression under

article 10 of the Convention by engaging in debate with the dissident was justified as a proportionate response to the threat created by the visit of a possible hostile reaction by the Iranian government and other forces in Iran.

177. In his judgment in *Lord Carlile*, Lord Sumption dealt with the four limbs of the proportionality test at para 34. As regards rational connection, the court, he said, "must review the rationality of the supposed connection between the objective and the means employed: is it capable of contributing systematically to the desired objective, or is its impact on the objective arbitrary?" The intensity of the scrutiny required on the part of a court "will depend on the significance of the right, the degree to which it is interfered with, and the range of factors capable of justifying that interference, which may vary from none at all (article 3) to very wide-ranging considerations indeed (article 8). But the legal principle is clear enough. The court must test the adequacy of the factual basis claimed for the decision: is it sufficiently robust having regard to the interference with Convention rights which is involved?". We would add, reflecting the earlier part of this statement, that the question of the robustness of the evidence required also has to take into account the nature of the public interest considerations which are relied upon to justify the interference (and see Lord Sumption's further observations at paras 48-51). As mentioned above, if a measure is directed to promoting a very important public interest, a less direct connection with achieving this may nonetheless be sufficient.

178. Lord Sumption went on to reject the reasons which prompted Lord Kerr to dissent from the court's decision. Lord Kerr concluded that difficulties inherent in predicting the likely Iranian response to the admission of the dissident made the executive's assessment inherently unreliable and therefore substantially diminished its weight. Lord Sumption accepted at para 51 that the volatility of the Iranian regime injected into the situation "a larger than usual element of uncertainty" which called for a high degree of care. But he did not accept that this diminished the weight to be attached to the executive's assessment. He said that "It is inherent in the precautionary approach which is generally required in dealing with potential threats to national security and public safety that decisions must be based on inherently uncertain assessments of the future".

179. Adapting those observations to the present case, we recognise that it is difficult both for the Government and for the court to understand what factors may or may not exert influence on President Putin and his government as regards the prosecution of the war. It is also difficult to assess whether any particular sanctions measure, or indeed any of the other measures put in place by the UK and its international partners, has had or may in future have an influence or effect. As we described in para 37 above, the Government's report to Parliament on the 2019 Regulations described the sanctions regime as "one element of a broader strategy to achieve the UK's foreign policy goals".

180. Bearing that in mind, we turn to whether there is a rational connection between the measures taken against the Phi and against Mr Shvidler.

(a) Rational connection: Dalston Projects

181. In our judgment the rational connection between the detention of the Phi and the aim of putting pressure on Russia is both economic and political.

182. The economic link is straightforward. The very considerable income that Mr Naumenko claims that he could earn by chartering out the Phi to other wealthy people is likely to make its way to Russia. It would be spent there by Mr Naumenko and his family to invest in or buy goods and services from Russian businesses and to maintain his luxury lifestyle. In this way it would be used to contribute to the Russian economy. Even if that money was not directly repatriated to Russia but used overseas, it nonetheless increases Mr Naumenko's disposable wealth and the resulting prestige he has within the circle of Russian society in which he moves. Mr Driver's evidence explains the point as follows:

> "Applying sanctions to high-net-worth individuals who are 'connected with Russia' and thereby limiting the usual economic benefits and/or luxuries they enjoy, can serve to incentivise behaviour change in ways that may impact the Russian state, including resigning from key positions, divesting, and speaking out publicly and/or privately against the war. Such sanctions also serve to disincentivise and deter others from taking up business positions or conducting economic activity in Russia, all of which can help to constrain or coerce, either directly or indirectly, the Russian Government's actions."

183. Mr Driver also provides evidence that the effect of the package of sanctions imposed since February 2022 may have contributed to the contraction of the Russian economy.

184. The political link needs more explanation given that it is accepted that Mr Naumenko has no political role in Russia.

185. Mr Driver's evidence describes in detail how the Russian political regime is based on a system of patronage, which means that economic sanctions are a particularly important tool for trying to have an effect on decisions made by the regime. Wealth and power in Russia are highly centralised and the opportunities and material benefits such as government contracts and senior positions in government and government-affiliated

entities are provided by the state to a small circle of insiders in return for their loyalty and support. He quotes from the book *Putin's Kleptocracy: Who Owns Russia?* by the political scientist Karen Dawisha published in 2014 and other similar works analysing the role of the oligarchs in Russia and their relationship with President Putin. One such commentator notes that "President Putin has cultivated a business elite who understand that any sign of disloyalty can lead to loss of their business and loss of protection from law enforcement" (see Ledeneva, *Can Russia Modernize? Sistema, Power Networks, and Informal Governance* (2013)).

186. Mr Driver explains that increasing the disadvantage felt by citizens who are part of the wealthy elite in Russia can encourage opposition to the regime or its policies and can foster public disquiet in relation to the state institutions which are responsible for the hostilities in Ukraine. This can in turn discourage them from inflicting further repression and violence.

187. Mr Naumenko's main challenge to the asserted rational connection was an argument that has come to be tagged as "the *Dalston Projects* heresy". This they argued arose from para 86 of the judgment of Sir Ross Cranston, where he said:

> "In this regard I accept [Counsel for the Transport Secretary's] submission that the Secretary of State need not demonstrate the efficacy of each individual detention (or designation) decision in order to maintain a sanctions measure. Certainly, it would be difficult to demonstrate that any one decision would have the desired foreign policy outcome. It is not an issue for the court. In the end all that is needed is a rational connection between the sanctions measure and the aim. Additionally, the Secretary of State is granted a broad margin of discretion in a case such as this to decide that the exercise of the sanctions power is needed, when coupled with other measures, as part of pursuing the UK's foreign policy objectives."

188. Mr Naumenko's objection diminished in importance during the course of oral submissions for two reasons. First, both appellants accepted that the respondent Secretaries of State did not have to show that the particular sanctions imposed on either Mr Shvidler or on the Phi would by themselves achieve the purposes for which they were imposed.

189. Secondly, a slight confusion that had arisen from the Court of Appeal's consideration of this issue was resolved. On the question of rational connection, counsel for Dalston Projects before the Court of Appeal had sought to draw an analogy between the detention of the Phi when there was no general policy to detain Russian ships and the

sanctions imposed on the Iranian bank in *Bank Mellat* when other Iranian banks in a similar position had not been subject to sanctions. Singh LJ rejected that submission in the following terms (paras 117-118):

> "Driven to its logical conclusion, the claimants' submission would mean that, if 100 ships are detained, each owner of one ship could say that detaining his ship is not going to be particularly effective or make a material contribution to the overall aim and so it is disproportionate to detain it. That argument would obviously be absurd. It is the overall effect of detaining all 100 ships which is important and the detention of each one of them obviously has a rational connection to the overall aim in view.
>
> The fact is that, in view of the circumstances in March 2022, most Russian ships had already been prohibited from entering UK ports. If, however, there had been other such ships such as the Phi, they would have been detained consistently with the objective of the detention of the Phi. This is also one important reason why the facts of this case are distinguishable from those of *Bank Mellat*. What troubled the majority of the Supreme Court in that case was that there were other Iranian banks which were not affected by the measure: see eg Lord Sumption JSC's judgment at para 22. This is what the Judge said at para 85 of the judgment in the present case, and I agree with him."

190. The reference to one ship in a flotilla of 100 ships still making a material contribution to the aims of the sanctions measures may have been relevant if the argument that the shipping sanctions were limited to ships involved in trade for Russia had succeeded. But the courts below had rightly rejected that argument and it was not in issue before this court. The Phi is detained not to prevent it from carrying Russian cargoes but because it is an archetypal emblem of conspicuous consumption. That term was coined in 1899 by the American sociologist Thorstein Veblen to explain the spending of money on luxury goods and services specifically as a public display of the income and the accumulated wealth of the buyer. The Phi is a prestige asset of considerable value and it is assessed that being deprived of its use by reason of Russia's invasion of Ukraine is likely to, or at least may, dispose Mr Naumenko to be discontented with the Russian regime and to that extent undermine support for it within the elite. Mr Naumenko was not arguing that his wealth was so vast that depriving him of the chartering fees for the Phi would make not the slightest difference to his behaviour or to his attitude to the regime so that there was no rational connection on that ground. On the contrary, at the hearing, as part of his case that the Phi Direction had a severe effect upon him and was therefore disproportionate for that reason, he attempted unconvincingly to minimise the extent of his wealth by pointing to the fact that he was not included on the Forbes 500 list of richest

Russians. However, this manoeuvre served to reinforce the point made by the Transport Secretary that being deprived of the use of the Phi was indeed likely to be experienced by Mr Naumenko as a painful personal imposition as a result of Russia's activities in Ukraine which would dispose him to be opposed to them. The more that impact on individual members of the elite could be replicated, the greater the potential likely effect on the regime itself would be.

191. The position reached in submissions to this court was therefore that when identifying a rational connection between the measure and its aim, it is permissible to have regard to the cumulative effect of all the measures taken, but the Secretary of State must still show some plausible contribution made to that effect by the measure under challenge. The appellants' submissions focused more on the implausibility of the measures taken against them making any difference.

192. In our judgment, this argument is fatally undermined by the difficulty that anyone has in assessing the likely impact of personal inconvenience and a sense of disaffection on the part of members of the Russian elite upon the regime itself. It is difficult to know whether in fact any particular measure has "worked" or is "working". That might only become clear at some point in the future if support for the regime collapses or if the regime suddenly changes its position in order to avoid such a collapse. On this point we agree with the observations of Lord Sumption in *Lord Carlile* about the margin of appreciation that the court must accord to the executive in making such an assessment. In looking for rational connection, Lord Sumption emphasised the difficulty for the Government – and for the court – of predicting how a particular regime is likely to react to action taken by the UK. He said at para 46:

> "… The future is a foreign country, as L P Hartley almost said. They do things differently there. Predicting the likely consequences of a step which the evidence suggests will be viewed in Iran as a hostile act, cannot be a purely analytical exercise. Nor can it turn simply on extrapolation from what did or did not happen in the past. There is a large element of educated impression involved. The decision calls for an experienced judgment of the climate of opinion in Iran, both inside and outside that country's public institutions. … We have no experience and no material which could justify us in rejecting the Foreign Office assessment in favour of a more optimistic assessment of our own. To do so would not only usurp the proper function of the Secretary of State. It would be contrary to long established principle which this court has repeatedly and recently reaffirmed. It would step beyond the proper function of a court of review. And it would involve rejecting by far the strongest and best qualified evidence before

> us. In my opinion it would be a wholly inappropriate course for us to take."

193. In this case, the informed assessment made by experienced officials for the Transport Secretary is that the Phi Direction will contribute to pressure on the regime in Russia, even if that pressure is exerted in subtle and invisible ways. Given the nature of the regime and the support on which it relies, that is a plausible assessment. It is also an assessment for which a court is wholly unqualified in constitutional terms and on grounds of relative expertise to substitute its own view.

194. In light of the evidence adduced by the Transport Secretary and given Mr Naumenko's residence in Russia, his membership of the wealthy Russian elite and the information available about the nature and proposed use of the Phi we have no doubt that there is a rational connection between its detention and the aims of the 2019 Regulations and the sanctions which they authorise to be imposed.

(b) Rational connection: Mr Shvidler

195. To recap, the reasons for designating Mr Shvidler are twofold: his connection with Mr Abramovich, who is well known to be closely connected with President Putin and the Russian regime, and his former directorship of Evraz plc, a global company engaged in the Russian extractives sector.

196. Mr Reed's evidence on behalf of the Foreign Secretary in the *Shvidler* proceedings sets out four ways in which the designation of Mr Shvidler, based in part on his association with Mr Abramovich, is rationally connected with the aims of the 2019 Regulations and of the designation imposed under them:

> (a) The designation will send a signal to Mr Shvidler himself and others who are associated with involved persons that there are negative consequences to having implicitly legitimised the Russian government's actions.
>
> (b) It will disincentivise others from associating themselves in future with individuals close to President Putin and who have carried on business in sectors of strategic significance. It will also encourage others to disassociate from those close to President Putin or involved in strategic sectors.

(c) It will incentivise Mr Shvidler and others in his position to oppose Russia's invasion of Ukraine more robustly. The FCDO does not regard Mr Shvidler's much vaunted statement hoping for an end to the war as clearly condemning the invasion. Nor has Mr Shvidler repeated it despite the invasion continuing.

(d) It will encourage Mr Shvidler to put pressure on Mr Abramovich and so amplify the incentives on him to encourage President Putin to cease or limit the destabilisation of Ukraine and to distance himself from President Putin, thus isolating President Putin.

197. We accept that this evidence establishes that there is a rational connection between the designation of Mr Shvidler and the aim of this sanction. As we have noted above (paras 191-192) and as the courts below correctly recognised in Mr Shvidler's case (paras 104 and 113 above), the effectiveness of a sanctions regime depends on the cumulative effect of the measures imposed under that regime. The imposition of sanctions in relation to Mr Shvidler contributes to that cumulative effect.

198. Mr Shvidler counters that he has distanced himself from Russian business by resigning from the board of Evraz plc and speaking out against the war in Ukraine, referring to the "senseless violence" there and stating that he hopes that the war can be brought to an immediate end. He argues that the fact that he was nevertheless designated "muddies" the signal sent by designation. It risks suggesting to other wealthy people that there is no point in dissociating themselves from Russian business or from those close to President Putin because they will still be subjected to the most severe measures.

199. We agree with Mr Reed's description of Mr Shvidler's statement criticising the invasion of Ukraine as limited, because it does not clearly condemn Russian aggression. We accept of course the fact that Mr Shvidler cannot be expected to place himself and his family in the physical danger that faces outspoken opponents of the Russian regime. The court acknowledges the terrible fate suffered by many of those who have done so over the years. But that is not the point. Mr Reed says in his evidence that the designation of Mr Shvidler is likely to contribute to the purposes of the 2019 Regulations because:

> "The designation will also encourage Mr Shvidler to put pressure on Mr Abramovich to (i) encourage President Putin to cease, or limit, policies and actions that are destabilising Ukraine and undermining or threatening its territorial integrity; and/or (ii) distance himself from President Putin, thus isolating President Putin; and/or (iii) to speak out against the Russian invasion of Ukraine. For this reason and more broadly, the

> designation will amplify the incentives on Roman Abramovich and the impact of that designation."

200. We also agree with the reasons given by Garnham J for rejecting the argument that designating Mr Shvidler cannot add much to designating Mr Abramovich himself:

> "114. Lord Anderson argues that the Defendant has a far more direct means of placing pressure on Mr Abramovich – that is, to designate him personally – and that he has done. If designating Mr Abramovich himself has not provided a significant enough incentive for him to do as the Defendant wishes, says Lord Anderson, it is hopeless to suggest that designating the Claimant would in some way cause him to do so.
>
> 115. I do not accept that that is so. As a matter of common experience, an individual may more readily act when it is at the request, or in the interests, of his friends and colleagues than when it is only in his own interests. In any event, the availability of a more direct means of putting pressure on Mr Abramovich does not undermine the value of additional pressure provided by the Claimant."

201. As far as the element of Mr Shvidler's involvement with Evraz plc is concerned, we are satisfied that there is a rational connection between Mr Shvidler's designation and the aim of encouraging prominent business people to stay away from businesses in sectors of strategic significance to the Russian government. Mr Shvidler maintained his connection with Evraz plc for several years after Russia's invasion of Crimea. He only resigned his position on the day Mr Abramovich was designated and trading in Evraz plc shares was suspended by the London Stock Exchange. It is inherent in the legislative framework that designation can relate to past conduct. The designation, in our judgment, sends a clear signal to people in Mr Shvidler's position that they would be wise to distance themselves from Russian business now and not leave resigning from their posts until the writing on the wall is as clear as it was as regards Mr Abramovich and Evraz plc in March 2022.

202. We are therefore satisfied that there is a rational connection between the legitimate aims of the 2019 Regulations which the measures taken under them are intended to pursue and the designation of Mr Shvidler on the two bases relied on by the Secretary of State.

11. Proportionality analysis stage (iii): Less intrusive means

203. The question under this part of the proportionality test "is whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective": *Bank Mellat*, para 74 (Lord Reed); see also para 20, where Lord Sumption states the question in similar terms. In our view, given the nature of the objective sought to be achieved by the SAMLA regime and the sanctions imposed under it in these cases, as explained above, it is clear that there was no less intrusive measure which could have been used which would not have compromised the achievement of that objective in an unacceptable way. Counsel for the appellants could point to none.

12. Proportionality analysis stage (iv): Fair balance

(a) Fair balance: Dalston Projects

204. In assessing whether the sanctions measures struck a fair balance between the individual rights of Dalston Projects and Mr Naumenko on the one hand and the general interest of the community on the other, it is necessary to bring into account the major importance of the public policy objective which they sought to promote, as explained above. That has to be set against the limited impact on Dalston Projects and Mr Naumenko. The direction in relation to the Phi means that Mr Naumenko is impeded in the use of a trophy asset to advertise his wealth and in earning some income from chartering it out for use. It is not suggested that this would have any significant effect upon how he lives his life, which given his great wealth is not surprising. As Singh LJ put it (para 129), the direction "does not cause him individual hardship in his normal daily life".

205. Weighing these matters against each other, Sir Ross Cranston and the Court of Appeal had no hesitation in concluding that the direction in respect of the Phi struck a fair balance. Singh LJ described this as "straightforward": para 126. We agree.

206. The appellants sought to bolster their case on fair balance by pointing out that the Phi has been detained in dock in London for a long time, which has caused it to become run-down and has put it in need of maintenance. The appellants are being put to expense because they have to maintain the Phi and keep it safe from intruders and fire risks, its chartering value is being reduced and they face problems in obtaining insurance.

207. There are two points to be made in response. First, although the appellants are having to meet such expenses without having the use of the Phi, have lost income from chartering the vessel and have experienced a deterioration in its condition and hence its value, there is nothing in the evidence to suggest that Mr Naumenko is unable to absorb

these costs with ease. The fact that they are imposed on him is central to the point of putting the direction in place as a sanction. We agree with the judge and the Court of Appeal that these matters do not affect the fair balance struck by the direction in any significant way.

208. Secondly, it is in fact the case that the OFSI regime provides scope for the most significant of these matters (the physical deterioration of the Phi from sitting unused and unmaintained in dock in London) to be addressed. The Transport Secretary has indicated that he is willing to grant permission for the Phi to be removed to Southampton for maintenance works to be carried out on her to preserve her value, provided adequate security arrangements are put in place for the transfer so that the appellants cannot simply remove the Phi from the jurisdiction. There have been discussions between the parties about this which have not as yet borne fruit. Each side accuses the other of being unreasonable.

209. We were invited to examine some of the exchanges about this, but it is not necessary to go further into these matters. They cannot affect the basic assessment made above that the Phi Direction is a proportionate measure. Moreover, if the appellants wish to argue that the Transport Secretary is behaving unreasonably or in breach of their rights under A1P1 with respect to taking steps to maintain the Phi (as distinct from having her released from detention), they can bring a judicial review claim to test this. The regime provides various routes by which these more marginal interests of the appellants can be protected. The lawfulness of any refusal by the Government to grant appropriate licences can be tested in court. If the appellants wish to do this, they may commence proceedings in the High Court.

(b) Fair balance: Shvidler

210. In our judgment, again in agreement with the Court of Appeal, the designation of Mr Shvidler also strikes a fair balance, taking account of the importance of the public policy aim which is in issue and the connection which exists between the designation and that policy aim (paras 195-202 above). Although Garnham J described the effects of the designation as "temporary and reversible", Singh LJ accepted Mr Shvidler's submission that the sanctions are severe and open-ended: paras 209-211. We agree. The effect on Mr Shvidler personally of having his assets frozen world-wide is obviously very drastic.

211. The effect on Mr Shvidler's family is also substantial. Singh LJ particularly emphasised the consequences of Mr Shvidler's designation for his children, whose education at private schools in the UK was disrupted. But as Singh LJ points out, they have been able to continue their education in the United States and, if they had remained in the UK "they would have had access to the publicly funded education system in this country, even if that was not their or their parents' first choice". Mr Shvidler's children's

core interests under article 8 have been or could be met, even if the luxury lifestyle and expensive education they would otherwise have enjoyed have been disrupted.

212. Again, it is also of significance that Mr Shvidler and his family can apply under the OFSI licensing system for permission to use his frozen assets to meet their core needs. The lawfulness of any refusal can be tested in judicial review proceedings. This licensing system is a form of safety valve which operates to reinforce the conclusion that the designation of Mr Shvidler strikes a fair balance.

213. However, the main point, as Singh LJ rightly emphasised (para 210), is that sanctions often have to be severe and open-ended if they are to be effective. The object of the designation in relation to Mr Shvidler is that he should so far as possible be disabled from enjoying his assets and pursuing his wealthy lifestyle. The designation contributes to the cumulative effect of the sanctions regime. If the strategy of imposing sanctions on individuals is to have any hope of being effective, designation has to hurt those who are subject to it. In our opinion, in light of the importance of the policy objective in issue and the connection between the designation of Mr Shvidler and that objective, the issue of fair balance in relation to his designation is, again, straightforward.

13. Capriciousness, discrimination and the absence of guidance

214. Lord Anderson, for Mr Shvidler, advanced a further submission in support of his proportionality challenge. He argued that it was arbitrary to designate Mr Shvidler in circumstances where others who fall within the designation criteria for the same reason as him have not been designated. He contends that there are many other businessmen who have as much or greater involvement in companies doing business in Russia as ever he did with Evraz plc. Lord Anderson further argues that the risk of arbitrary decision-making in the application of the Foreign Secretary's extremely broad designation powers is increased by the lack of any policy to guide designations or de-designations.

215. The Court of Appeal rejected this aspect of Mr Shvidler's proportionality challenge: paras 193-195. At first instance, Mr Shvidler advanced a case that his designation was in violation of his right under article 14 of the Convention not to be discriminated against, comparing himself with others who he said were similarly placed and who had not been made the subject of a designation. That case was rejected by Garnham J (paras 146-153) and the Court of Appeal refused permission to appeal in relation to it. Garnham J observed (para 151) that the evidence showed that Mr Shvidler was designated on the basis of the combination of his role at Evraz plc and his relationship with Mr Abramovitch, rather than by reason of any illegitimate ground.

216. The Court of Appeal rejected Mr Shvidler's attempt to support his proportionality challenge by arguing that his designation was arbitrary, relying in particular on the *Belmarsh* case: paras 193-196.

217. Mr Shvidler is not entitled to advance in this court a case based on alleged violation of article 14 of the Convention, nor does he seek to do so.

218. In our view, Lord Anderson's distinct submission that the alleged arbitrariness in designating Mr Shvidler but not other people shows that the designation was disproportionate must be rejected. A form of this argument was successful in the *Belmarsh* case and in *Bank Mellat*, according to Lord Sumption's analysis in that case. But that was on a very different basis from that put forward by Lord Anderson.

219. As Lord Sumption explained in *Bank Mellat*, at paras 25-27, with reference to the *Belmarsh* case, a measure may respond to a real problem but nevertheless be irrational or disproportionate by reason of its being discriminatory in some respect that is incapable of objective justification. In the *Belmarsh* case a derogation from the Convention to permit the detention of non-nationals whose presence in the UK represented a threat to national security and who could not be deported, but not to permit the detention of British nationals similarly placed, was held to be a disproportionate response to the terrorist threat which provoked it. According to Lord Sumption, this was because the distinction was arbitrary and because "it substantially reduced the contribution which the legislation could make to the control of terrorism, and made it difficult to suggest that the measure was necessary" (para 25). Applying that reasoning in *Bank Mellat*, where the bank had been subjected to sanctions solely on the footing that it used banking procedures equivalent to those used by other banks in the market, nothing in the government's case explained why the court should accept that it was necessary to eliminate the bank's business in London in order to achieve the objective of the statute, "if the same objective can be sufficiently achieved in the case of comparable banks by requiring them to observe financial sanctions [directed against Iran] and relevant risk warnings", with the result that the direction issued to the bank was "disproportionate to any contribution which it could rationally be expected to make to its objective" (para 27).

220. In the *Belmarsh* case, the Government clearly thought that in relation to British nationals who posed a security threat the ordinary measures available to the police and the Security Service to contain such a threat would be a sufficient response and no case was advanced to explain why they would not equally be sufficient in the case of non-nationals. As Lord Reed summarised the position in the *Belmarsh* case in *Bank Mellat*, para 97, "[t]he difference in treatment of British and foreign suspects was relevant to proportionality because it bore on the question whether the interference with the rights of the foreign suspects had been shown to be necessary". In both cases the distinction in treatment supported the disproportionality challenge because the Government had itself

adopted a baseline that other general measures in place were sufficient to meet the relevant threat and could not credibly explain why anything further was required.

221. This reasoning is not applicable in the present case. It is true that if the Foreign Secretary does not designate some particular wealthy business person with connections with Russia, that person's position is unlikely to deter him or her or any others from assisting or supporting the Russian government. But it cannot be suggested that non-designation is the result of an assessment that some other general measures, such as general sanctions against Russia, will be effective to achieve the public policy goal of deterring Russia from continuing with its invasion of Ukraine. Nor can it be suggested that non-designation of some individuals establishes a baseline of a sufficient response to that invasion: it is no response at all. The designation of a range of wealthy business persons who are connected with Russia is assessed by Parliament and by the Foreign Secretary to be a response which does hold out some prospect of putting pressure on the regime in support of that policy goal. It is not the case that every single such wealthy business person has to be designated in order for each designation to make a material contribution to that strategy; it is legitimately open to Parliament and the Foreign Secretary to assess that adding each designation makes a material contribution to the public policy objective and that each additional designation increases the effect of the strategy. Taking this as the basic position, clearly the designation of Mr Shvidler is a measure which is proportionate to the legitimate aim in view, assuming (as we have explained above to be the case) that it is proportionate in his individual case.

222. The absence of a published policy on designation or de-designation makes no difference to this analysis. Designations have been issued on rational and legitimate grounds in many cases. The nature of the Government's strategy is clear. It is not incompatible with this strategy that the Government has chosen to adopt a system which allows it to make careful judgments whether to designate individuals on a case-by-case basis, having regard to their individual circumstances which will inevitably vary widely. This is a marker of a proportionate and tailored response, not the opposite.

14. Conclusion on proportionality

(a) Dalston Projects

223. For the reasons we have given, we conclude that the Phi Direction was proportionate and lawful.

(b) Shvidler

224. We also conclude that the designation of Mr Shvidler was proportionate and lawful.

15. The reasons/grounds issue (*Dalston Projects*)

225. The second ground in the *Dalston Projects* appeal was ably argued before the court on behalf of Mr Naumenko by Mr Al-Karim. The point arises from the requirement in regulation 57D(5)(c) that a detention direction "must state the grounds on which the ship is detained". The Phi Direction stated, under the heading "Grounds for detention":

> "The Phi is being detained on the grounds that it is owned, controlled or operated by Sergei Georgievich Naumenko, a person connected with Russia."

226. Mr Al-Karim argues that this short sentence is not enough to satisfy the requirement that the grounds on which the Phi is detained must be stated. He accepts that there is a distinction between the requirement to state "grounds" as regards the detention of a ship and the requirement to state "reasons" as regards a designation measure in regulation 8(4). But it is still not sufficient merely to rehearse the statutory basis on which the ship can be detained without setting out in brief why this particular ship has in fact been detained. A greater level of detail is necessary in light of a purposive interpretation of regulation 57D, and by way of a duty which must be implied into the regulation in order to secure fairness and natural justice.

227. Singh LJ addressed this point at paras 90 onwards of his judgment. He referred to the decision of the High Court in *R v South Gloucestershire Appeals Committee, Ex parte C* [2000] ELR 220 (QB) ("*South Gloucestershire*"). That case concerned a challenge to the adequacy of the reasoning given by an appeal committee established by the county council refusing to admit a prospective pupil to the school which her parents wished her to attend. The relevant legislative provision stated that the decision of the appeal committee "and the grounds upon which it is made" should be communicated to the appellant. The complaint by the father was that the letter telling them about the decision "merely gave a ritual incantation of the requisite two-stage test" and that it therefore failed to give proper grounds. Dyson J accepted that the grounds should have indicated that the committee had taken into account the main points relied on by each party. But he rejected the submission that there was any general principle about what needed to be included "save perhaps to say that a minimum requirement of the grounds of a decision is that they explain broadly the basis of the decision": p 225. In the case before him, Dyson J held that an omission in the earlier letter had been made good by a later letter which explained the decision in more detail.

228. Singh LJ did not consider that Dyson J's observations there were relevant to Dalston Projects' appeal. He held that the statement in the Phi Direction that the Phi was detained because it was owned, controlled or operated by Mr Naumenko and that he is a person connected with Russia was sufficient. The statement asserted certain facts, in particular as to the ownership of the vessel and that Mr Naumenko is connected with Russia. That achieved the purpose of enabling Mr Naumenko to challenge the decision if either of those points were wrong.

229. We agree with Singh LJ's analysis on this point. The distinction between the requirement in regulation 57D when a detention direction is issued and the requirements in regulation 8 when a person is designated is important. Regulation 8(4) specifies further that a "statement of reasons" in relation to designation "means a brief statement of the matters that the Secretary of State knows, or has reasonable grounds to suspect, in relation to the designated person which have led the Secretary of State to make the designation."

230. This provision can be contrasted with the simpler requirement in regulation 57D(5)(c) and (d) which provides for the content of a detention direction stating that, amongst other things, it "must state the grounds of which the ship is detained."

231. The nature of the decision in the *South Gloucestershire* case was the outcome of an adjudicative process following an adversarial hearing, unlike the decision to detain the Phi. It is not surprising that in the former kind of case the decision-making body may be required to indicate which arguments put forward by the parties it accepted and which it rejected. There is no such requirement here. The grounds stated in the Phi Direction are those on which the Secretary of State relied and still relies as justification for exercising the powers under the 2019 Regulations.

232. Mr Al-Karim argued that the Phi Direction was defective in not making clear whether the Phi was being detained because Mr Naumenko owned it, or because he controlled or because he chartered or operated it. Although regulations 57C(1)(b) and 57D(3)(b) empowered the Secretary of State to restrict the movement of and detain the vessel on the basis of any one of those links between Mr Naumenko and the vessel, he submitted that the Transport Secretary must identify which of those potential links is in fact the one relied on in making any direction. A direction cannot simply rehearse the ambiguous and all-encompassing phrase "owned, controlled, chartered or operated" used in the regulation.

233. We reject that submission. The reason why regulations 57C(1)(b) and 57D(3)(b) are drafted in broad terms (and those terms are in turn broadly defined in regulation 57I) is that very wealthy people often adopt opaque structures by which they own or operate their assets, whether for tax reasons or otherwise. To require the Transport Secretary to specify which of the four possible links he or she relies on in relation to any given vessel

would be a pointless exercise. It would serve only to prompt meritless challenges to directions based on a technicality arising from ownership structures which may have been designed to obscure this very point. It would also be likely to result in drafting to cover all possibilities, which would not advance matters and is in effect what happened here.

234. We are also not convinced by the argument that the court must imply a duty to give more detailed grounds in order for owners of detained vessels to exercise their statutory rights under section 38 to ask the court to review the measure. If the decision to detain is challenged on particular grounds, the Transport Secretary is likely to find that it is incumbent on him or her, pursuant to their duty of candour, to respond to that challenge and provide further information about the process that led up to the making of the direction. That is what happened in the present case: see paras 68 and 69 above. Nothing further was required in the Phi Direction itself. We reject the suggestion that the Transport Secretary's interpretation of the requirement denudes the right of the court to review the detention.

235. We therefore reject this ground of appeal in the *Dalston Projects* case.

16. The conversion of the Phi (*Dalston Projects*)

236. The Consultants engaged by Dalston Projects to correspond with the DfT raised at an early stage their contention that the Transport Secretary had taken possession of the yacht or become bailee of the yacht. They contended that the DfT was liable to pay the mooring fees and other charges for maintaining the yacht, something which the DfT denied. The claim form issued by Dalston Projects sought damages under section 8 of the Human Rights Act 1998 and also for the tort of conversion. The loss alleged included the loss of chartering income, damage to the vessel and repair costs.

237. A case management order was made directing that a hearing should proceed to consider both the lawfulness of the detention decisions and any issues of law raised by the claim to damages under section 8 of the HRA or in conversion. Any issues as to causation and quantification of loss were postponed to a later date.

238. As the courts below held that the detention of the Phi was lawful, they referred only briefly to the issue of whether, if they had held that the detention of the yacht pursuant to the 2019 Regulations was unlawful, the purported exercise of that power amounted in law to conversion of the yacht by the Government. Sir Ross Cranston referred at para 91 to the decision of Flaux J in *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport (The Van Gogh)* [2008] EWHC 2794 (Comm); [2009] 1 All ER (Comm) 955. That held that the invalid detention of a cruise ship on which there had been a serious outbreak of norovirus would not amount to conversion.

239. The Court of Appeal noted that it was common ground that Dalston Projects' appeal on the conversion point only arose if the appeal otherwise succeeded and Singh LJ did not discuss it further: para 133.

240. This court heard detailed submissions on the point from Mr Al-Karim appearing for the appellants in the *Dalston Projects* appeal and from Mr Pobjoy on behalf of the Transport Secretary, in particular as to whether early cases on conversion did or did not require the alleged tortfeasor to have asserted dominion and control over the asset.

241. We have concluded that the detention of the Phi was lawful so these questions do not arise for decision. We leave them to be considered on another occasion.

17. Overall conclusions

242. For the reasons we have given we would dismiss both these appeals.

(a) The Dalston Projects appeal

243. We have carried out our own assessment of the proportionality of the Phi Direction. We conclude that it was a proportionate measure lawfully issued and maintained by the Transport Secretary. We would dismiss the appeal on the reasons/grounds issue. In the light of these rulings, we conclude that the detention of the Phi was lawful and we would therefore dismiss the appellants' claim in conversion.

(b) The Shvidler appeal

244. We have carried out our own assessment of the proportionality of the designation of Mr Shvidler. We conclude that it was a proportionate measure lawfully issued and maintained by the Foreign Secretary.

LORD LEGGATT (DISSENTING ON THE SHVIDLER APPEAL):

1. Introduction

245. The use of sanctions has become for the United Kingdom, as for many other countries, a key instrument of foreign policy. By the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA"), and regulations made under that Act, Parliament has authorised the imposition of sanctions on countries, organisations and individuals. Their

basic aim is to exert economic pressure on a foreign government to desist from actions which are regarded as contrary to the values and interests of the United Kingdom or to international law. That aim is undoubtedly legitimate. Yet when sanctions are imposed on individuals, sensitive issues can arise about how far the government may lawfully go in curtailing individual liberties in pursuit of its foreign policy. In our democracy these are issues for the courts to decide.

246. Such issues are raised on these appeals. They are raised in acute form in the case of Mr Eugene Shvidler. For more than three years all his assets have been frozen following his "designation" by a minister under The Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019/855), as amended in February 2022 ("the Regulations"). Unlike most individuals designated by name under these Regulations, Mr Shvidler is not a Russian citizen and does not live or carry on business in Russia. He is a British citizen who had lived in England for many years before he was designated on 24 March 2022. He is not accused of any crime or unlawful act. It is not suggested that he himself has links with the Russian regime. He has never voiced support for President Putin, let alone for the invasion of Ukraine which began on 24 February 2022. Indeed, on 12 March 2022 he had made a statement published in The Guardian newspaper that he was hoping and praying for an end to the "senseless violence" in Ukraine and for "the war" to be brought to an immediate end.

247. The basis on which Mr Shvidler's assets have been frozen is twofold: first, that he is "associated with" a person, Mr Roman Abramovich, who is or has been involved in obtaining a benefit from or supporting the government of Russia; and second that, until shortly before his designation, Mr Shvidler was a non-executive director of Evraz plc, a mining company listed on the London Stock Exchange which operates through subsidiaries in Russia as well as in the United States, Ukraine, Canada and the Czech Republic. These tenuous connections to the Russian government are said on behalf of the Foreign Secretary to justify depriving Mr Shvidler, indefinitely, of his right to deal with any of his own funds and other "economic resources", wherever in the world they are located.

248. The legislation contains what should be an important safeguard. Under section 38 of SAMLA, a person designated for the purposes of sanctions has a right to apply to the High Court for a review of the minister's decision. On such an application it is for the court to decide whether the designation is lawful, including – where the legality of the designation depends on it – whether interference with one or more fundamental rights of the designated person is justified in the public interest.

2. The proper approach to these appeals

249. One question that arises on these appeals is what approach an appeal court should take when there is an appeal from the decision of the High Court on such an application. Should the appeal court make its own assessment of whether the designation was justified? Or should it intervene only if the lower court made an error of law in reaching its decision? Lord Sales and Lady Rose discuss this question in section 8 of their judgment. I agree with what they say there about the proper approach. I also agree that, on each of the present appeals, this court should make its own assessment. That is because the two cases under appeal are in effect test cases which raise points of general principle and great social significance regarding the operation of the sanctions regime introduced in response to Russia's invasion of Ukraine. Because of those factors, it is appropriate for the Supreme Court to form its own view of the matter without deferring to the views of the courts below.

250. In Mr Shvidler's case, I think this is necessary anyway because neither court below made its decision on the correct legal basis. The Court of Appeal held that the decision of the High Court judge dismissing Mr Shvidler's application for judicial review was flawed because the judge applied the wrong legal test: rather than forming his own opinion of whether the designation of Mr Shvidler under the Regulations was justified, the judge confined himself to reviewing the reasonableness of the government's assessment. It is not disputed before this court that the judge did make this error. The Court of Appeal recognised that this required them to carry out the necessary assessment themselves but added, in apparent contradiction, that they were still "only conducting an appeal by way of review, not by way of rehearing": see para 169.

251. I agree with Lord Sales and Lady Rose that this description of the approach required does not make sense. But I do not agree that, despite this misdescription, the Court of Appeal adopted the correct approach all the same. When it came to the critical question whether the designation of Mr Shvidler struck a "fair balance" between his rights as an individual and the interests of the community, Singh LJ's judgment, at paras 204-215, dealt only with Ground 1E of Mr Shvidler's grounds of appeal. That ground of appeal alleged that the judge had made three specific legal errors in his approach to this question. The point of seeking to demonstrate these errors was to persuade the Court of Appeal that it should carry out its own assessment. Singh LJ rejected the three specific criticisms made and accordingly rejected Ground 1E (para 215). But he had already held that the Court of Appeal should carry out its own assessment because the judge had failed to do so, having wrongly confined himself to reviewing the reasonableness of the government's assessment (see above). The Court of Appeal should therefore have made its own independent assessment of "fair balance". Yet it did not.

252. Nothing turns on this last point as, for the reasons mentioned at para 249 above, all the members of this court are agreed that we must assess for ourselves the legality of

the sanctions imposed on Mr Shvidler and on the other appellant, Dalston Projects Ltd. We must do so by making the assessment which the judge was required to carry out in light of the evidence available when the judge's decision was made.

3. My conclusions on these appeals

253. In the case of Dalston Projects Ltd, I agree with my colleagues that the detention of its motor yacht "Phi" was lawful and that the appeal should therefore be dismissed. I do not agree with all the reasoning of Lord Sales and Lady Rose in reaching this conclusion; but I do not think that any useful purpose would be served by setting out what are largely differences of emphasis between us. I agree that a rational case has been made for preventing the beneficial owner of the yacht, Mr Sergei Naumenko, a very wealthy Russian citizen resident in Russia, from benefiting the Russian economy by receiving revenue from a luxury asset; and that the restriction on his enjoyment of this asset is justified by the purposes of the sanctions regime.

254. My reason for writing this separate judgment is to explain why, in the case of Mr Shvidler, I disagree with the conclusion reached by the other members of the court. Making it a criminal offence for an individual who has done nothing unlawful to deal with any of his own assets without the government's permission, and imposing this sanction without any geographical or temporal limit, is a serious invasion of liberty. The court on an application for judicial review of such a measure should require cogent reasons to justify it. In my view, the flimsy reasons relied on by the government in this case do not begin to do so. My wider concern is that, if the courts are not prepared to protect fundamental individual freedoms even in a case like this, the right to a judicial review of the minister's decision to curtail such freedoms under sanctions regulations is of little worth.

4. The separation of powers

255. Underlying my disagreement with the majority of the court is a difference of view about the separation of powers. In their judgment, at paras 126-130, Lord Sales and Lady Rose argue that the executive branch of government should be accorded a "wide margin of appreciation" (ie latitude) in making decisions about the imposition of sanctions on individuals because of the constitutional responsibility of the executive for the conduct of foreign affairs and its "superior institutional competence" in this field. I agree with the need to recognise and respect the separate roles and competences of different organs of the state. I also agree that the courts should recognise and respect the particular constitutional responsibility and institutional competence of the executive in the field of foreign policy. But what I believe to be missing from this account is adequate recognition of the role which, under our constitution, the courts are called on to play in protecting individual liberties.

256. If that protection is to be meaningful, giving a "wide margin of appreciation" to the views of ministers and government officials cannot be taken too far. The courts are failing in their duty if they simply rubber-stamp assertions made by the executive to justify invading individual liberties without subjecting those assertions to critical scrutiny. At para 130 of their judgment Lord Sales and Lady Rose suggest that the executive should be accorded a "wide margin of appreciation" on the ground of having greater institutional competence than the courts to judge whether its own decision to restrict the liberty of an individual strikes a "fair balance" between the rights of that individual and the interests of the community. With that view, I profoundly disagree. I will return to this point and state my reasons for disagreeing when I discuss below the proper approach to be adopted by a court in assessing proportionality.

5. The legality of sanctions

257. Whether the sanction imposed on Mr Shvidler is lawful depends, first, on whether the criteria specified in the Regulations for designating a person by name are satisfied and, second, on whether designating Mr Shvidler by name for the purpose of freezing his assets is otherwise compatible with his legal rights.

258. Although only the second question is in issue on this appeal, it is relevant before addressing it to identify the basis on which Mr Shvidler has been designated by name under the Regulations and the legal consequences of that designation.

6. The designation of Mr Shvidler

259. Mr Shvidler has been designated by name under regulation 5(1)(a) for the purposes of regulations 11 to 15. Regulation 11(1) prohibits him or anyone else from "dealing with" any of the "funds" and "economic resources" which he owns, holds or controls. The term "funds" is defined in the legislation to mean "financial assets and benefits of every kind" and "economic resources" comprise "assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services": see section 60 of SAMLA. The term "dealing with" is also about as broadly defined, in regulation 11(4) and (5), as it is possible to imagine. Anyone who contravenes the prohibition on such dealing commits a criminal offence: see regulation 11(3). In addition, third parties are prohibited from making funds or economic resources available to the designated person (whether directly or indirectly) and from making funds or economic resources available to anyone else for that person's benefit (such as by discharging a financial obligation for which the designated person is responsible). Anyone who contravenes any of these prohibitions also commits a criminal offence: see regulations 12 to 15.

260. It might be expected that, if any distinction based on nationality were drawn, a British citizen would have greater protection under the Regulations from interference with his property than a Russian national. Far from it. Had Mr Shvidler not been a British citizen, the asset-freeze would at least have been limited to his assets situated in the United Kingdom. But in the case of a "United Kingdom person" (defined to include a British citizen and certain others such as a British Overseas Territories citizen), the prohibitions described above may, and do, apply to conduct outside the United Kingdom: see regulation 3 and section 21 of SAMLA. The freezing of Mr Shvidler's assets is accordingly not limited to his UK assets but applies to all funds and economic resources in which he has an interest, anywhere in the world.

261. This asset-freeze has built into it some very narrow exceptions - for example, to permit payments which the designated person is under a legal obligation to make to public authorities such as HMRC: see regulation 58A. Otherwise it is a criminal offence for the designated person to use any of his or her own funds or economic resources for any purpose whatever (including even to buy food) without a licence from the Treasury. Even then, the purposes for which the Treasury may issue such a licence - if they "consider that it is appropriate" to do so - are extremely limited. Those purposes are limited by regulation 64(2) and Schedule 5 of the Regulations largely to meeting basic needs of the designated person and any dependent family member (such as medical needs and needs for food, rent or mortgage payments and utility payments) and paying reasonable legal fees and expenses. A licence may also be issued - again, only if the Treasury "consider that it is appropriate"- to enable "an extraordinary expense of a designated person to be met" or "anything to be done to deal with an extraordinary situation": see Schedule 5, paras 5 and 7.

262. The licensing system thus puts in the control and discretion of the government the ability of the designated person to use their own resources even to meet needs essential for survival.

7. The basis for designating Mr Shvidler

263. The rationale for sanctions is readily intelligible when their aim is to exert pressure on a foreign state by damaging its economy. The rationale is also clear, although more speculative, when sanctions are targeted at members of an elite who have economic power and political influence within the foreign country. It is far from obvious, however, why it should be thought useful to target an individual such as Mr Shvidler who does not live in Russia and when no evidence has been adduced to show that he has any economic resources or any political influence there.

264. The public explanation given for the decision to designate him by name on 24 March 2022 does not inspire confidence in the rationality of the decision-making process.

In a press release issued on that day which singled out for special mention five individuals being sanctioned, the first of whom was Mr Shvidler, the Foreign Secretary (Liz Truss) said:

> "These oligarchs, businesses and hired thugs are complicit in the murder of innocent civilians and it is right that they pay the price."

This was followed by tweets published by the Secretary of State for Transport, Grant Shapps, on 26 March and 8 April 2022 which described Mr Shvidler as one of "Putin's friends" and "Putin's cronies", as "benefitting from Russia's illegal action" in invading Ukraine, and as "not welcome here".

265. These aspersions were all baseless. According to Mr Shvidler's uncontradicted evidence, he has no involvement in Russian politics and no relationship with President Putin. He is not an oligarch. He has not benefited from, let alone been complicit in, the invasion of Ukraine. To describe Mr Shvidler as "not welcome here" is repugnant when he is a British citizen (as are his five children) of unblemished character.

266. Though born in the Soviet Union, Mr Shvidler emigrated at age 24, renouncing his Soviet citizenship to do so, and entered the United States as a stateless refugee. He became a US citizen before later moving with his family to the United Kingdom in 2004 under the Highly Skilled Migrants Programme. He was naturalised as a British citizen in 2010. He is a very wealthy and successful businessman who has donated some £10 million to educational charities in the UK. Mr Shvidler has never lived in, nor been a citizen of, the Russian Federation and has not even visited Russia since 2007.

267. The formal statement of reasons given for Mr Shvidler's designation contained several inaccuracies. It was subsequently revised, but not revoked, in November 2022 after Mr Shvidler requested a ministerial review of his designation. The revised grounds relied on for designating Mr Shvidler are that he:

> (1) is associated with a person, Roman Abramovich, who is involved in obtaining a benefit from or supporting the Government of Russia; and
>
> (2) has been involved in obtaining a benefit from or supporting the Government of Russia by working as a non-executive director of Evraz plc, an entity carrying on business in a sector of strategic significance to the Government of Russia, namely, the Russian extractives sector.

8. Meeting the designation criteria

268. It is not in dispute on this appeal that these grounds satisfy the criteria for designating a person by name set out in regulation 6 of the Regulations. The basic requirement is that the Secretary of State must have reasonable grounds to suspect that the person is an "involved person".

269. As defined in regulation 6(2)(a), an "involved person" means a person who:

> "is or has been involved in—
>
> (i) destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine, or
>
> (ii) obtaining a benefit from or supporting the Government of Russia"

270. This core definition of an "involved person" is expanded and extended by other provisions of regulation 6 in various far-reaching ways. One of these provisions treats as an "involved person" anyone who is "associated with" a person who is or has been involved in one of the activities described in regulation 6(2)(a): see regulation 6(2)(d). Mr Shvidler falls in this category because he is "associated with" Mr Roman Abramovich who has himself been designated on the basis that he is or has been involved in "obtaining a benefit from or supporting the Government of Russia".

271. Regulation 6(6)(a) provides that being "associated with" a person includes "obtaining a financial benefit or other material benefit from that person". Mr Shvidler was found by the judge to have obtained financial benefits from Mr Abramovich, not by any direct means, but because he had worked for two companies in which Mr Abramovich had a controlling interest. First, in 1996 Mr Shvidler became Vice-President for Finance of Sibneft, a listed oil company which was majority owned by Mr Abramovich. Mr Shvidler was President of Sibneft from 1998 until 2005, when the company was sold to Gazprom. In these roles Mr Shvidler was remunerated by Sibneft for his services and was given a nominal shareholding of 10 shares (equivalent to 0.00000021% of the company's share capital). Second, in 2011 Mr Shvidler was appointed a non-executive director of Evraz plc (a role for which he was again remunerated by the company). He held that role as the nominee of a company controlled by Mr Abramovich which held 28.64% of the shares of Evraz plc. In concert with two others, Mr Abramovich was a controlling shareholder of Evraz plc.

272. Mr Shvidler's role as a non-executive director of Evraz plc also itself brings him within the extended definition of an "involved person" through a series of deeming provisions. By regulation 6(4)(d)(ii), "working as a director (whether executive or non-executive)" of an entity "carrying on business in a sector of strategic significance to the Government of Russia" is treated as being "involved in obtaining a benefit from or supporting the Government of Russia" for the purposes of the regulation. The phrase "sector of strategic significance to the Government of Russia" is defined by regulation 6(7) to include "the Russian extractives sector". Thus, by having worked as a non-executive director of Evraz plc, a FTSE-100 mining company with a subsidiary in Russia, Mr Shvidler's is classified as an "involved person".

273. Originally, the government also relied in the grounds given for designating him on the fact that Mr Shvidler purchased shares in Evraz plc and owns shares equivalent to 2.78% of its share capital. But when the statement of reasons for his designation was amended in November 2022 (see para 267 above), reliance on this shareholding was removed.

274. To establish that the designation of a person by name for the purposes of sanctions is lawful, showing that the person falls within the criteria specified in the Regulations is necessary but not sufficient. It is also necessary to determine whether the designation violates a fundamental right of the person concerned.

9. Interference with fundamental rights

275. The arguments concerning this question have been framed in terms of rights protected by the European Convention on Human Rights ("the Convention"), as given effect in UK law by the Human Rights Act 1998. It is accepted by the government that the asset-freeze imposed on Mr Shvidler interferes with the exercise of his right to the peaceful enjoyment of his possessions guaranteed by article 1 of the First Protocol to the Convention and his right to respect for private life guaranteed by article 8. The issue is whether this interference is justified in the public interest.

276. The legal principles which govern how that question must be answered are not themselves contentious. There are three stages to the analysis. It is first necessary to establish the impact of the measure on fundamental rights of the individual affected by it. It is also necessary to identify what legitimate public aim(s) the measure is intended to serve. The third stage is to decide whether the impact on fundamental rights is justified by the pursuit of that aim. This involves a four-part test, now well established by Supreme Court decisions. A formulation often quoted is that of Lord Sumption in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 20, which itself adopted wording used by Lord Wilson in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45. In short, the four questions are:

(i) whether the objective is sufficiently important to justify limiting a fundamental right; (ii) whether the measure is rationally connected to the objective; (iii) whether the objective could have been achieved by a less intrusive measure; and (iv) whether "a fair balance has been struck" between the rights of the individual and the interests of the community. The burden of persuasion falls on the government to show that these requirements are satisfied: see eg *Kiarie v Secretary of State for the Home Department* [2017] UKSC 42; [2017] 1 WLR 2380, para 78.

277. Although the term "proportionality" is often used loosely to refer to the whole test, it is really only the fourth element which involves a judgment of proportionality. The first three criteria are designed to screen out measures which do not meet minimum standards of rational justification. Only the fourth question, assuming it is reached, directly addresses the relationship between the expected benefits of the measure and its impact on the rights of the individual.

278. Although the fourth limb of the test is commonly expressed as requiring the court to decide whether "a fair balance has been struck", I agree with those commentators who have criticised this formulation as misleading: see eg Timothy Endicott, "Proportionality and Incommensurability" in Huscroft, Miller and Webber (eds), *Proportionality and the Rule of Law* (2014), ch 14; and Francisco Urbina, *A Critique of Proportionality and Balancing* (2017) chs 3-5. It employs the metaphor of a set of scales which weighs or balances. Even if the metaphor were apt, the language used would be inaccurate because the relevant question should not be whether a balance has been struck but whether an imbalance has been demonstrated by showing that the public interest outweighs the rights of the individual. But more importantly the metaphor is itself misleading. It embodies a false assumption that there is some common system of measurement which enables benefits to society as a whole to be weighed against costs to the affected individual to decide which outweighs the other and so should have priority.

279. Such a cost-benefit analysis may be possible and appropriate when assessing what is in the overall interests of the community. But there is no common metric by which expected benefits to the community can be weighed against a wrong done to an individual such that, the greater the public benefit, the greater the wrong that may justifiably be done. Such weighing is antithetical to the very idea of rights. The function of rights is to set limits to the circumstances in which the interests of individuals may be overridden by the interests of the community at large. Depriving a person of their liberty, or the use of their property, or their freedom of expression, for example, is not justified by showing that the benefits to the community of doing so substantially exceed the cost to the individual of the restriction measured in terms of money or utility (which may be comparatively slight).

10. The proper approach to proportionality

280. What is required in deciding whether an interference with a fundamental right or freedom is proportionate is a judgment about whether the interference is just, having regard to its impact on the individual's rights and the nature and strength of the reasons relied on to justify it. That is a judgment which under the division of responsibilities in the UK constitution is allocated to the courts.

281. As it was put by Lord Hoffmann in R (Prolife *Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 AC 185, para 76:

> "The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others."

282. Being answerable to an elected legislature makes ministers suited to formulating policy and deciding whether a particular policy or a measure designed to implement it is in the interests of the community as a whole. But when it comes to deciding whether, when a conflict arises, those community interests should prevail over a fundamental right or freedom of a particular individual, it is rightly recognised that courts are better suited to deciding the question. There are at least four reasons why.

283. First, a court is independent of, and impartial towards, the parties to the dispute. The minister is not, since the minister is one of the parties. Second, ministers as politicians, and officials acting under their direction, are naturally and rightly concerned to promote the collective interest. That very fact makes them unsuited to determine whether the collective interest should prevail over a fundamental right of an individual. To make that judgment, an impartial arbiter is needed which is independent of the elected branches of government and from the political pressures and passions to which those branches are necessarily responsive.

284. Third, alongside their independence, courts have a distinctive competence in resolving disputes by applying demanding standards of public reason to adjudicate between competing arguments. They also reach decisions through a highly regulated and public process specifically designed to ensure fairness as between the parties and that the competing arguments are carefully and impartially evaluated.

285. Fourth, courts are entrusted with a responsibility deeply rooted in British history which has led them to be relied on to protect the liberties of individuals. The courts are custodians of fundamental values that insist that we live in a free country, that political power must not be used arbitrarily and that the most basic interests of individuals, whoever they may be, must not be sacrificed for the benefit of the majority. The courts have not always lived up that responsibility. It often seems to be overlooked, for example, that the famous speech of Lord Atkin in *Liversidge v Anderson* [1942] AC 206, celebrated for defending the right of individual against the executive even in wartime, was a dissent. But examples can be found of cases, such as *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 (often referred to as "the Belmarsh case"), where the courts have been effective in performing this role.

286. For these reasons I reject the suggestion that the executive is best suited to judge whether it has itself struck a "fair balance" in an individual case between the public interest and a fundamental right or freedom of an individual. In a society committed to the rule of law, judgments about whether encroaching on a fundamental right or freedom is justified by the reasons relied on by the executive for doing so are reserved to independent courts. I consider that judges are abdicating their responsibility if in making these judgments they defer to the executive's own view that it has struck a "fair balance".

11. Common law rights

287. Although the arguments on this appeal have been framed in terms of Convention rights, they could equally be framed in terms of fundamental freedoms protected by the common law. Since the time of Magna Carta, the common law has always attached great importance to property rights, among which the right to deal with your own property and use it to obtain goods and services is a very basic aspect.

288. In a number of cases concerned with important common law rights, the court has applied what in substance is a test of proportionality. A classic example is R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532. As Lord Reed stated in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, para 119:

> "One can infer from these cases that, where Parliament authorises significant interferences with important legal rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality."

See also para 60 (Lord Carnwath), paras 95-98 (Lord Mance) and paras 105-109 (Lord Sumption); *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3; [2016] AC 1457, para 56; and *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869, para 89.

289. Even without recourse to the Human Rights Act, the Regulations made under SAMLA would properly be interpreted as authorising the Secretary of State to restrict important legal rights of designated persons only to the extent justified by the purposes of the Regulations.

12. Impact on the rights of the individual

290. Although it is not in dispute that the asset-freeze imposed on Mr Shvidler interferes with his Convention rights, in applying the test of proportionality the nature and seriousness of that interference are relevant.

291. I have described at paras 259-262 above the legal effect of the asset-freezing provisions in the Regulations. Those provisions may be compared with two other asset-freezing regimes with which courts are familiar. A court order freezing assets may be made to prevent a debtor from avoiding payment of an existing or prospective court judgment. Such an order may also be made in proceedings brought by law enforcement agencies to seize the proceeds of crime. In either case a person's assets will be frozen only if strict requirements are met, which include showing a good arguable claim to the value of the assets and a real risk that, unless the assets are frozen, they will be put beyond reach. Such an order is temporary and will be imposed only until the underlying claim has been resolved. Because of their intrusion on the freedom to deal with property, freezing orders are acknowledged to be a draconian measure. They have been described as "one of the law's two 'nuclear' weapons" (the other being an order permitting entry to premises to search for and seize evidence relevant to legal proceedings): see *Bank Mellat v Nikpour* [1985] FSR 87, 92, per Donaldson LJ.

292. Unlike such freezing orders, an asset-freeze imposed under the Regulations is not justified by any claim to recover funds held by the individual whose assets are frozen; nor is it subject to any comparable constraints. It is imposed to pursue political aims. For a Russian or other foreign national who has some assets in the UK which are frozen, the impact on legal rights is likely to be comparatively modest. For a UK national whose entire assets are frozen, however, the likely impact is greater by an order of magnitude. A particularly oppressive feature of the regime is the open-ended nature of the measure. As well as having no geographical limit, the asset-freeze applies for as long as the government thinks fit or until it considers that the purposes of the Regulations have been achieved. It is one thing to prohibit an individual from using or dealing with any of his or her own economic resources on a temporary basis for a defined period. It is quite another

to do so for a period that has no end in sight. And the longer the prohibition remains in place with no end in sight, the more oppressive it becomes.

293. Under section 24 of SAMLA as originally enacted, there was a duty on the appropriate minister to review a designation which imposes an asset-freeze after three years. But on 15 March 2022 (the week before Mr Shvidler was designated) that provision was repealed. After an initial ministerial review, the only right to request a variation or revocation of the designation arises where "there is a significant matter which has not previously been considered by the Minister": see section 23(2).

294. It so happens that the first ever appeals heard in the UK Supreme Court (in 2009) were challenges to the legality of measures designed to counter terrorism by freezing the assets of individuals: see *Ahmed v Her Majesty's Treasury* [2010] UKSC 2; [2010] 2 AC 534. Orders in Council provided for the freezing, without limit of time, of the funds and economic resources of persons designated by the Treasury on the basis that the Treasury had reasonable grounds for suspecting that the person was, or might be, someone who participated in or facilitated the commission of acts of terrorism. The asset-freeze was enforced by provisions similar to regulations 11 to 15 of the Regulations, which prohibited anyone from dealing with funds or economic resources owned or held by a designated person and from making funds, economic resources or financial services available, directly or indirectly, to or for the benefit of a designated person, unless this was done under the authority of a licence granted by the Treasury.

295. In Ahmed the Supreme Court held that the Orders in Council went beyond the powers conferred by the Act of Parliament said to authorise them and were therefore unlawful. The aim of those measures – preventing acts of terrorism – was plainly of national importance. Yet this court applied the principle that, in the absence of clear and express language, a statute will not be interpreted as empowering the executive to override fundamental rights of the individual. Lord Hope, who gave the lead judgment, referred, at para 6, to Lord Atkin's speech in *Liversidge v Anderson* and described the consequences of the asset-freezing measures as "so drastic and so oppressive that we must be … just as careful to guard against unrestrained encroachments on personal liberty". He also said, at para 60, that "the restrictions strike at the very heart of the individual's basic right to live his own life as he chooses" and endorsed the description of designated persons whose assets had been frozen as "effectively prisoners of the state" (see also para 4).

296. Here there is no doubt that the Regulations and the measures which they authorise are within the powers conferred by SAMLA. But the related principle applies that the Regulations are to be interpreted as requiring no greater interference with fundamental rights than is objectively established to be necessary to achieve the legitimate aim of the interference (see paras 288-289 above). Furthermore, Lord Hope's descriptions of the oppressive nature and effect of the asset-freezing measures in issue in *Ahmed* are just as

apt to describe the nature and effect of regulations 11 to 15 of the Regulations when the person designated for this purpose is a British citizen.

297. Inevitably, it is not only Mr Shvidler himself on whom the freezing of all his funds and economic resources has had a catastrophic impact. His family has also been severely affected. Like him, his former wife and three adult children have had banking services withdrawn from them. As a direct result of Mr Shvidler's designation, his two youngest children were permanently excluded from their schools with immediate effect, leaving them without education in the middle of a school year. They have since had to continue their education in the United States, where Mr Shvidler is now living (though still subject to the same prohibitions on dealing with his assets because of their worldwide scope).

13. The aims of the measure

298. The purposes of the Regulations are set out in regulation 4. The original purposes were "encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine". In June 2023 the regulation was amended to add "promoting the payment of compensation by Russia for damage, loss or injury suffered by Ukraine on or after 24th February 2022 as a result of Russia's invasion of Ukraine".

299. The importance of these aims is pre-eminently a matter for political judgment which it is the function of ministers and not courts to make. It is not – nor could it realistically be – disputed on behalf of Mr Shvidler that the aim of "encouraging Russia to cease actions destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine" is in principle sufficiently important to justify limiting fundamental rights. The first element of the four-part test set out at para 276 above is therefore satisfied.

14. Is the measure connected with the aim?

300. It is tempting to think that the vital importance of a policy objective itself justifies imposing severe measures in pursuit of that objective. It may also be argued that such measures need to be severe if they are to be effective. Such arguments are made by the government in this case and were accepted by the Court of Appeal. At para 210 of his judgment Singh LJ said:

> "If sanctions are to be effective, a serious price has to be paid by those who are within the definition of people to be designated under the 2019 Regulations. On the other side of the

> balance is Russia's very serious violation of international law and the need to bring the invasion of Ukraine to an end."

301. These points are valid only if there is good reason to believe that requiring the person designated under the Regulations to pay "a serious price" is likely to make a real contribution to the objective of bringing the invasion of Ukraine to an end. If there is not, then imposing a measure calculated to cause serious hurt to the designated individual simply ensures that it will produce a serious violation of the individual's rights.

302. There is also a risk that the Regulations may be used to impose sanctions on individuals, not because there is any realistic prospect that the measures imposed will actually contribute to achieving the desired international aim, but for the purpose of signalling to a popular audience that the government is taking firm action to curb Russian aggression. Such a purpose is not a legitimate basis for curtailing individual freedom. That this risk is real is apparent from the political messaging that accompanied the announcement of the sanctions imposed on Mr Shvidler (see para 264 above).

303. It is therefore essential to scrutinise closely the reasons relied on by the government to support the claim that freezing Mr Shvidler's assets is likely to make a material contribution to achieving the purposes of the Regulations. A question arises here, as it often does when a court has to evaluate reasons put forward on behalf of a minister to justify a decision, whether or to what extent the court should attach weight to the institutional competence of the relevant department of government. The answer to that question must depend on the nature of the reasons advanced. A court will be less equipped to assess the cogency of the reasons if or in so far as they are based on experience or special sources of knowledge or expertise which, as lawyers, judges do not have. At the other end of the scale, judges are well able to assess the logical validity, consistency and basic rationality of arguments and to check their compatibility with ordinary common sense.

304. Assessing the strength of the reasons relied on to justify freezing Mr Shvidler's assets is relevant to two elements of the four-part test set out at para 276 above. First, it determines whether there is a rational connection between the measure and its legitimate aim. Unless there is such a connection, the measure is unlawful. Second, even if that threshold requirement is met, the strength of the reasons relied on remains of crucial importance in applying the fourth limb of the test and determining whether the reasons are sufficient to justify the interference with the rights of the individual targeted by the measure.

15. The reasons advanced by the FCDO

305. To seek to show a rational connection between the freezing of Mr Shvidler's assets and the relevant aims, the government relies on a witness statement made by Mr David Reed, an official at the Foreign, Commonwealth and Development Office ("FCDO"). Mr Reed asserts that freezing Mr Shvidler's assets on the ground of his association with Mr Abramovich is likely to contribute to achieving the purposes set out in regulation 4 (quoted at para 298 above) in four ways:

> (1) It will send a signal to Mr Shvidler himself and "others in his position" (said to mean "persons who are associated with involved persons who are close to President Putin and have carried on business in sectors of strategic significance to the Russian Government since the illegal annexation of the Crimea in 2014") that "there are negative consequences to having implicitly legitimised the Government of Russia's actions in that way".
>
> (2) It will disincentivise others from associating themselves in future with such persons and will also encourage others to disassociate from such persons.
>
> (3) It will incentivise Mr Shvidler and others in his position to oppose Russia's invasion of Ukraine more robustly. In this regard the FCDO considers that Mr Shvidler's public statement mentioned at para 246 above did not clearly condemn the invasion.
>
> (4) It will encourage Mr Shvidler to put pressure on Mr Abramovich and so amplify the incentives on Mr Abramovich to (i) encourage President Putin to cease or limit policies and actions that are destabilising Ukraine and/or (ii) distance himself from President Putin, thus isolating President Putin, and/or (iii) speak out against the Russian invasion.

306. Mr Reed makes assertions similar to the first three mentioned above about the potential benefits of designating Mr Shvidler "for his former prominent role [in] the Russian extractives sector" through having worked as a non-executive director of Evraz plc.

307. The weight that should be given to Mr Reed's opinions for reasons of institutional competence would be greater if it appeared that they were based on any evidence or body of experience or knowledge accumulated by the FCDO about the efficacy of sanctions. But there is nothing to indicate that they are. Rather, they are on their face no more than armchair theories about how freezing Mr Shvidler's assets could have consequences which would assist the desired aims. Thinking of a plausible theory of how something

could conceivably come about is not evidence that it is likely to happen or even that there is any realistic prospect that it will happen. In any case, when viewed with a measure of common sense, most of Mr Reed's conjectures are not even plausible.

16. Association with Roman Abramovich

308. Taking the points made in turn, Mr Reed does not explain how Mr Shvidler's association with Mr Abramovich is supposed to have "implicitly legitimised" the Russian government's actions after the annexation of Crimea in 2014. There is no suggestion that Mr Abramovich wanted or was encouraging Russian aggression towards Ukraine such that associating with him could somehow be construed as supporting the Russian government's actions. This assertion is incoherent.

309. The assertion that designating Mr Shvidler will disincentive others from associating with persons "close to President Putin" at least makes sense but does not explain why individuals who are not deterred from associating with such persons by the prospect of being designated themselves might credibly be deterred by the designation of Mr Shvidler.

310. The third reason advanced shows no recognition of the risks that, on his uncontradicted evidence, Mr Shvidler would be taking if he spoke out against the Russian invasion of Ukraine in terms that would be treasonable in Russia. As he has pointed out, by using the term "war" rather than "special military operation" in his public statement made on 12 March 2022, he had already used language that would result in his imprisonment if used in Russia. Maintaining a freeze of Mr Shvidler's assets does not give him any incentive to make a further, more robust statement when it has never been suggested that, if he were to do so, his designation would be revoked. Nor does Mr Reed give any reason to suppose that any statement made by Mr Shvidler might conceivably make the slightest difference to the views or behaviour of anyone with any influence in Russia or on the Russian government.

311. The fourth reason given presupposes that Mr Shvidler has the ability to "put pressure" on Mr Abramovich and that there was any reason to think that Mr Abramovich might be stirred into taking any action by the designation of Mr Shvidler which he was not prompted to take by the freezing of his own assets, as had already occurred 10 March 2022. As to what that action might be, the suggestions made are mutually inconsistent, which undermines their credibility. It is contradictory to speculate, as Mr Reed does, that Mr Abramovich will be incentivised both to "encourage President Putin to cease or limit policies and actions that are destabilising Ukraine" and to "distance himself from President Putin".

312. Mr Shvidler referred in his evidence to well-publicised attempts made by Mr Abramovich soon after the invasion of Ukraine to broker peace negotiations. Those efforts were wholly unsuccessful. Whatever hope there might have been in March 2022 that Mr Abramovich might be capable of taking some step that might affect President Putin's conduct towards Ukraine, and that sanctioning Mr Shvidler might influence Mr Abramovich to take such a step, I do not see how this theory could still be maintained by the time the High Court gave its judgment on 18 August 2023, some 17 months later (which, as noted earlier, is the time at which the question must be judged). By that time this theory had been exposed as wishful thinking.

17. Connection with Evraz plc

313. The corresponding claims based on Mr Shvidler's former role as a non-executive director of Evraz plc are, if anything, even less credible. I note that they include a suggestion that the designation of Mr Shvidler will incentivise him (and others in his position) to "divest" from sectors of strategic significance to the government of Russia. I take this to be a reference to Mr Shvidler's shareholding in Evraz plc. Since the grounds for Mr Shvidler's designation were amended in November 2022 to remove reliance on this shareholding (see para 267 above), I cannot see that this suggestion is open to Mr Reed. It is in any case self-contradictory because the effect of freezing Mr Shvidler's assets is to prevent him from disposing of his shares.

314. The suggestion that Mr Shvidler "implicitly legitimised" the Russian government's actions after the annexation of Crimea in 2014 by serving as a director of Evraz plc is no more coherent than the suggestion that he did so by being associated with Mr Abramovich. It can be tested against the government's own policy. Had the UK government considered it an appropriate response to the annexation of Crimea to require UK companies to divest from the Russian extractives sector or to require individuals not to work as directors of UK companies involved in that sector, then regulations imposing such requirements would have been introduced either following the annexation of Crimea or at the latest when the Regulations were made in 2019. That was not done.

315. When they were made in 2019, the Regulations defined an "involved person" in regulation 6 as a person who "is or has been involved in destabilising Ukraine or undermining or threatening the territorial integrity, sovereignty or independence of Ukraine". A person "associated with" such a person was also included in the definition. But there was no reference to "obtaining a benefit from or supporting the Government of Russia"; no reference to "carrying on business in a sector of strategic significance to the Government of Russia"; no definition therefore of what constituted such a sector; and no reference to working as a director of an entity carrying on business in a sector. Those provisions were added by amendment only on 10 February 2022, a matter of days before Russia invaded Ukraine.

316. It was only in February 2022, therefore, that the government adopted a policy that individuals and companies should no longer carry on business in the Russian extractives sector and other specified sectors of the Russian economy. In these circumstances I do not see how any criticism can reasonably be made of Mr Shvidler (or for that matter the other non-executive directors of Evraz plc, such as the King's former principal private secretary, Sir Michael Peat) for working as directors of Evraz plc after the annexation of Crimea in 2014. No one could rationally have thought that by doing so they had conferred legitimacy on Russia's invasion of Ukraine.

317. The other reasons put forward relating to Mr Shvidler's former role as a non-executive director of Evraz plc are equally illogical. The substance of them is that designating Mr Shvidler would encourage him and "others in his position" to resign from or avoid taking up directorships in companies involved in sectors of strategic significance to the government of Russia. So far as Mr Shvidler himself is concerned, such encouragement was otiose and could not have served a rational purpose because he had already resigned from his position before the decision to designate him was made. The same applies to "others in his position" in that nine of the other ten directors of Evraz plc had resigned at the same time.

318. None of the other directors of Evraz plc was designated along with Mr Shvidler. (The two individuals who control the company in concert with Mr Abramovich, neither of whom is British, were subsequently designated in November 2022.) Nor, for example, according to Mr Shvidler's uncontested evidence, has the government designated any current or former director of BP, another UK company which had interests in the Russian extractives sector when Russia invaded Ukraine. At that time, unlike Evraz plc, BP was heavily and profitably engaged in a joint venture with the Russian state-owned Rosneft Oil company, with two members on the board of Rosneft. If sanctioning an individual for working as a director of a company which had invested in the Russian extractives sector was thought likely to contribute to achieving the purposes set out in regulation 4, then it was irrational to single out Mr Shvidler. It was irrational both because to do so was arbitrary and because it undermined any contribution that sanctioning individuals who had worked as directors of such companies could conceivably make. If the designation of Mr Shvidler sent any signal to others in his position, it was that he alone had been targeted – presumably for other reasons – and that the performance of their roles did not expose them to sanctions.

319. Looking at the reasons advanced by Mr Reed as a whole, I consider them so inadequate and lacking credibility that they do not establish a rational connection between the measure taken and the desired aims. In making that assessment I have had in mind the argument that the effectiveness of sanctions depends on their cumulative effect. Unless, however, a measure is rationally connected to the desired objective, it cannot add or contribute anything to any such cumulative impact.

18. Was the interference with rights proportionate?

320. I therefore do not reach the question of proportionality (properly so called). But if that final stage of the assessment were reached, further considerations of fairness would also be relevant. There are three to which I attach importance.

321. First, a theme of the reasons advanced for freezing Mr Shvidler's assets is that he should be sanctioned, not for anything that he was doing or threatening to do at the time of his designation, but for past associations and activities which were lawful and not contrary to any prohibition at the time when they occurred. I would not dismiss the possibility that penalising a person for past behaviour which was blameless when it occurred could influence the future conduct of others. A notorious historical example is the execution of Admiral Byng in 1757 for failing in his attempts to relieve Minorca – a killing carried out, in the well-known words of Voltaire, "pour encourager les autres". But in any such case encouragement of others is achieved by treating the individual in a way which is inherently unjust. A court should be slow to accept that penalising an innocent individual to incentivise others is a legitimate means of pursuing a policy aim, however important that aim is thought to be.

322. Second, the argument that it is reasonable to sanction Mr Shvidler to encourage him to speak out "more robustly" in opposition to Russia's invasion of Ukraine has sinister connotations. It implies that it is legitimate in a democracy for the executive to freeze a person's assets in order to put pressure on that person to speak out in support of government policy. Such an Orwellian approach should be rejected. It seeks to justify interference with property rights on the ground that such interference can be used to interfere with freedom of expression.

323. Third, the fact that Mr Shvidler has been subjected to more severe sanctions solely because of being a British citizen is unjust. I can imagine circumstances in which that would not be so - for example, if Mr Shvidler had acted in a way that was disloyal towards the United Kingdom. But no such suggestion is made. If all the facts had been exactly the same except that Mr Shvidler was not a British citizen but, say, a Russian citizen with the right to reside in the United Kingdom, only his assets in this country would have been frozen and not his foreign assets. Such an approach is compatible with international law because nationality (along with residence) is generally recognised as a basis of jurisdiction over extra-territorial acts and therefore allows the United Kingdom to impose restrictions and criminal penalties on conduct of a UK national outside the United Kingdom. But the question here is not whether the imposition of a more far-reaching invasion of liberty is permissible under international law but whether it is fair. In my opinion it is unfair and arbitrary to impose sanctions on Mr Shvidler which apply worldwide, not because of any assessment that such extra-territorial reach is necessary, but simply as an automatic consequence of his British citizenship.

19. Conclusion

324. I have identified at paras 292-297 above the devastating effect on Mr Shvidler and his family of depriving him, indefinitely, of access to his own funds and other economic resources on a worldwide basis except to such minimal extent as the government allows. Like the asset-freezing measures considered in the case of *Ahmed*, the restrictions imposed on Mr Shvidler strike at the very heart of his right to live his own life as he chooses. I do not consider that the reasons relied on by the government come close to justifying such a drastic curtailment of his liberty. The restrictions are unjust and disproportionate to any contribution which they would rationally be expected to make to the purposes of the Regulations. Although I am alone in doing so, I deprecate and would declare unlawful the removal of basic freedoms to which Mr Shvidler should be entitled as a citizen of this country. I would allow his appeal.