UKSC/2025/0043

IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)
B E T W E E N:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GJELOSH KOLICAJ

Respondent

APPELLANT'S
WRITTEN CASE

References:

- *All references in the format [FTT/x], [UT/x] and [CA/x] are to paragraph numbers in the First-tier Tribunal's ("FTT"), Upper Tribunal's ("UT") and Court of Appeal's judgments respectively.*

I. INTRODUCTION AND OVERVIEW

1. Mr Gjelosh Kolicaj ("GK") was a dual Albanian/British national[1]. On 27 February 2018, he was convicted of money laundering offences, having been part of an organised crime group that had removed nearly £8 million from the UK and sent it to Albania, the money being the proceeds of unspecified criminal activity. His leading role in the criminal activity continued throughout the period that was the subject of the indictment, and it persisted even after arrests had been made, and cash had been seized.

2. On 22 January 2021, the Secretary of State decided to deprive GK of his British citizenship, pursuant to s.40(2) of the British Nationality Act 1981 ("BNA 1981"), on the basis that his deprivation was conducive to the public good because of GK's involvement in serious organised crime. He was served with a notice pursuant to

Tab 33, p.340

[1] The Court of Appeal stayed its Order (dated 17 January 2025), which quashed the Secretary of State's deprivation decision and order, pending the determination of this appeal.

s.40(5) of the BNA 1981 which informed him that the Secretary of State had decided to make a deprivation order; of the reasons for the order; and of his right to appeal. Very shortly thereafter, he was issued with the deprivation order itself.

Tab 34 p.342

3. The Court of Appeal held that, whilst it was legitimate for the Secretary of State to operate a system whereby she does not offer the opportunity for representations to be made before a deprivation of citizenship decision is made (because of the risk that the subject will renounce any other citizenship they possess thereby rendering themselves stateless), procedural fairness required the Secretary of State to offer an opportunity to make representations after the decision has been taken, and to conduct a merits-based evaluation in light of any representations made **[CA/29]**. That conclusion was reached despite the existence of the right of appeal. The Secretary of State submits that they were wrong to do so.

Tab 5, p.114

4. On 5 June 2025, the Secretary of State was granted permission to appeal by the Supreme Court on both grounds advanced, namely:

Tab 9, p.171

   i **Ground One:** The Court of Appeal materially erred in law in finding that procedural fairness required that GK be granted a right, after the Secretary of State had decided to deprive him of his British nationality, to make representations to the Secretary of State for a merits-based evaluation of the decision.

   ii **Ground Two:** The Court of Appeal materially erred in law when it quashed the deprivation order: see **[CA/30]** and the Order of the Court of Appeal dated 17 January 2025 at §3. It had no jurisdiction to do so because there is no right of appeal against a deprivation order; the right of appeal exists against the deprivation decision: see s.40A(1) BNA 1981, *N3 v Secretary of State for the Home Department* [2025] 2 WLR 386 at §48, and *S1 v SSHD* [2016] 3 CMLR 37 at §61.

Tab 5, p.114

Tab 88, p.1801

Tab 92, p.1936

5. By GK's Notice of Acknowledgement and Intention to Participate dated 2 July 2025, GK raised three additional and/or alternative grounds upon which GK argues that the Court of Appeal's order should be upheld. It is submitted that they are all wrong. In summary, the Respondent argues that:

Tab 8, p.168

i **Respondent's Notice Point 1:** The Court of Appeal erred in concluding, when determining what fairness required in the particular circumstances of the present case, that it was "*legitimate to operate a system in which the Secretary of State informs the person affected only after it is made because of the risk of renunciation of the other nationality*" **[CA/29]**.

Tab 5, p.114

ii **Respondent's Notice Point 2:** The Deprivation Order was unfair because it was made by applying a policy which was not published and was not made available to GK until long after the Order was made.

iii **Respondent's Notice Point 3:** The Court of Appeal erred in concluding that the Upper Tribunal was wrong in law to hold that the Secretary of State did not consider the exercise of her discretion under s.40 of the British Nationality Act 1981.

II. THE FACTS

6. GK was born on 24 April 1981 and was a dual British-Albanian national. He arrived in the UK in 2005 and on 6 September 2007 he was granted indefinite leave to remain on the basis of his marriage to a British citizen. On 5 February 2009, GK naturalised as a British citizen.

7. On 27 February 2018, GK was convicted of the offence of conspiracy to remove the proceeds of criminal conduct from England and Wales contrary to s.327 of the Proceeds of Crime Act 2002. The conspiracy involved the transportation of large quantities of cash generated from undetermined criminal conduct from the UK to Albania. Cash was packed into suitcases which were checked onto commercial flights to Albania, where another relative of GK would be waiting to receive it. GK and his brothers were organisers of the conspiracy. In total, 65 flights were taken, and the total estimated value of the conspiracy was just under £8 million. GK was sentenced to 6 years' imprisonment.

Tab 37, p.362

8. A ministerial submission dated 13 May 2020 and entitled "*Deprivation of British Citizenship*" recommended that the Home Office should "*use the deprivation power [arising under s.40(2) of the British Nationality Act 1981] against people guilty of serious organised crime, but limit its use to the most serious and high profile cases*."

Tab 5, p.97

[CA/9]. The Secretary of State accepted the advice given in the submission. Prior to this point, although Chapter 55 of the Home Office Nationality Instructions issued by the Secretary of State had defined "*conduciveness to the public good*" as "*depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours*", in practice the Secretary of State had not regularly used s.40(2) of the British Nationality Act 1981 ("BNA 1981") in cases of serious organised crime **[CA/9]**.

Tab 40, p.453

Tab 35, p.343

9. A ministerial submission dated 17 December 2020 recommended that the Secretary of State consider using the power under s.40(2) of the BNA 1981 to deprive GK of his British citizenship. In support of this recommendation, five documents were annexed:

   i Annex A: A National Crime Agency ("NCA") recommendation to this effect of 19 October 2020 which summarised GK's offending and assessed that it was likely that he would continue to pose a risk following completion of his sentence.
   ii Annex B: An assessment that deprivation of British citizenship would not leave GK stateless.
   iii Annex C: An assessment of potential breaches of the ECHR arising from a deprivation order.
   iv Annex D: A welfare of children assessment, in accordance with s.55 of the Borders, Citizenship and Immigration Act 2009.
   v A draft Notice of intention to make a deprivation order.

10. On 22 January 2021, GK was served with:

Tab 33, p.340

   i A letter informing him that his status as a British citizen was under review, namely a "Notice of intention to make a deprivation order" under s.40(2) of the BNA 1981 ("the Notice"); and,

Tab 34, p.342

   ii About 30 minutes later, a Deprivation of Citizenship Order made pursuant to s.40(2) of the BNA 1981 ("the Order").

11. Both the Notice and the Order recorded that the Secretary of State was satisfied that it was conducive to the public good to deprive GK of his British citizenship. In the Notice, the Secretary of State explained, briefly, her reasons for that conclusion, relying on the conviction as establishing that GK was a participant in "serious organised crime" as referred to in chapter 55.4.4 of the Nationality Instructions; that, accordingly, deprivation was conducive to the public good; and that the decision would not make GK stateless.

Tab 33, p.340

12. GK appealed against the decision of 22 January 2021 pursuant to s.40(A)(1) of the BNA 1981. By a decision promulgated on 5 May 2022, the FTT dismissed the appeal. Thereafter, GK applied to the FTT for permission to appeal to the Upper Tribunal on 19 May 2022. This was refused on 19 July 2022.

Tab 7, p.145

Tab 24, p. 273

13. On 1 August 2022, GK applied to the Upper Tribunal directly for permission to appeal. He raised 14 grounds of appeal. On 4 May 2023, the Upper Tribunal granted permission to appeal on all grounds.

Tab 23, p.266

Tab 22, p.264

14. GK's appeal to the Upper Tribunal was heard on 19 July 2023 by Dove J and Mr CMG Ockleton. The decision was promulgated on 13 November 2023. GK's grounds of appeal were categorised into three themes: (i) procedural fairness; (ii) material considerations; and (iii) the *Tameside* duty. By a decision promulgated on 13 November 2023, the Upper Tribunal allowed GK's appeal.

Tab 6, p.120

15. As to procedural fairness, GK argued that it was unfair for the Secretary of State to make the decision to deprive GK of his citizenship without affording him the opportunity to make prior representations. In particular, he argued that he had material he would have wished to put before the Secretary of State in relation to his risk of re-offending. On this point, the Upper Tribunal concluded that in the circumstances of the case, the risk of the entire decision-making process being frustrated by GK renouncing his Albanian citizenship, so as to disqualify him from a decision to deprive him of his citizenship on the basis of statelessness, justified the Secretary of State proceeding without affording GK an opportunity to make representations **[UT/58]**. However, the Upper Tribunal went on to find that it did not appear from the deprivation decision that the Secretary of State was aware of

Tab 6, p.141

Tab 6, p.143

her discretion as to whether it was appropriate to make a deprivation decision or that she had exercised it in GK's case **[UT/62]**. Accordingly, GK's appeal was allowed **[UT/66]**.

Tab 6, p.144

16. The Secretary of State applied to the Upper Tribunal for permission to appeal to the Court of Appeal, which was refused on 15 December 2023. By an Appellant's Notice dated 12 January 2024, the Secretary of State applied to the Court of Appeal for permission to appeal to the Court of Appeal on the same ground. On 15 April 2024, Falk LJ granted permission to appeal.

Tab 17, p.214

17. By a Respondent's Notice, GK argued that the Upper Tribunal's decision should be upheld on two additional grounds, namely, that the Secretary of State's decision was unlawful because (i) GK had not been permitted to make representations before the decision to deprive was made; and (ii) the Secretary of State had applied an unpublished policy. The unpublished policy in question was said to be contained in the ministerial submission of 13 May 2020.

18. The appeal was heard by Underhill, Dingemans and Edis LJJ on 11 December 2024 and judgment was handed down on 17 January 2025.

19. On the Secretary of State's single ground of appeal, the Court of Appeal found that it was not possible to say that the Secretary of State was unaware that she was exercising a discretion in making her decision **[CA/39-40]**. On that basis, it would have allowed the Secretary of State's appeal. However, it proceeded to consider the two Respondent's Notice arguments advanced by GK.

Tab 5, p.117

20. As to GK's first Respondent's Notice point, the Court of Appeal concluded that it was legitimate for the Secretary of State to operate a system whereby a person is informed of the Secretary of State's deprivation decision only after it has been made because of the risk of renunciation **[CA/29]**. However, the Court of Appeal found that the Secretary of State should have indicated at the time of the deprivation decision that she was willing to review her decision by conducting a merits-based evaluation in light of any representations or evidence supplied by the person **[CA/29]**. The Court of Appeal went on to conclude that the Secretary of State's

Tab 5, p.114

Tab 5, p.114

Notice and Deprivation Order were issued and maintained in a way which was procedurally unfair and had to be quashed **[CA/30]**. In the circumstances, there was no need, therefore, for the Court of Appeal to address GK's second Respondent's Notice point.

Tab 4, p.91

21. By an order dated 17 January 2025, the Court of Appeal ordered (in material part) that:

> "*1. The Appellant's appeal against the decision of the Upper Tribunal is allowed.*
> *2. The Respondent's first ground (in his Respondent's Notice of 28 April 2024) is upheld.*
> *3. The Appellant's Notice and Deprivation Order of 22 January 2021 are quashed. …"*

Tab 14, p.190

22. On 31 January 2025, the Secretary of State applied to the Court of Appeal for permission to appeal to the Supreme Court. This was refused on 11 February 2025.

Tab 13, p.189

On 6 June 2025, the Supreme Court (Lord Lloyd-Jones, Lord Sales and Lord Stephens) granted permission to appeal.

III. LEGAL FRAMEWORK

23. When deciding under s.40(2) of the BNA 1981 whether deprivation is conducive to the public good on grounds that an individual has been involved in serious organised crime, the Secretary of State has a discretion. Section 40(2) provides:

Tab 43, p.477

> "*The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good."*

24. The Secretary of State's power in s.40(2) is limited by s.40(4), which prevents the Secretary of State from making an order if she is satisfied that it would make the person in question stateless[2].

Tab 43, p.478

Tab 43 p.478 [2] Unless the limited exception in s.40(4A) BNA 1981 applies.

Tab 43, p.478

25. Section 40(5) of the BNA 1981 provides that, subject to certain exceptions[3], before making an order depriving a person of citizenship, the Secretary of State must give the person written notice specifying (a) that the Secretary of State has decided to make an order; (b) the reasons for the order; and, (c) the person's right of appeal (whether under s.40A(1) or under s.2B of the Special Immigration Appeals Commission Act 1997[4]).

26. Ordinarily, the Secretary of State cannot, therefore, make a deprivation order without first giving the person written notice under s.40(5). However, s.40(5) does not stipulate any period of time which must elapse between the notice of the decision and the deprivation order. There are powerful reasons in the public interest why the Secretary of State may wish to avoid a dual national such as GK learning of her intention to make a deprivation order under s.40(2) of the BNA 1981. For example, a number of the individuals who were involved in the Rochdale child sexual grooming ring attempted to frustrate deprivation and deportation by the

Tab 5, p.104

Secretary of State by renouncing their original nationality such that deprivation would render them stateless and would thus be barred by s.40(4) **[CA/13]**. Accordingly, the Secretary of State's practice in recent years in relation to s.40(2) cases (conduciveness cases) has been to give a person written notice under s.40(5) just minutes before the Order, as happened in GK's case, thus denying the person any chance to renounce their original citizenship.

Tab 43, p.481

27. Section 40A(1) provides a right of appeal to the First-tier Tribunal for a person who is given notice under s.40(5) of a decision to make an order in respect of them under s.40 of the BNA 1981.

IV. GROUND ONE: PROCEDURAL FAIRNESS

Tab 5, p.114

28. As noted above, at **[CA/29]**, the Court of Appeal concluded that it was legitimate to operate a system in which the Secretary of State informed the person affected by

[3] See s.40(5A).

[4] Section 40A(2) of the BNA 1981 specifies that the right of appeal under s.40A(1) does not arise where the Secretary of State has certified that the deprivation decision was taken wholly or partly in reliance on information which in her opinion should not be made public (a) in the interests of national security; (b) in the interests of the relationship between the United Kingdom and another country; or, (c) otherwise in the public interest.

the decision only after it was made (i.e. with no opportunity for prior representations) because of the risk of renunciation of any other nationalities. The Court of Appeal was right to reach this conclusion – see *Begum v Secretary of State for the Home Department* [2024] 1 WLR 4269 ("*Begum No. 2")* at §112, where the Court of Appeal concluded that there was no right to prior consultation before a deprivation decision was taken under s.40(2) on the grounds of national security due to "*the existence and distinctive nature of this right of appeal*" (applying *Al-Jedda v Secretary of State for the Home Department* ("*Al-Jedda No.2*") (SC/66/2008, 18 July 2014) and *U3 v Secretary of State for the Home Department* [2024] KB 433). That judgment was upheld by this Court when refusing permission to appeal in Ms Begum's case: see §2 of the permission ruling.

Tab 71, p.1252

Tab 63, p.915

Tab 98, p.2208

Tab 108, p.2454

29. However, the Court of Appeal then went on to find that "*in the absence of a full appeal on the merits to the FTT, [the Secretary of State] should also say at that time that she is willing to review her decision by conducting a merits based evaluation in the light [of] any representations or evidence which that person supplies…It is not enough to say that the appeal rights conferred by section 40A remedy the lack of a chance to make representations because of the inability to challenge the decision to find that deprivation would be conducive to the public good or the exercise of discretion to deprive, save on public law and on the basis of material before the Secretary of State*" **[CA/29]**.

Tab 5, p.114

30. It is submitted that that conclusion was wrong for the following four reasons which are developed below:

i The Court of Appeal's approach cannot be reconciled with that of the Court of Appeal in *Begum No. 2* and *D5, 6, 7 and C9* [2025] EWCA Civ 957 ("*D5, 6, 7 and C9"*) and the Supreme Court's recent decision in *N3.*

ii The decision appears to have founded on misconceptions as to the nature and scope of the appeal right under s.40A(1).

iii The decision appears to have been founded also on a misunderstanding of the facts of GK's case.

iv The Court of Appeal's approach is wrong in principle, introducing uncertainty into established principles of public law and the principle of procedural fairness.

Tab 71, p.1220

Tab 80, p.1488

Tab 88, p.1787

(i) Inconsistent with *Begum No. 2; N3; and, D5, 6, 7 and C9*

Tab 71, p.1252

31. The Court of Appeal confirmed in *Begum No.2* at §112 that the existence and distinctive nature of the right of appeal was a compelling reason for interpreting s.40(5) BNA 1981 as excluding the right to make representations before a decision was taken under s.40(2). Representations made after the discretion has been exercised are necessarily directed to the making of a new decision; not to influencing the original decision. But the right of appeal is already, by that point, triggered by the original decision. In those circumstances, it is unclear why procedural fairness requires a right to make representations after the decision. There was no suggestion in *Begum No.2* that procedural fairness required such an opportunity.

Tab 88, p.1801

32. Similarly, in *N3,* this Court held at §45 that "*There is no requirement on the Secretary of State to await the response from the person concerned to the written notice before making the deprivation order. Rather, once the written notice has been given the Secretary of State, at a time of his or her own choosing, implements the deprivation decision by making the deprivation order itself".* Accordingly, it is clear from *N3* that there is no requirement to permit representations following the deprivation decision and before making the deprivation order. Any such requirement would be inconsistent with this Court's finding that the Secretary of State may implement the deprivation decision "*at a time of his or her own choosing*" once the notice of decision has been given.

33. Whilst *Begum No. 2* and *N3* concerned deprivation decisions under s.40(2) on the grounds of national security, neither Court's reasoning is confined, either expressly or implicitly, to national security cases under s.40(2). There is no cogent reason to distinguish this case from *Begum No.2* and *N3*. There is no principled reason in law why procedural fairness should place a person who has participated in serious organised crime in a better position than a person who is being deprived of their citizenship on national security grounds. Both deprivation decisions were taken on conduciveness grounds under the same statutory power (s.40(2) BNA 1981), and the nature of the right of appeal is the same, albeit the appeals may be heard by either the First-tier Tribunal or SIAC, depending on the nature of the material in

Tab 81, p.1529

Tab 73, p.1317

issue: see *D5, 6, 7 v SSHD* (SC/176-178/2020, 13 October 2023) at §67 and *C9 v SSHD* (SC/173/2020, 2 February 2024) at §18 where the Special Immigration Appeals Commission applied the approach in *R (Begum) v Special Immigration Appeals Commission* [2021] AC 765 ("*Begum No.1")* to serious organised crime cases[5].

Tab 80, p.1511

34. In *D5, 6, 7 and C9 v SSHD*, the Court of Appeal considered the question of "*what principle, if any, distinguishes cases in which the reason for the deprivation is not an assessment that the appellant is a risk to national security but an assessment that he is involved in SOC*": see *D5, 6, 7 and C9* at §104. In answering that question, Laing LJ noted that one premise of the appellants' argument was that the relevant cases in the House of Lords and the Supreme Court all concerned how SIAC should approach national security cases (as opposed to serious organised crime cases). However, Laing LJ went on to note that at §105 that it did not follow that: "*because those cases were all national security cases, the approach does not or cannot apply when other facets of the public interest are engaged. In none of those cases did the relevant court make any such pronouncement…".* At §106 she concluded (correctly it is submitted) that:

Tab 80, p. 1512

> *"There is no warrant in the words of [sections 40 and 40A of the BNA] for a construction which could lead to the application of different principles to SIAC's review of a deprivation decision, depending on whether the deprivation was based wholly or mainly on national security, or on the other facets of conduciveness to the public good which Parliament has explicitly entrusted to the Secretary of State in the first instance and to SIAC on an appeal. The three aspects of conduciveness to the public good are linked in the statutory scheme; all appellants are exposed to the risk of deprivation on those grounds, and have the same rights of appeal which are subject to certification into SIAC...".*

35. Of the parties in *D5, 6, 7 and C9*, only C9 argued that he should have been given the opportunity to make representations <u>before</u> the Secretary of State deprived him of his citizenship. However, Laing LJ applied Lord Reed's analysis in *U3* at §82 to the effect that "*in relation to deprivation decisions, procedural fairness is secured after the decision has been taken, by means of the right of appeal to SIAC, rather than through the application of common law principles of procedural fairness to*

Tab 80, p.1498

[5] These decisions were upheld on appeal to the Court of Appeal.

the Secretary of State's decision-making process at the time when the decision is taken". On that basis, she concluded at §121:

Tab 80, p.1515

> *"If, as I consider it should, SIAC must take a similar general approach to all deprivation decisions made on the ground that deprivation is conducive to the public good, then, regardless of the particular facet of the public good which is engaged, the Supreme Court's reasoning about procedural fairness in paragraph 82 of U3 […] is relevant. It is obiter, because there was no issue about procedure in that case, but it is strongly persuasive. For what it is worth, I also consider that it is right. That reasoning is explicitly based, not on the precise nature of the issue which SIAC is considering in the appellant's appeal, but on the schematic feature that, where there is an appeal to SIAC against a deprivation decision on conducive grounds, procedural fairness is ensured, after the event, by the statutory right of appeal to SIAC, in and of itself. That reasoning is supported by the reasoning of this court in paragraph 112 of Begum v Secretary of State for the Home Department [2023] EWCA Civ 152; [2024] 1 WLR 4269 that SIAC's role on an appeal (in a national security case) excludes 'the right to prior consultation'….Whether or not it is obiter, it is, again, strongly persuasive, and, in my view, right."*

36. Laing LJ therefore held at §122 that: "*SIAC was right, for the reasons it gave in [D5, 6, 7 and C9], to decide that it was not unlawful to make the decisions in these cases without giving the appellants a chance to make representations".* There is no cogent reason to distinguish between this case and *D5, 6, 7*. Both cases concern deprivation decisions made under s.40(2) (non-conduciveness grounds) on the basis of serious organised crime. The mere fact that the Secretary of State certified her decisions in *D5, 6, 7 and C9* such that the right of appeal was to SIAC, as opposed to the FTT, does not justify a different approach.

Tab 80, p.1516

(ii) Misunderstanding as to the nature and scope of the appeal right under s.40A(1) of the BNA 1981

37. At **[CA/15]**, the Court of Appeal held that:

Tab 5, p.105

> "*the decision of the Supreme Court in Begum … restricts the scope of an appeal to the FTT against a deprivation decision under section 40(2) to a review of the decision on public law grounds. This does not allow new material to be placed before the FTT and involves no right to make representations to the FTT of the kind which might affect the merits of the decision… This right does not therefore fill the gap left by the new procedure adopted in section 40(2) cases explained above".*

38. In so finding, the Court of Appeal misunderstood the nature of an appeal against s.40(2) deprivations decisions following *Begum No. 1*, *Begum No. 2* and *U3*. Those cases make clear that the nature of an appeal to the FTT or SIAC against a s.40(2) decision is "*distinctive*" (*Begum (No. 2)* at §112) and, whilst it is not a full merits appeal, it involves rigorous scrutiny of the decision. Notably:

Tab 71, p.1252

i The appellate body's jurisdiction against a s.40(2) decision is not supervisory, but genuinely appellate: *Begum (No. 1)* at §69, *Begum (No. 2)* at §10ii. It is not fulfilling a judicial review function: *N3* at §38; and the Supreme Court in *U3* at §§43-49, 64 and 91. The principles of law it must apply will depend on the decision, and different principles may apply to the same decision where it has a number of aspects giving rise to different considerations or where different statutory provisions are applicable: *Begum (No. 1)* at §69 and see also *Chaudhry v SSHD* [2025] EWCA Civ 16 at §54.

Tab 72, p.1292
Tab 88, p.1788
Tab 97, p.2188
Tab 97, p. 2193
Tab 97, p.2201
Tab 72, p.1292
Tab 74, p.1339

ii In *Begum No.1,* the Supreme Court emphasised at §71 that SIAC has a number of important functions to perform on an appeal against a s.40(2) decision, namely:

> *"First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act."*

Tab 72, p.1293

iii It was against that background that SIAC concluded in *U3* that in a deprivation appeal it could "*discern a flaw that would not have been detectable in ordinary judicial review proceedings*" because it has a "*more powerful microscope*" than the Administrative Court: *U3 v SSHD* (SC/153/2018 & SC/153/2021, 4 March 2022). In his notice of objection, GK argues at §8 that the "*powerful*

Tab 99, p.2280, para 32

Tab 10, p.174

microscope" analogy described by SIAC in *U3* relates solely to the role and expertise of SIAC, and does not derive from the statutory right of appeal against s.40(2). As such, he argues that those remarks are not relevant to appeals against s.40(2) decisions before the FTT (because of various procedural differences between the FTT and SIAC which GK relies upon). GK is correct to note the "*powerful microscope*" analogy is relevant to appeals before SIAC – there, the individual concerned is often unable to see the full case against them, and so procedural fairness demands that a particularly rigorous approach be applied by SIAC in light of that imbalance. However, no such potential deficit in fairness arises in the FTT because an individual can see the whole case before them and respond fully. The procedural differences between SIAC and the FTT which necessitate the application of a "powerful microscope", result from the need to remedy a fairness deficit which simply does not arise before the FTT. It does not follow, as GK appears to suggest, that that the analysis of the courts in *U3* as to the breadth of the right of appeal before SIAC is irrelevant to appeals before the FTT. To the contrary, the analysis of this Court in *U3* at §§43-49 and 52, and of the Court of Appeal in *U3* at §§174 and 178 as to the important fact-finding role of SIAC on appeals, which is not equivalent to a judicial review, is plainly of relevance to appeals before the FTT (as is the analysis contained within the case law cited at §38i above). See, for example, *Chaudhry* at §54, where the Court of Appeal held, having considered *Begum No.1*, *Begum No.2*, *B4 v SSHD* (SC/159/2018, 1 November 2022) and the Court of Appeal's decision in *U3*[6], that in cases where the deprivation decision was taken on grounds of fraud (i.e. s.40(3) of the BNA), it was for the FTT to find on appeal as a matter of fact, whether there was fraud, false representation or concealment of a material fact.

Tab 97, p.2188

Tab 98, p.2262

Tab 98, p.2263

Tab 74, p.1339

39. The right of appeal to the FTT/SIAC is part of the statutory scheme which has been designed by Parliament to ensure procedural fairness. In *D5, 6, 7,* SIAC held at §94 that:

Tab 81, p.1536, §94

"Further, it is necessary to assess fairness by having regard to the overall process. The appellants had no opportunity to make representations in advance

[6] The Court of Appeal's judgment in *Chaudhry* pre-dated the handing down of this Court's decision in *U3* but both parties and the Court were content for the Court of Appeal to hear the appeal in *Chaudhry* before this Court's decision in *U3* was handed down.

of the decisions being made. However, subject to the statutory constraints that prevent the disclosure of material that would be damaging to the public interest, they have had a very full opportunity to do so in the context of these proceedings. They have taken that opportunity: they have provided extensive evidence, and detailed written submissions amounting (including appendices) to more than 100 pages. The Special Advocates have likewise, acting in the appellants' interests, made extensive representations. If any material error were shown in the decision making process then, in principle, the appellants would be entitled to an order that the decisions be quashed. So, the lack of an opportunity to make representations in advance of the decision is counterbalanced by the appeal/review process."

As in SIAC, in an appeal against s.40(2) deprivation decisions before the FTT, an individual can adduce evidence, make detailed submissions, and if a material error is shown in the decision-making process, they would be entitled to an order that the deprivation decision be quashed. As the Court noted in *D5, 6, 7* procedural fairness must be assessed by reference to the overall process and the lack of an opportunity to make representations in advance of the deprivation decision being taken is counterbalanced by the appeal process. By the same logic a lack of opportunity to make representations post-decision is also "*counterbalanced by the appeal process*". If representations or evidence are advanced during the appellate process, whether before the FTT or SIAC, that require the Secretary of State to reconsider a deprivation, she can do so, and she can then concede the appeal if appropriate to do so: see, *B4* at §18. The ability to do so further demonstrates the flaw in the procedure which the Court of Appeal's process mandates and which, if not followed, is said to invalidate a decision already taken.

Tab 81, p.1536

Tab 68, p.1069

40. At **[CA/15]** the Court of Appeal stated that the appeal right: "*does not allow new material to be placed before the FTT and involves no right to make representations to the FTT of the kind which might affect the merits of the decision…".* That is a misunderstanding. As the Supreme Court confirmed in respect of both the FTT and SIAC in *N3* at §37: "*in hearing the appeal the appellate body makes its own decision on all facts in evidence before it. It is not restricted to the facts as known to the Secretary of State when making the deprivation decision".*

Tab 5, p.106

Tab 88, p.1799

41. At **[CA/15]**, the Court of Appeal also gave two examples of submissions it said that GK may have wanted to make but had no opportunity to raise within the scope of his appeal that (a) his offending was not of the most serious or high-profile kind and

Tab 5, p.106

therefore he did not fall within the Secretary of State's published policy (as described in the ministerial submission in May 2020); and, (b) he now represented a very low risk of re-offending and therefore the Secretary of State should not have exercised her discretion to deprive him of his citizenship.

Tab 5, p.107
[CA/17]

42. However, both these matters could have been raised within the context of his appeal through established public law grounds and/or do not assist GK in any event:

i As to (a), GK could have argued that the Secretary of State failed, without good reason, to apply her established policy to his case and he could have adduced evidence in support of that argument about the nature of his offending. The failure, without good reason, to apply a relevant policy is a well-established public law ground of challenge: *R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport* [2022] 1 WLR 3748 at §100 and *R (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care* [2021] PTSR 1251. However, given the Secretary of State's decision was based on GK's conviction, it is difficult to envisage what submissions he might have been able to make in this regard – his offending involved a leading role in the laundering of an estimated £8m in cash over a prolonged period. There was no dispute that he had been convicted of the relevant offence. In fact, GK appealed to the FTT on the basis that his conduct could never rationally be assessed by the Secretary of State as falling within the scope of the prevailing policy, and to the UT on the basis that the Secretary of State's policy was not applicable to his case. However, the FTT and UT rejected those arguments on the facts, see the FTT's decision at §80 and the UT's decision at §54. They were right to do so.

Tab 65, p.1023

Tab 7, p.165

Tab 6, p.139

ii As to (b), the FTT and UT in fact found in GK's case that there was no requirement for the Secretary of State to be satisfied before making a deprivation decision under s.40(2) that there is a current risk of harm or a current risk of re-offending (see the FTT's decision at §§62 and 64 and the UT's decision at §56). That is a well-established principle in deprivation appeals; what is required to be "current" is the assessment of conduciveness, not the risk of harm, which can be satisfied exclusively by past conduct: *Pham v SSHD* [2018] EWCA Civ 2064, per Arden LJ at §52. Accordingly, an opportunity to

Tab 7, p.160

Tab 6, p.140

Tab 89, p.1828

make representations to this effect post-decision would have added nothing. The UT and FTT correctly concluded that the Secretary of State was entitled in law to make the decision on the basis that she did. It is not a question, as the Respondents seeks to suggest in his Notice of Objection, of treating such material as "*a priori irrelevant*"; it is simply a recognition that in an appeal jurisdiction based on establishing a public law error, the Secretary of State was lawfully entitled to proceed in this way. Further, and in any event, GK had the opportunity to adduce evidence which post-dated the Secretary of State's decision in support of this aspect of his appeal (see *N3* at §37, *B4* at §§16-17; and *U3* at §31) and he did so. For example, he produced an email from his probation officer dated 28 January 2022; a risk assessment dated 26 March 2021; and his license conditions. He also produced a number of letters of support relating to his character, including from an employer (dated 7 March 2022), and from friends (all of which are dated various dates within March 2022). That evidence was squarely before the FTT, but ultimately rejected by the FTT on the basis that SSHD was not under *"any obligation to embark upon a train of enquiry as to what other agencies, or individuals, might offer as their own assessment of the risk that the Appellant posed*" (see the FTT's decision at §61).

Tab 88, p.1799
Tab 68, p.1069
Tab 99, p.2280
Tab 7, p.160

43. To the extent that there may be other arguments not considered by the Court of Appeal that GK may have wished to run, it is difficult to envisage what an opportunity to make such representations post-decision, in addition to the existing right of appeal, would add in the circumstances. The relevant question in s.40(2) cases under the Secretary of State's policy is whether there has been involvement in serious organised crime. In GK's case, as in many cases, that was evidenced by his conviction, which is an uncontested matter of fact. To the extent that there remain any (as yet unidentified) arguments which could not be encompassed within a conventional public law ground of challenge, that is the result of the ambit of the appeal for which Parliament has provided: *Begum (No. 1)* at §66. It is not a reason to redraw the parameters of that challenge.

Tab 72, p.1291

Tab 5, p.113

44. In addition, the Court of Appeal's finding at **[CA/27]** that "*the purpose of s.40(5) is to enable a person who is the subject of a decision to make a deprivation order to*

bring an effective appeal before the order is made" is wrong. There is no support for the Court of Appeal's conclusion in that regard in the BNA 1981 itself. To the contrary, s.40(5) does not stipulate any period of time which must elapse between the notice of the decision and the deprivation order. As the Supreme Court held in *N3*, "*once the written notice has been given the Secretary of State, at a time of his or her own choosing, implements the deprivation decision by making the deprivation order itself*": *N3* at §45. (See also *R (W2) v Secretary of State for the Home Department* [2018] 1 WLR 2380 at §63: "*if the decision to make a deprivation order is lawful the timing of the subsequent order does not make it unlawful"*.)

Tab 88, p.1801

Tab 101, p.2356

45. The Court of Appeal's finding in this regard also ignores the repeal of s.40A(6) and its consequences (see *N3* at §55):

Tab 88, p.1803

i Sections 40 and 40A of the BNA 1981 were inserted in their current form by s.4(1) of the Nationality, Immigration and Asylum Act 2002. As enacted, s.40A(6) of the BNA 1981 provided that a deprivation order under s.40 could not be made while an appeal could be brought or was pending. That provision was repealed by para. 4(c) of Schedule 2 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Paragraph 121 of the Explanatory Notes to the 2004 Act explained that the reason for this change was to allow a deprivation order to "*be made before any appeal is heard, thereby allowing deprivation and deportation proceedings to take place concurrently*".

Tab 44, p.487

Tab 46, p.567

ii The effect of s.40A(6) being repealed is that a deprivation order takes effect from the moment that it is made but it remains subject to a *"(non-suspensive) right of appeal"*: *R (D4) v Secretary of State for the Home Department* [2022] QB 508 at §15. As the Supreme Court recognised recently in *N3* at §55, a deprivation order "*can be, and usually is made before the outcome of appellate proceedings"*.

Tab 79, p.1472

Tab 88, p. 1803

46. The statutory scheme for the making of deprivation decisions, provision of written notice (s.40(5)), and the ability to appeal against deprivation decisions contained within the BNA 1981 constitute, overall, a complete statutory code. There is no lacuna which necessitates the introduction of a procedural requirement, with no

statutory basis, which is aimed at triggering the Secretary of State to reconsider her decision; indeed, such an obligation is inconsistent with the statutory scheme which Parliament has devised. Once a person has their s.40(5) notice, they are aware of the reasons for the decision, and they are aware of the basis on which they can appeal. For all the reasons set out above, the "*distinctive*" appeal available following a s.40(2) decision does not require further supplementing to ensure procedural fairness.

Tab 72, p.1252, § 112

iii. The facts of GK's case

47. The Court of Appeal considered that officials advising the Secretary of State had wrongly asserted in the submission put before her that GK would have a right to make representations post-decision, when he did not: see **[CA/11 & 43]**. It is correct that an ability to make post-decision representations is referred to in the submission (dated 17 December 2020) and Annexes C and D. However, none of those references were focused on the deprivation decision absent an appeal. In turn:

Tab 5, p.102

Tab 5, p.118

i Submission, §11: There is an explicit reference to an ability to make representations that deportation, as opposed to deprivation, would breach GK's human rights or rights under the Refugee Convention. This does not concern the deprivation decision.

Tab 35, p.347

ii Annex C, §§6, 7, 8, 10: Paragraphs 6 and 10 explicitly relate to deportation. §§7-8 relate to both the deprivation and deportation decisions but specifically concern representations regarding human rights (Article 8 ECHR). Article 8 has only a limited application in the deprivation context: the issues are whether the reasonably foreseeable consequences of deprivation amount to an interference with private and family life, and whether deprivation was "arbitrary", rather than whether it was proportionate: see *Aziz v SSHD* [2019] 1 WLR 266 at §§26-29; *Usmanov v Russia* (Application no. 439361/18) (2021) 72 EHRR 33, *Begum No. 1* at §64 and *R3 v SSHD* [2023] Imm AR 683 at §§65-67 and 107. Further, and in any event, it is well-established that in-country deprivation decisions will not engage human rights issues where, as in GK's case, there is no deportation decision accompanying the deprivation decision: *Aziz per* Sales LJ at §§27-29. In such circumstances, it is unnecessary for the Secretary of State and the FTT

Tab 35, p.354

Tab 66, p.1043

Tab 72, p.1290

Tab 91, p.1892

Tab 91, p.1901

Tab 66, p.1043

to engage in a "*proleptic analysis*" of, for example, Article 8 ECHR because "*[t]he making of the deprivation orders would not violate anyone's rights under article 8*": *per* Sales LJ, at §§27, 28. As such, although reference is made at paragraphs 7-8 of Annex C to the opportunity to make representations, relating to Article 8, against both the deprivation and deportation decisions, as is clear from the above, Article 8 only has a limited application in the deprivation context, and in particular in circumstances such as here, where the deprivation decision was not accompanied by a deportation decision.

Tab 35, p.356

iii Annex D, §3: This states that GK will be given the opportunity to make representations against both the deprivation and deportation decisions in relation to s.55 of the Borders, Citizenship and Immigration Act 2009 (welfare of children).

48. Accordingly, the only references to an ability to make representations against the deprivation decision within the submission were in the context of (i) human rights; and, (ii) s.55 of the Borders, Citizenship and Immigration Act 2009. The intention, consistently with the case-law, was for those submissions to be made as part of the appeal: *U3*, *Begum (No. 2)*. However, as to (i), it is well-established that within the existing right of appeal, the question of whether the deprivation decision was incompatible with GK's human rights contrary to s.6 of the Human Rights Act 1998 was for the FTT to determine objectively on the basis of its own assessment: *Begum (No.1)* at §69, and so, GK had the opportunity to make full representations as part of his appeal (albeit noting the limited application of Article 8 in the deprivation context, as is set out above). As to (ii), as is explained at §1 of Annex D, deprivation of GK's citizenship was unlikely to have a significant effect on the best interests of any children because their mother was highly likely to be granted leave to remain, and the deprivation decision would not impact their status as British citizens, nor was there any evidence that it would impact on their education, housing, financial support or contact with GK. In those circumstances, any opportunity to make representations in that regard would not have prevented deprivation.

Tab 72, p.1292

Tab 35, p.356

49. For all these reasons, the references to an opportunity to make representations were irrelevant and/or made no difference in GK's case. GK had the opportunity to make representations in relation to the alleged breach of his Article 8 rights and the

welfare of his children within the scope of the FTT appeal, to the limited extent to which Article 8 could have been engaged in the deprivation proceedings. These representations were considered in detail and dismissed on the merits by the FTT (see FTT's decision at §20, §§39-53). The submission did not refer to any opportunity to make post-decision representations in respect of other issues. No legitimate expectation argument was advanced, and any such argument would have been impossible in circumstances where GK was able to ventilate those points within his appeal and was not aware of the reference to representations when made. Further, and in any event, the appeal process also provided a means for the Secretary of State to keep the decision under review, and to concede the appeal if it became clear during that process that there was an error. See, for example, *U3* at §95:

Tab 7, p.150
Tab 7, p.154
Tab 98, p.2243

> *"…once an appellant appeals, the national security assessment will be updated to take account of her evidence and of any material uncovered by the exculpatory review. In that way, those advising the Secretary of State keep the deprivation decision under review during the appeal. Officials would be bound to draw to the attention of the Secretary of State anything which undermines or materially changes the original assessment. "*

iv. In principle

50. The effect of the Court of Appeal's decision is that a deprivation decision under s.40(2) can be lawfully made, but the continued lawfulness of the decision will be contingent on an opportunity for representations being offered following the decision and a merits-based evaluation taking place. If that is not done, the decision will become unlawful at some later date (despite having been lawfully taken in the first place). That position is unfounded in authority, would foster uncertainty, and is inconsistent with principles of good administration. Recent academic commentary has described the Court of Appeal's decision in *Kolicaj* as being "*vitiated by several fundamental errors*" and being "*contrary both to the public interest and the intention of Parliament in [the] BNA 1981*"[7].

Tab 103, p.2420
Tab 103, p. 2424

51. A public law decision is either lawful or unlawful when made. All decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent jurisdiction.

[7] "*Deprivation of Citizenship: The Limits of Procedural Fairness*", *Judicial Review*, 1–7 (2025) at §§11 and 22.

52. A decision of a public authority cannot generally be challenged on the basis of material or events which post-date its making. That is because a judicially reviewing court is assessing the legality of the decision as at the date it was taken (sometimes also by reference to the process which preceded the taking of the decision)[8].

Tab 5, p.114

53. It appears that the Court of Appeal concluded that the Decision was *issued* **[CA/30]** (or in other words taken) in a way which was procedurally unfair because "*in the absence of a full appeal on the merits to the FTT, she should also say at that time that she is willing to review her decision by conducting a merits based evaluation in light [of] any representations or evidence which the person supplies*" **[CA/29]**. It appears that the Court concluded that the Decision was unlawfully *maintained* because the Secretary of State did not carry out a merits-based evaluation of the Decision following receipt of any representations or evidence: see **[CA/29-31].** See also **[CA/36]** where the Court noted, albeit in the context of considering the Secretary of State's ground of appeal concerning the exercise of her discretion, that the Secretary of State "*had been advised that she would, at some unspecified stage, receive representations from [GK] and that they would receive consideration then, in some unspecified way. She failed to ensure that this happened which meant that both her decision was procedurally unfair and that her reasons were inadequate*". On the Court of Appeal's analysis, a deprivation decision can be lawful when taken (provided the Secretary of State informs the individual of the opportunity to make post-decision representations) but will become unlawful at some later date if the Secretary of State fails to follow through with that promise.

Tab 5, p.114

Tab 5, p.114

Tab 5, p. 116

54. The Court of Appeal did not specify the procedure which it considered the Secretary of State could implement to achieve procedural fairness in its view, concluding that this was not a matter for the court: **[CA/31]**). In itself, this was a problematic approach, since it leaves the practical implications of its decision unclear. For example, it is unclear by which precise point in time the Court considered that procedural fairness required the Secretary of State to consider any further representations (and thus the decision would become unlawfully "maintained" if

Tab 5, p.114

[8] *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064-1064.

she had not done so). Equally, the consequences of the Court of Appeal's decision are problematic. The Court of Appeal appears to have concluded that procedural fairness requires the Secretary of State to offer an opportunity to make representations after the notice to make a deprivation decision is issued pursuant to s.40(5) BNA 1981, but before the actual making of a deprivation order (see **[CA/27-30]**), such that a person's representations must then be considered before the deprivation order is in fact made. However, statelessness for the purposes of s.40(4) BNA 1981 is to be judged as at the date of the deprivation order: *Secretary of State for the Home Department v. Al Jedda* [2014] AC 253 at §32; *Pham v. Secretary of State for the Home Department*[2015] UKSC 19, [2015] 1 WLR 1591 at §37. Following the Court of Appeal's logic, a person would be able to frustrate the deprivation process by renouncing their other citizenship after receipt of the notice of the first decision under s.40(5), during the period in which the Secretary of State had to invite representations, but before the actual making of the deprivation order. This would mean that the Secretary of State would not then be able to make a deprivation order against them because to do so at that stage would make them stateless for the purposes of s.40(4) BNA 1981. Such an approach would entirely undermine the deprivation system.

Tab 5, p.113

Tab 64, p.996

Tab 90, p.1849

Tab 10, p.174

55. At §9 of his Notice of Objection, the Respondent seeks to argue that the Court of Appeal was not creating a new category of 'contingently lawful' decisions, but instead, merely indicating that "*the prima facie unfairness of a no-notice decision might be sufficiently mitigated by (a) a promise made at the time of the decision that subsequent representations could be made and would be substantively reviewed; and (b) a system in place which enabled that to happen*". However, in practice, the effect of the Court of Appeal's decision was to create a new category of 'contingently lawful' decisions. The Court of Appeal's criticism was that the Secretary of State failed to invite and consider post-decision representations and therefore the Secretary of State both "issued" and "maintained" the decision in a way which was procedurally unfair: **[CA/30]**. Had the Secretary of State invited post-decision representations within her deprivation decision, on the Court of Appeal's analysis, that decision would have been lawfully taken. But if the Secretary of State had failed to consider any representations received, it follows from the Court of Appeal's reasoning that the decision would then become

Tab 5, p.114

unlawfully "maintained" such that the original decision would therefore be rendered unlawful at that later stage. The effect of the Court's decision is that the original decision was only contingently lawful (that is to say lawful when made, but becoming unlawful at some unspecified later date if an opportunity to make further representations was not given). For all the reasons set out above, this was an unwarranted and unjustified addition to the statutory scheme. The creation of this new category of contingently lawful decisions is unorthodox and undesirable.

56. The Secretary of State makes three further points in relation to the unorthodox nature of the Court of Appeal's decision:

Tab 102, p.2413
Tab 102, p.1978

i First, GK's reliance on *R (XH and AI) v SSHD* [2018] QB 355, at §§151-155 and *R v SSHD, ex parte Doody* [1994] 1 AC 531, *per* Lord Mustill at 560F to attempt to rationalise the Court of Appeal's decision is wrong. In *XH and AI*, the key issue was the right to good administration under the Charter of Fundamental Rights of the EU. The Court went no further than to suggest that being able to make representations in response to a decision was compatible with that right. It did not suggest a failure to notify someone that they could make such representations could later invalidate a decision that was lawfully taken. In any event, the case was considering a right under EU law, not domestic principles of procedural fairness. Similarly, Lord Mustill's remarks in *Doody* at 560F do not assist. Nowhere in the passage relied upon by GK was it suggested that where Parliament has accorded a right of appeal, a refusal to permit post-decision representations could later render unlawful a decision that was lawfully taken.

ii Second, the Supreme Court's recent decision in *N3* further highlights the flaws in the Court of Appeal's proposed approach. In *N3,* the Supreme Court held that the effect of a successful appeal against a deprivation decision is that the deprivation order is treated as having no effect, and the individual is treated as having been a British citizen throughout for all purposes, save in respect of the lawfulness of immigration enforcement action taken by the Secretary of State on the basis of the deprivation order up to the time the appeal against it was allowed: see *N3* at §60 and §92. The Court of Appeal's 'contingently lawful'

Tab 88, p. 1804
Tab 88, p. 1812

analysis in the present case is inconsistent with the approach in *N3*. It serves to demonstrate that the decision is unworkable in practice.

Tab 43, p.478

iii Third, s.40(5)(a) of the BNA 1981 makes clear that the deprivation notice informs a person that "*the Secretary of State has decided to make an order*" (emphasis added) – it is not notice that the Secretary of State is considering making an order. As the Supreme Court recently confirmed in *N3* at §45, there is "*one decision followed by implementation of the decision".* There is no right of appeal against a later decision by the Secretary of State to uphold or maintain a deprivation decision, after having invited and received representations from the person concerned. The statutory scheme set out within the BNA 1981 does not envisage or provide for the unorthodox approach envisaged by the Court of Appeal. Given that the appeal actually before the Court of Appeal in *Kolicaj* was only against the original deprivation decision, and given the Court of Appeal appears to have accepted that the original decision was validly made, the Secretary of State's appeal against the UT's decision ought to have been allowed, and upon remaking, GK's appeal ought to have been dismissed. The Court of Appeal's jurisdiction was limited to that sole issue. It had no jurisdiction to go on to make the findings it did in relation to a requirement to permit post-decision representations which were not required by the statutory scheme. The Court of Appeal's imposition of such a requirement was an example of judicial legislation.

Tab 88, p.1801

V. GROUND TWO: QUASHING OF THE DEPRIVATION ORDER

57. It is submitted that the Court of Appeal had no jurisdiction to quash the deprivation order.

58. The Court of Appeal only has the powers of the lower court: CPR r.52.20. The right of appeal exists against the deprivation decision only, not the deprivation order: see s.40A(1) BNA 1981, *N3* at §48, and *S1 v SSHD* [2016] 3 CMLR 37 at §61. In *N3*, the Supreme Court held at §§92-93 that: *"Once SIAC makes its determination that a deprivation order would make an individual stateless and accordingly allows the appeal against it, nothing more is required to be done. The Secretary of State is simply bound by that determination for all purposes… As a matter of good practice*

Tab 43, p.481

Tab 88, p.1801

Tab 91, p.1936

Tab 88, p.1813

and for good order, we consider that the Secretary of State should formally withdraw the deprivation order as from the date of the SIAC or tribunal order, to minimise the risk of confusion". The Court of Appeal's approach in this case is inconsistent with the correct approach identified by this Court in *N3*.

Tab 10, p.175

59. The Respondent makes two points in respect of the Secretary of State's Ground 2 (at §§11-14 of the Notice of Objection):

    i that Ground 2 is premature because the Secretary of State had been invited by the Court of Appeal to apply to vary its order, and she failed to do so; and,

    ii that Ground 2 is academic in light of the Supreme Court's decision in *N3* where this Court concluded at §45 that the deprivation decision and deprivation order amounted to "*one decision followed by implementation of the decision*".

Tab 88, p.1801

60. As to the Respondent's first argument (concerning whether this Ground is made prematurely), it is accepted that the draft order was based largely on wording initially agreed by both parties. Nonetheless, the point was drawn to the Court of Appeal's attention in the Secretary of State's application to the Court of Appeal for permission to appeal to the Supreme Court (dated 31 January 2025). After the Secretary of State's permission to appeal application was made, a Court clerk wrote, by email, to the counsel then instructed on behalf of the Secretary of State on 14 February 2025 and stated that "*the Court's provisional view is that it was entitled to quash the order as well as the decision. You are right that the statute provides only for an appeal against the decision, but if the decision is quashed it would seem necessarily to follow that any consequent Order falls to be quashed and that the statute must be understood to confer a power to do so. (Of course the issue only arises because in this kind of case the Secretary of State no longer allows an interval between decision and order.) The Court does not believe that the S1 decision to which you refer is inconsistent with this view"* but that if the point was of substantive significance to the Secretary of State, she should make a "*separate formal application to vary the Order, explaining more fully why she says that the Court did not have the jurisdiction to make it. She should also identify whether the application is made under CPR 40.12 or on some other and if so what basis".* Counsel did not communicate this email to the Secretary of State's solicitors or the Secretary of

Tab 12, p.187

State until 10 March 2025, the day before the deadline for any application by the Secretary of State for permission to appeal to the Supreme Court.

Tab 4, p.91

61. In light of the fact that by 10 March 2025, the original order had been sealed (dated 17 January 2025); permission to appeal to the Supreme Court had been refused by the Court of Appeal; and the deadline for an appeal to the Supreme Court was imminent (11 March 2025), the Secretary of State did not consider that there was sufficient time to make a formal application to vary the Court of Appeal's order nor that an application to vary the Order would have been appropriate at that stage since:

i The Order had already been sealed and so the Court of Appeal was *functus officio* (save for in the narrow circumstances set out below which did not apply here). It is well-established that "*there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under the Civil Procedure Rules (rule 40.2(2)(b)), an order is now perfected by being sealed by the court. There is no jurisdiction to change one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal"*[9].

Tab 83, p.1597

Tab 51, p.614

ii CPR r.3.1(7) provides that *"[a] power of the court under these Rules to make an order includes a power to vary or revoke the order*." However, as the Court of Appeal confirmed in *Tibbles v SIG Plc (Trading as Asphaltic Roofing Supplies)* [2012] 1 WLR 2591 at §39, the established case law has laid down firm guidance as to when the power under r.3.1(7) may be exercised, and this is normally only where (a) there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated. Similarly, in *Collier v Williams* [2006] 1 WLR 1945 at §40, Dyson J noted that "*CPR r3.1(7) cannot be used simply as an equivalent to an appeal against an order with which the applicant is dissatisfied*". Here, there was a disagreement between the Secretary of State and the Court as to a substantive point of law. The correct means of ventilating such a dispute is through an appeal not through an application to vary an order under CPR r.3.1(7).

Tab 96, p.2169

Tab 78, p.1437

[9] *Re: L and B (children)* [2013] 1 WLR 634 at §19. See also *AIC Ltd v Federal Airports Authority of Nigeria* [2022] 1 WLR 3223 at §1.

iii Similarly, this was not a point which could appropriately be corrected under the slip rule within CPR r.40.12 (despite the Court clerk's reference to CPR r.40.12 in their email). The commentary to the White Book 2025 states at 40.12.1, in respect of the slip rule, that *"[t]he court may correct error in a judgment or order arising from "an accidental slip or omission*" and *"[e]ssentially the rule exists to do no more than correct typographical errors".* Here, there was a disagreement between the Secretary of State and the Court on a substantive point of law – specifically, whether the Court of Appeal had the power to quash the deprivation order. It was not a matter that would have been appropriate to resolve through an application under the slip rule.

Tab 52, p.616

Tab 53, p.618

62. Against that background, the Secretary of State considered that the most appropriate course of action was to raise this issue as Ground 2 of this appeal. Notwithstanding the invitation of the Court clerk, there was no requirement for the Secretary of State to make an application to the Court of Appeal to vary its Order, in circumstances where the point of disagreement was a substantive point of law, and for that reason, the Respondent is wrong to suggest that this ground of appeal is "premature". To the contrary, the Secretary of State, quite properly, advanced this ground of appeal within her in time application for permission to appeal to the Supreme Court, which was granted by this Court. In any event, the Respondent's first objection is now academic in circumstances where this Court has granted permission to appeal on Ground Two.

63. As to the Respondent's second argument (that this Ground has become academic in light of the Supreme Court's conclusion in *N3* at §45 that there is "*one decision followed by implementation of the decision*"), that argument is misconceived. In *N3,* the Supreme Court explicitly noted that the right of appeal only exists against the deprivation decision, not the deprivation order itself: *N3* at §48, and that where an appeal against a deprivation decision is allowed, "*the order is to be treated as having no effect*": *N3* at §90, and see also the extract from *N3* at §§92-93 cited at §58 above. Nothing within *N3* renders this aspect of the Secretary of State's appeal academic. To the contrary, *N3* supports the conclusion that the Court of Appeal had no jurisdiction to quash the deprivation order in this case.

Tab 88, p.1801

Tab 88, p. 1801

Tab 88, p.1812

VI. RESPONDENT'S NOTICE POINTS

Respondent's Notice Point 1: The Court of Appeal erred in concluding that it was legitimate for the Secretary of State to operate a system in which she informs the person affected only after it is made because of the risk of renunciation of the other nationality.

64. By his first Respondent's Notice point, GK argues that the Court of Appeal erred in concluding, when determining what fairness required in the particular circumstances of GK's case, that it was legitimate for the Secretary of State to inform GK only after the deprivation decision had been taken because of the risk of renunciation of nationality. GK argues that no such risk was established in GK's case because the Secretary of State did not adduce evidence of the process of renunciation of Albanian citizenship or its likely timeframe.

65. This argument is wrong. The Court of Appeal was right to conclude, on the evidence before it, that it was legitimate to operate a system in which the Secretary of State informed the person affected by the decision only after it was made (i.e. with no opportunity for prior representations) because of the risk of renunciation of any other nationalities. In *Begum No.2* at §112, the Court of Appeal concluded that there was no right to prior consultation before a deprivation decision was taken under s.40(2) on the grounds of national security due to "*the existence and distinctive nature of this right of appeal*" (applying *Al-Jedda No.2* and *U3*). That judgment was upheld by this Court when refusing permission to appeal in Begum's case: see §2 of the permission ruling. That decision is a complete answer to this point – the Court of Appeal did not need further evidence before it in GK's case about the renunciation of Albanian citizenship in particular. The Court's reasoning in *Begum No.2* was not expressly or implicitly confined to national security cases under s.40(2) and there is no principled reason why fairness would require prior consultation in a serious organised crime conduciveness case, but not in a national security case (thus placing the individual who has participated in serious organised crime in a better position than a person who is being deprived of their citizenship on national security grounds).

Tab 71, p.1252

Tab 108, p.2454

Respondent's Notice Point 2: The Deprivation Order was unfair because it was made by applying a policy which was not published and was not made available to GK until after the Order was made

66. The Secretary of State understands GK's position to be that the ministerial submission dated 13 May 2020 was an unpublished policy[10]. However, it is well-established by existing case law that the ministerial submission dated 13 May 2020 was not an unpublished policy. In *D5, 6, 7 and C9*, Laing LJ noted at §24 that "*SIAC specifically, and rightly, rejected, in both appeals, an argument that a submission to the Secretary of State dated 13 May 2020 and entitled 'deprivation of British citizenship', to which the Secretary of State had referred in correspondence, and in another case, was a statement of her policy…"* There was no appeal against that conclusion in *D5, 6, 7 and C9* . See also, in particular, §§57 and 95-99 of SIAC's judgment in *D5, 6, 7* and §§32-35 of SIAC's judgment in *C9.*

Tab 80, p.1494

Tab 81, p.1526

Tab 81, p.1536

Tab 73, p.1320

67. In the present case, the UT concluded that it was "*entirely satisfied*" that the ministerial submission dated 13 May 2020 was not a "*secret or alternative policy*" since:

> *"The paper which [was] provided was simply a discussion or explanation of the substance of the current policy, which was the policy which the respondent applied in reaching her decision. It follows that there is no substance in the appellant's case that the decision in relation to him was as the result of the application of some "bottom drawer" or unpublished policy and unlawful as a consequence."* **[UT/53]**

Tab 6, p.139

68. The UT was right to reach that conclusion and the second Respondent's Notice point must fail for the reasons set out above.

[10] Since, although this is not specified within the Respondent's Notice before the Supreme Court, this was GK's case within his Respondent's Notice before the Court of Appeal.

Respondent's Notice Point 3: The Court of Appeal erred in concluding that the Upper Tribunal was wrong in law to hold that the Secretary of State did not consider the exercise of her discretion under s.40 of the British Nationality Act 1981

Tab 5, p.116

69. The documentary evidence before the Court of Appeal clearly demonstrated that the Secretary of State was aware of her discretion and exercised it: see **[CA/37-40]**. It was entirely clear from the submission and the decision letter, taken as a whole, that the SSHD was well aware that she had a discretion, and was given a significant amount of material relevant to the exercise of that discretion. Had she been under the impression that deprivation followed automatically once the threshold of involvement with serious organized crime was met, then there would have been no need for any of the remaining information. The section in the decision letter referring to section 55 and the welfare of the children would have been completely meaningless. There was no proper basis for the UT to conclude that SSHD did not consider the exercise of her discretion under s.40 of the BNA 1981.

Tab 5, p.117

70. As the Court of Appeal found, it is "*clear from the briefing documents that all concerned in advising the Secretary of State knew that there was a discretion to be exercised, and they sought to assist her in that regard. The NCA letter addresses discretionary matters, as does the Annex which addresses compatibility with Convention Rights (Annex C). Annex D deals with the children and this is fully reflected in the Notice*" and accordingly Edis LJ concluded that he "*did not think it [was] possible to say that the Secretary of State was unaware she was exercising a discretion in making her decision*" **[CA/39]**. For all the reasons set out above, the third Respondent's Notice point too must fail.

VII. CONCLUSION

71. In the circumstances, the Court is invited to allow the appeal for the following among other:

REASONS

(1) The Court of Appeal erred in finding that procedural fairness required that GK be granted a right, after SSHD had decided to deprive him of his British nationality, to make representations to SSHD for a merits-based evaluation of the deprivation decision;

(2) The Court of Appeal erred in quashing the deprivation order. It had no jurisdiction to do so because there is no right of appeal against a deprivation order; the right of appeal exists against the deprivation decision.

SIR JAMES EADIE KC
DAVID BLUNDELL KC
HARRIET WAKEMAN

26 September 2025