

**IN THE SUPREME COURT** **UKSC/2025/0043**  
**ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)**

**BETWEEN:-**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**-and-**

**MR GJELOSH KOLICAJ**

**Respondent**

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**WRITTEN CASE ON BEHALF OF THE RESPONDENT**

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

**OVERVIEW**

**A. INTRODUCTION AND SUMMARY SUBMISSIONS**

- Tab 33, pp.340-341      1. On 22 January 2021 the Appellant Secretary of State for the Home Department's ['A'] gave the Respondent GK ['R'] notice that she had decided to deprive him of his British citizenship, pursuant to her powers under s.40(2) of the British Nationality Act 1981 ['the BNA 1981']. About half an hour later, A implemented that decision by serving a deprivation order on him. R appealed to the First-tier Tribunal ['the FtT']. R had received no prior notice of A's decision and had therefore had no opportunity to make representations to A before she took it. In a judgment of 17 January 2025, the Court of Appeal concluded that, in all of the circumstances, including the nature of the appeal available to him following the A's decision, A had issued and maintained the decision in a way which was procedurally unfair [CA/30, 42, 43], and directed that the deprivation order be quashed.
- Tab 34, p.342
- Tab 5, pp. 92 -119
- Tab 5, pp.114; 118

2. A argues before this Court that the Court of Appeal erred in concluding that she had acted with procedural unfairness by depriving him of his nationality without prior notice and failed to provide him with an opportunity to make representations to her after the decision for a merits-based evaluation (Issue 1). A further argues that the Court of Appeal had no jurisdiction to quash the deprivation order (Issue 2).

- Tab 3, pp. 168- 170
3. By a Respondent's notice, R argues (a) that the Court of Appeal erred by finding, on the facts of A's own case, that A was justified in making a decision without giving prior notice (Issue 3); (b) that the deprivation decision<sup>1</sup> was unfair because it was made by reference to an unpublished policy which R was, therefore, unable to address (Issue 4); and (c) that the Court of Appeal erred by overturning the finding of the Upper Tribunal ['UT'] that the Secretary of State had failed to exercise her discretion when making the s.40(2) decision (Issue 5). Issues 3-5 will be academic to R if A does not succeed on her Ground 1.

## B. FACTS

4. R was born an Albanian national. He entered the UK lawfully on 6 August 2005. On 5 February 2009 he was naturalised as a British Citizen, following which he held dual British and Albanian nationality. He married his second wife, an Albanian national, on 22 January 2013, and two British national children were born to the couple<sup>2</sup>. On 19 December 2019, R was convicted on a guilty plea of conspiracy to remove the proceeds of criminal conduct from England and Wales and sentenced to 6 years' imprisonment.

Tab 38, pp. 367-374

- Tab 36, pp. 359-361
5. On 19 October 2020, the National Crime Agency submitted a recommendation ['the NCA Recommendation'] in which it invited A to consider the use of her powers under section 40(2) of the *British Nationality Act 1981* ['the 1981 Act'] to deprive R of his British citizenship and subsequently deport him to Albania. The NCA Recommendation summarised R's offence, assessed that it was likely that R "would continue to pose a
- Tab 43 , pp. 477-480

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<sup>1</sup> The Respondent's Notice refers to the 'order'; the reference should be to the 'decision' (as an appeal lies against the decision rather than the order).

<sup>2</sup> By the time of R's appeal to the FtT, his wife was pregnant with twins; they are now almost 2 years old. All four children have been British since birth.

*risk to the UK following completion of [his] sentence [...]*”, and concluded that his

Tab 36, p.361 “*continuing presence in the UK is clearly not conducive to the public good*”.

6. On 17 December 2020 an officer within the Home Office (Steve Parsons) sent a

Tab 35, ministerial submission to A [**‘the Parsons Submission’**] proposing that she deprive R pp.343-358 of his citizenship. The submission enclosed the NCA Recommendation and four further annexes. It referred to a ministerial submission of 13 May 2020 about the circumstances

Tab 35, pp. in which the deprivation power should be used, set out its assessment that R’s 350-378 “*criminality fits squarely within the parameters for use of the conducive deportation power set out in Fiona Johnstone’s submission of 13 May*”; that depriving him of his

Tab 37, British nationality would “*negate the risk he poses to the UK based on his role in p.362-366 organised criminality*”; and argued that deprivation was “*not sought solely to sanction the criminality in this case but also as a tool to protect the public*” [Parsons Submission

Tab 35, §§5, 9, 10]. The Home Secretary was specifically asked to agree that steps be taken to pp.345-346 avoid any delay between serving a deprivation decision and serving a signed order, in order to “*mitigate any opportunity for [R] to take action to renounce his Albanian*

Tab 35, *citizenship and thereby make him solely British prior to the order being signed, which p.349 would prevent deprivation taking place [...]*” [Parsons Submission §22].

7. On a date thereafter, A decided to deprive R of his British citizenship pursuant to s.40(2)

Tab 33, of the 1981 Act [**‘the Decision’**] and, at 10.30 a.m. on 22 January 2021, while R was pp.339-341 still serving the custodial part of his sentence, she gave him notice of the Decision. That notice triggered a right of appeal to the First-tier Tribunal [**‘the FtT’**]. At 11.03 a.m. on

Tab 34, p.342 the same day, A served on R the order which deprived him of his citizenship with immediate effect [**‘the Order’**]. The NCA Recommendation, the Parsons Submission, and Annexes B-D to that submission were not sent to R at that time.

8. On 9 February 2021, R appealed against the Decision to the First-tier Tribunal [**‘the**

Tab 7, **FtT’**] pursuant to s.40A(1) of the 1981 Act. He relied on public law grounds and on pp.145-167 Article 8 ECHR. On the following day, A initiated deportation proceedings against him<sup>3</sup>.

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Tab 6 ,  
p.126 <sup>3</sup> Due to a misunderstanding of the law by R’s previous representatives, there was no response to A’s initial correspondence about deportation [UT/14], and a deportation order was signed on 8 July 2021. R applied on 16 July 2021 to revoke it, A refused, and that refusal is the subject of a separate appeal pending before the FtT.

9. In the course of R's FtT appeal: (i) on 30 March 2021 A provided R with a Respondent's Bundle pursuant to rule 24 of the *Tribunal Procedure (First Tier Tribunal) (Immigration and Asylum Chamber) Rules 2014* ['**the FtT Procedure Rules**'], which included the NCA Recommendation of 19 October 2020; (ii) on 8 February 2022, R filed a provisional bundle of material which included evidence relating to his risk of reoffending (which probation services had assessed as low on 26 March 2021); (iii) In response to specific disclosure requests from R and an direction from the FtT, on 18 February 2022 A disclosed the Parsons Submission and its further annexes; (iv) on 11 March 2022, R filed his appeal skeleton argument ['ASA'] and a bundle of evidence, including detailed evidence relating to his family and private life in the UK; (v) on 23 March 2022, in response to a further specific disclosure request from R, A disclosed the 13 May 2020 Ministerial Submission of Laura Johnstone ['**the May 2020 Submission**'], of whose existence R's representatives had first become aware when they received the Parsons Submission; (vi) also on 23 March 2022, A filed her own skeleton argument; and (vii) on 30 March 2022, R filed a reply to A's skeleton argument, dealing specifically with the disclosed May 2020 Submission.

Tab 56, p.784

Tab 31,  
pp.332-334

Tab 30, p.329

Tab 29,  
pp.319 - 320

Tab 29,  
p.322-326

Tab 28,  
p.301-318

Tab 26,  
p.296-298

10. In her covering letters of 18 February 2022 and 23 March 2022, and in her ASA of 23

Tab 29, p.319

- March 2022 and further correspondence of 29 March 2022, A denied that she had a duty of disclosure.

Tab 27, p.299

Tab 7,  
pp.145-167

Tab 7,  
pp.153-154

Tab 7, pp.157

Tab 7,  
pp.158-166

Tab 7, p.160

Tab 7, p.162

11. The FtT dismissed A's appeal on 5 May 2022. It reviewed A's conclusion of 22 January 2021 that deprivation was conducive to the public good (i.e. that the condition precedent for deprivation was met) on public law principles [FtT/36-38]. It concluded that Article 8(1) was not engaged by the deprivation decision [FtT/53] in light of the very limited Article 8 claim which A had made [FtT/49]. It then [FtT/54-84] reviewed A's deprivation decision (i.e. her exercise of discretion) on public law grounds<sup>4</sup>, declining to consider evidence which had come into existence after 22 January 2021 [FtT/61] and concluding that there was "*no obligation upon [A] to always commence a train of enquiry into an assessment of the risk of reoffending*" [FtT/65]. It concluded that A's

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<sup>4</sup> The FtT directed itself in accordance with the guidance given in the UT's then leading case on the approach to deprivation appeals, *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 238 (IAC).

decision was **not** procedurally flawed for failure to give R the opportunity to make prior representations [FtT/66-69]. The FtT concluded that A acted rationally in concluding that R “*fell within the scope of her prevailing policy*” [FtT/84 and see 70 for the identification of that policy].

Tab 7, p.162

Tab 7, p.166;  
p.162

Tab 6,  
pp.120-144

Tab 6, p.143

12. R applied for, and was ultimately granted, permission to appeal to the UT, which allowed his appeal in a determination promulgated on 13 November 2023. The UT rejected A’s submissions in relation to procedural fairness, to the unpublished 13 May 2020 ministerial submission<sup>5</sup>, and to the duty of enquiry. Identifying, however, the two stages of a deprivation decision under s.40(2) of the 1981 Act (which required the SSHD to decide first whether the condition precedent for deprivation was met, then whether to exercise her discretion to make a deprivation order), the UT concluded that A had (i) failed to adopt that mandatory two-stage approach [UT/62]; or (ii) if it had adopted that approach, it had failed to give adequate reasons in support of its decision about the second stage of the approach [UT/63].

13. A appealed to the Court of Appeal, with permission granted by Falk LJ on 15 August 2024, against the UT’s finding that she had failed to adopt the two-stage approach. R filed a Respondent’s Notice arguing that the UT should also have allowed his appeal by reference to procedural fairness and to the 13 May 2020 submission. The Court of

Tab 16,  
pp.198-213

Tab 5, p.114

Appeal allowed A’s appeal on the discretion ground, but concluded that R’s Notice and Deprivation Order were issued in a way which was procedurally unfair and had to be quashed [CA/30]; in those circumstances it was unnecessary to deal with the policy arguments (R noting that the 13 May 2020 Ministerial Submission had, in any event, been largely incorporated into published policy on 10 May 2023).

Tab 9, p.171 14. A was granted permission to appeal to the Supreme Court on 6 June 2025.

## C. LEGAL FRAMEWORK: DEPRIVATION OF CITIZENSHIP

<sup>5</sup> R argued before the UT that it was in fact “*an unpublished supplementary policy or adopted statement of internal guidance [...] which further limits the exercise of the discretion in comparison with the published policy*” and that, by reference to *Lumba v SSHD* [2012] 1 AC 245 §§37-39 it was “*required to be published at least in gist*”; alternatively its existence and adoption were “*relevant matters which the principles of procedural fairness required [R] to be able to address before a substantive adverse decision was taken*” (Speaking Note of 19 July 2023 §§10(b) and (c). See also R’s Skeleton Argument of 28 June 2023 §§4.14, 4.38.)

Tab 20,  
pp.248;  
256

Tab 85,  
p.1721

Tab 18,  
pp.219-  
220

15. A core part of A's case is that "*the "distinctive" appeal available following a s.40(2) decision does not require further supplementing to ensure procedural fairness*" (A's

Tab 2, p.38 Written Case §46). Appeals from deprivation decisions under s.40(2) of the BNA 1981 may be heard either in SIAC or in the FtT, and the two tribunals have developed parallel but materially distinct procedures and practices. R's response to this part of A's case is that the "*distinctive nature*" of the appeal, which the Courts have analysed, consists of a set of procedures and practices, mitigating against unfairness, which have been developed in SIAC appeals, but do not operate in the FtT and, in particular, did not operate in R's own proceedings before the FtT. The following section presents the statutory framework for deprivation decisions and appeals, and then examines the different ways in which procedures and practices have been developed in the two tribunals.

### ***Statutory framework***

Tab 43, p.477 16. Section 40 of the BNA 1981 governs the Secretary of State's power to make deprivation orders. By s.40(2), if she is "*satisfied that deprivation is conducive to the public good*", then she "*may by order deprive a person of a citizenship status [for present purposes, his/her status as a British citizen]*". A parallel discretionary power exists if the Secretary of State is satisfied that a person has obtained his/her citizenship by fraud or other dishonesty (s.40(3)).

Tab 43, p.478 17. The Secretary of State is prohibited from making an order on s.40(2) grounds if she is satisfied that the order would make the person stateless (s.40(4)), unless the person obtained citizenship by naturalisation, would be entitled to obtain citizenship of another country, and has "*conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom [...]*" (s.40(4A)). Subject to a narrow exception which was not in force at the material time (BNA s.40(5A)), a mandatory precondition for the making of an Order is that the person be given "*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 under section 40A(1) or under section 2B of the Special Appeals Immigration Act 1997*". As this Court emphasised in *R (N3)*

Tab 88, pp.1802-1803 *v SSHD [2025] UKSC 6, [2025] 2 WLR 386* §54 "*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*: the order is the “*implementation of the decision*”, rather than a separate decision.

- Tab 43, p.477 18. There are thus two routes to an appeal from a s.40(2) decision. By BNA 1981 s.40A(1)(a) a person who is given a s.40(5) notice of a deprivation decision may appeal against the decision to the First-tier Tribunal. By contrast with other appeals to the First-tier Tribunal, no grounds of appeal are specified by the statute. By s.40A(2), however, the Secretary of State may certify that the decision was taken “*wholly or partly in reliance on information which in his opinion should not be made public*” in the interests of national security, UK international relations or otherwise in the public interest, in which case there is no appeal to the First-tier Tribunal. Since 2003, however, where an appeal is certified on this basis, s.2B of the Special Immigration Appeals Commission Act 1997 [‘**the SIAC Act 1997**’] provides a right of appeal to SIAC. It is important for present purposes that there are therefore two appellate routes from a s.40(2) decision to different tribunals with different procedure rules, practice directions, and practices.
19. Between 2003 and 2005, the appellant regime in s.40A included a provision (s.40A(6)) suspending the power to make any deprivation order until an appeal (whether to the FtT or to SIAC) had been finally determined, withdrawn or abandoned (former BNA 1981), but this provision was repealed on 4 April 2005, with the effect that an appeal was no bar to deprivation. The purpose of the repeal was “*to facilitate earlier removal from the UK [...] or the prevention of entry into the UK of the person concerned [...]*”<sup>6</sup>. Between 2005 and 2014, s.40A contained a provision (s.40A(3)(a)) which empowered the FtT or SIAC to direct that a deprivation order should be treated as having had no effect. The purpose of the repeal of that provision was to ensure that immigration enforcement action remained lawful pending the final determination of the appeal before SIAC or the FtT (*N3* §60); as this Court established in *N3* however, for other purposes a successful appeal produced legal effect from the outset, and the Secretary of State “*is not entitled to deny that the individual remained a British citizen throughout the whole period after the making of the deprivation order [...]*” (*N3* § 92)

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Tab 88, p.1803 <sup>6</sup> *N3* §54; see also §56: the purpose was “*to facilitate enforcement and therefore protection of the public at an earlier stage*”.

- Tab 44, p.484 20. Sections 40 and 40A do not identify the consequences of a successful appeal in SIAC, or in the FtT, and the legislation “*operates on the basis of an assumption that the ordinary principle governing the effect of an appeal will apply*” (N3 §50); nor is there any provision directing the Secretary of State to restore British citizen status or providing for the withdrawal of a deprivation order (N3 §51). Rather, “*as a matter of good practice and for good order [...] the Secretary of State should formally withdraw the deprivation order as from the date of the SIAC or tribunal order [allowing an appeal against a decision to make a deprivation order] [b]ut the binding effect of such an order does not depend upon the taking of such an administrative step*” (N3 §93).

### ***Procedure and practice in SIAC and the FtT***

- Tab 45, p.490 21. SIAC was established pursuant to the SIAC Act 1997 s.1 in order to “*remedy the deficiencies in the advisory panel system and to produce a system which reconciled, so far as possible, the interests of national security in such cases and the interests of the individual*” (*W (Algeria) v SSHD* [2010] EWCA Civ 898 §6<sup>7</sup>). The Act provides for the appointment of Special Advocates (s.6) and empowers the Lord Chancellor to make rules, subject to affirmative Parliamentary resolution, for “*regulating the exercise of the rights of appeal [to SIAC]*” and “*for prescribing the practice and procedure to be followed*” (s.5); in making the rules, the Lord Chancellor must have regard, in particular, to “*the need to secure that decisions which are the subject of appeals are properly reviewed*” and “*the need to secure that information is not disclosed contrary to the public interest [...]*” (s.5(6)).
- Tab 55, p.736 22. As originally enacted, the Special Immigration Appeals Commission (Procedure) Rules 2003 [“**SIAC Procedure Rules**”] simply required the Secretary of State (by Rule 10) to file with the Commission as soon as reasonably practicable after the appeal is lodged “*a statement of the evidence upon which [she] relies in opposition to the appeal*”; Rules 37-38 provided a limited CLOSED procedure.

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<sup>7</sup> The Court of Appeal’s summary of the origins and purposes of SIAC was cited with approval by Lord Brown in *W (Algeria) v SSHD* [2012] UKSC 8, [2012] 2 AC 115 §2.

23. The SIAC Procedure Rules were then very significantly amended by the Special Immigration Procedure (Amendment) Rules 2007<sup>8</sup>, themselves codifying practices which had been developed during the early years of SIAC<sup>9</sup>. These introduced inter alia:
- (i) A requirement that the SSHD serve “*any exculpatory material of which he is aware*” together with the statement of evidence (Rule 10(1)(b)).
  - (ii) Provision for an appellant then to file and serve evidence in support of their appeal (Rule 10A(1)).
  - (iii) A requirement, if such evidence is served, that the Secretary of State make a further “*reasonable search for exculpatory material*” and file with the Commission a statement of any further evidence on which s/he wishes to rely (Rule 10A(4) and (9), again subject to a CLOSED procedure).
  - (iv) Provision for both the appellant and the Special Advocate to apply for directions requiring the Secretary of State to “*file further information about his case, or other information*” (Rule 10A(5)-(7)).

24. The amended SIAC Procedure Rules were supplemented in turn by a Practice Note for Proceedings Before SIAC (5 October 2016). The Practice Note fleshes out the provisions for “*full and fair disclosure of exculpatory material*” (being “*any material which adversely affects the case of the SSHD or would lend support to the position of the Appellant/Claimant*”)<sup>10</sup>. At the time when the Practice Note was written, it was understood that s.2B appeals to SIAC were full merits appeals; and there is, understandably, nothing in the Practice Note about ongoing review by the Secretary of State of the merits of the original decision. Practices which have subsequently developed are summarised in *U3 v SSHD* [2025] UKSC 19, [2025] 2 WLR 1041 §§46, 84<sup>11</sup> (see further below).

25. The Immigration and Asylum Chamber of the First-tier Tribunal, by contrast with SIAC, deals primarily with proceedings where all of the material the Secretary of State relies on is disclosed to an Appellant; and it deals almost exclusively with appeals where it conducts a full, merits-based assessment. the FtT Procedure Rules 2014, with

<sup>8</sup> Those changes remain in force.

Tab 94 , p.2075 <sup>9</sup> See *RB (Algeria) v SSHD* [2009] UKHL 10, [2010] 2 AC 110 §17 per Lord Phillips.

<sup>10</sup> Practice Note §§9, 11. For the contents of disclosure, see also *R (SSHD) v SIAC* [2015] EWHC 681 (Admin), [2015] 1 WLR 4799 (Divisional Court) §38.

Tab 95, p. 2157

Tab 97, pp.2188-2189 <sup>11</sup> See also §§44-49 and 91.

subsequent amendments, are made by a Tribunal Procedure Committee pursuant to s.22(1)-(2) of the Tribunals, Courts and Enforcement Act 2007 ('TCEA'), s.22(4) and Schedule 5 Part 1. Practice Directions and Practice Statements are made pursuant to ss.23(1)(a) and 23(2) TCEA. There appear to be no Rules or Practice Directions aimed specifically at appeals against s.40(2) deprivation decisions.

26. At the time of the FtT appeal in the Respondent's case, the FtT Procedure Rules contained very limited obligations on the SSHD for disclosure, no provision for exculpatory review, and no requirement for any post-decision reconsideration. Rule 24 required a 'Respondent's Bundle' containing the notice of the decision to which the appeal relates and “[24(1)(a)] *any other document the respondent provided to the appellant giving reasons for the decision*”, together with “[24(1)(d)] *any other unpublished document which is referred to in a document mentioned in subparagraph (a) or relied upon by the respondent*”. If (but only if) the Secretary of State intends to *change or add to* the grounds or reasons relied on, she must provide the Tribunal and the other parties with “*a statement of whether the respondent opposes the appellant's case and the grounds for such opposition*”. There is no further framework for disclosure as a matter of course, although there are provisions empowering the Tribunal to order the production of documents (see e.g. Rules 4(1), 4(3)(d), 6(2)-(3), 15(1)(b) and 15(4)).

Tab 56, p.769

27. On 11 June 2020 the President of the FtT (IAC) published 'Presidential Practice Statement No 2 of 2020: Arrangements during the COVID-19 pandemic', aimed at FtT (IAC) proceedings brought *online*, and outlining standard directions which would require the respondent to an appeal to undertake a “*meaningful review of the appellant's case, taking into account the [Appellant's Skeleton Argument] and appellant's bundle, providing the result of that review and particularising the grounds of refusal relied upon*”. In those standard directions, the respondent would be required to “*engage with the submissions made and the evidence provided to the Tribunal*”. This did not require a respondent to reconsider her decision on the merits taking into account post-decision evidence, particularly in a case where an appeal was understood to be limited to public law grounds directed towards circumstances at the date of the decision, still less did it require a respondent to conduct an exculpatory review and file further evidence. In the present case, there was no respondent's review, and the Secretary of State did not

consider that she was required to make any disclosure until a specific direction was made.

- Tab 57,  
p.845
28. On 6 April 2022, the day after the FtT hearing in the present case, Rule 24A was introduced into the FtT Procedure Rules. This largely codified the COVID-19 Practice Statement, requiring a respondent, within 14 days of receipt of an ASA, to provide “*a written statement [...] of whether the respondent opposes all or part of the appellant’s case and if so the grounds of such opposition*”. There is no requirement of a review of the merits of the original decision, but rather a response to the ASA with a view to narrowing issues; and there is no requirement for an exculpatory review, for production of documents, or for any further review after such disclosure<sup>12</sup>. A further Senior President of the Tribunal’s [‘SPT’] Practice Direction and Chamber President’s Practice Statement, both of 13 May 2022, mirrored the wording of the 2020 Practice Statement. Tab 60,  
pp.857-881
- The most recent SPT Practice Direction of 1 November 2024 sets out (in paras 7.5 to 7.11) more details of the mandatory contents of a Rule 24A(3) Review, with increased focus on narrowing the issues (including a requirement that a respondent set out her position on any schedule of disputed issues, make submissions about any issues on which there is disagreement, specify which, if any, witnesses the respondent intends to cross-examine, and set out any concessions made in light of the ASA).
- Tab 61,  
p.890-891

#### *The jurisdiction of SIAC on s.2B appeals and of the FtT on s.40A appeals*

- Tab 72,  
p.1262
29. Prior to the decision of this Court in *R (Begum) v SIAC and SSHD* [2021] UKSC 7, [2021] AC 765 [‘**Begum no. 1**’], it was generally thought that s.40A of the BNA provided “*a full merits right of appeal*” (*Al Jedda (No. 2) v SSHD* (SC/66/2008) §159). This was one of the reasons why SIAC, in *Al Jedda no. 2*, considered that there was no right to prior notice and representations: the nature of the post-decision appeal was “*enough to dispense with any prior obligation to consult*”<sup>13</sup>. A similar approach was taken by the Court of Appeal in *Begum v SIAC and SSHD* [2020] EWCA Civ 918, [2020] 1 WLR 4267 §125: “*the full merits appeal is a hearing de novo in which SIAC*
- Tab 63,  
p.966

Tab 75,  
pp.1364-  
1366

<sup>12</sup> For the UT’s view of the very limited role of evidence filed at the Rule 24A stage, see *Chimi (deprivation appeals; scope and evidence) Cameroon* [2023] UKUT 115 (IAC) §§61-68 and below paragraph 32.

Tab 63,  
pp.966-  
967

<sup>13</sup> *Al Jedda no. 2* §§160-161, citing *Bank Mellat* §187.

*has to stand in the shoes of the [SSHD] and determine whether, on all the evidence before it, the conditions for making a deprivation decision are made out”.*

- Tab 72, 30. This Court disapproved that approach in *Begum no. 1* §§68-71: appellate courts or p. 1292-1293 tribunals “cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves” (§68)<sup>14</sup>; they are generally restricted to considering whether the decision-maker has acted lawfully by reference to public law principles, and “the principles to be applied by SIAC in reviewing the Secretary of State’s exercise of his discretion are largely the same as those applicable in administrative law” (§69)<sup>15</sup> with “appropriate respect” paid to the SSHD’s assessment when making evaluative judgments (§70); despite this, SIAC’s role in an appeal against a s.40(2) decision is “appellate” rather than supervisory (§69) and SIAC has “a number of important functions to perform on an appeal against a decision under section 40(2)”, which include assessing “whether the Secretary of State [...] has been guilty of some procedural impropriety” (§71).
- Tab 72, Tab 76, 31. In *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 00238 (IAC), p.1374 the UT ‘reformulated’ the approach the FtT should now take to s.40A appeals in light of this Court’s clarification of the law in *Begum no. 1*. This was the case which governed the approach of the FtT at the time of its decision in the present case<sup>16</sup>. It proposed a three-stage procedure (§30). First, the FtT should “establish whether the relevant condition precedent specified in section 40(2) or (3) of the 1971 Act exists [i.e. conduciveness to the public good or citizenship obtained by dishonesty] for the exercise of discretion whether to deprive [...]” and “in answering the condition precedent question” the Tribunal “must adopt the approach set out in paragraph 71 of the Judgment in Begum [no. 1], which is to consider whether the Secretary of State has
- Tab 76, Tab 76, pp.1386

<sup>14</sup> As the Court noted, SIAC had previously had a power to allow an appeal on the basis that the SSHD’s discretion should have been exercised differently, but the provision creating that power had been repealed.

Tab 72, <sup>15</sup> “Different principles” apply where SIAC is considering whether the SSHD has acted incompatibly pp.1292; with a person’s human rights, or when determining whether the SSHD’s order would make a person and 1293 stateless contrary to BNA 1981 §40(4) (*Begum no. 1* §§69, 71), or when determining whether the SSHD has established a condition precedent of fraud or dishonesty for the purposes of BNA 1981

Tab 74, s.40(3) (*Chaudhry v SSHD* [2025] EWCA Civ 16; [2025] K.B. 395)

Tab 7, 153 <sup>16</sup> *Ciceri* was handed down on 8 September 2021. Both parties invited the FtT to follow *Ciceri* (R’s Skeleton Argument of 11 March 2022 §§ 6, 8; A’s Skeleton Argument of 23 March 2022 §§ 13-14) and the FtT duly did so [FTT/§§ 36-37].

Tab 76, p.1386	<p><i>made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held</i>” (§30(1)). Second, if the relevant condition precedent was established to that standard, then the Tribunal “<i>must determine whether the rights of the appellant or any other relevant person under the ECHR are engaged [...] and] if they are, the Tribunal must decide for itself whether depriving the appellant of British citizenship would be a violation of those rights</i>” (Ciceri §30(2)), having regard to the foreseeable consequences, and assessing proportionality by reference to “<i>the evidence before it (which may not be the same as the evidence considered by the Secretary of State)</i>” (§30(3)). Thirdly, if deprivation would not breach those rights, the Tribunal may allow the appeal if, but only if, it concluded that the Secretary of State [‘<b>the SSHD</b>’] had fallen into public law error in the exercise of her discretion (§30(6)). Importantly, while updating evidence was therefore considered to be admissible for the purposes of assessing proportionality, it was <i>not</i> admissible when determining the questions whether the SSHD had established the condition precedent (conduciveness of deprivation, or citizenship obtained by dishonesty), and it was not admissible when reviewing the SSHD’s exercise of her discretion<sup>17</sup>.</p>
Tab 76, p.1387	<p>32. The UT consolidated that approach in <i>Chimi (deprivation appeals, scope and evidence)</i> [2023] UKUT 00115 (IAC). The UT changed the order in which it recommended that the three issues (condition precedent, discretion, human rights) should be addressed and re-emphasised the limits to the relevance of any evidence which had not been before the SSHD at the date of the decision under appeal (§§ 61-68). It concluded that the Rule 24A procedure (see above §28) was <i>not</i> a general dispensing power permitting an appellant to adduce new evidence, because “<i>the decision which is to be reviewed by the Tribunal is that which is under appeal and not any subsequent decision in which the Secretary of State might provide altogether different reasons for that decision [...] [t]he focus in such an appeal must therefore be on the decision actually taken by the Secretary of State and the evidence which was before her at that time, subject to [...] limited exceptions</i><sup>18</sup>” (§65). <i>Chimi</i>, handed down on 19 May 2023, was the case which governed the approach of the tribunals at the time of the UT appeal in the present case</p>

<sup>17</sup> The FtT in the present case duly followed that approach: see [FTT/38 and particularly FTT/61]. It thereby limited the scope for the admission of fresh evidence,

Tab 7,  
pp.160

<sup>18</sup> The exceptions identified are those circumstances in which evidence can be adduced in conventional Judicial Review proceedings to prove an error of law (such as misdirection as to an established fact giving rise to unfairness, or breach of a *Tameside* duty).

- Tab 6,  
pp.131-132 [see UT/30-31]. In light of the further clarification of the law by the higher courts, and particularly by this court in *U3 v SSHD* [2025] UKSC 19, [2025] 2 WLR 1041 ['U3 SC'], the *Chimi* approach to the use of post-decision evidence and to the target of the appeal was wrong.
33. Meanwhile, SIAC (and the higher courts on appeal from SIAC) were similarly engaged with the new understanding of the law brought about by the judgment in *Begum no. 1*. In *SSHD v P3* [2021] EWCA Civ 1642, [2022] 1 WLR 2869 §§ 114-115, Laing LJ expressed the concern that SIAC may be taking an “*unduly narrow*” approach to its role following *Begum no. 1*, emphasised that “*even where SIAC is limited to applying public law principles [...] it does not necessarily follow that SIAC should confine itself to material which was before the Secretary of State*” and noted that SIAC will hear oral evidence and will have before it, for example, “*evidence which comes to light on an exculpatory review*” and is “*entitled to make of that evidence what it may*”. This approach already pointed in a different direction from that taken by the UT in *Ciceri*.
34. Following *P3*, SIAC itself in *U3 v SSHD* (SC/153/2018 & SC/153/2021) noted that “*its procedures allow for the detailed consideration of evidence, OPEN and CLOSED, including exculpatory evidence*” and that it “*can and very often does hear oral evidence from a Security Service witness about the national security assessment*” (§31). As a consequence, SIAC is able “*to discern a flaw that would not have been detectable in ordinary judicial review proceedings in the Administrative Court [...] because it has a more powerful microscope, not because it is looking for a wider range of flaws*” (§32). SIAC rejected the submission that “*when considering the national security assessment, SIAC should confine itself to the evidence that was before the decision-maker when the challenged decision was taken*” (§34). It noted (§35) that, in most judicial review contexts, that limit to the admissibility of evidence “*does not lead to unfairness because the affected person had the opportunity to make representations to the decision-maker before the decision was made*”; in deprivation cases, however, “*decisions are frequently taken [...] without giving the affected person any opportunity to make representations. If on the issue whether she is a risk to national security U3 could not adduce evidence that was not before the decision-maker, there would be no opportunity for anyone to consider her answer to the case against her, whether at the time of the decision itself or afterwards*”. In light of Parliament’s decision to give a right of appeal against

deprivation decisions, SIAC found it “impossible to interpret the regime it enacted as precluding SIAC from taking into account [an] appellant’s own evidence that she is not a risk to national security” (§35). One of the ways in which this evidence could be taken into account was that “the national security assessment will invariably be updated to take account of the appellant’s evidence and any material uncovered by the exculpatory review” and that “if the national security assessment is maintained, the updated assessment will in practice take the place of the original one for the purposes of the appeal” (§38)<sup>19</sup>.

Tab 99,  
p.2281

Tab 99,  
p.2282

35. When Shamima Begum’s case came back before SIAC (SC/163/2019) the Commission, referring to *Bank Mellat v HMT (No 2)* [2013] UKSC 38/30; [2014] AC 700, *Lloyd v McMahon* [1987] AC 625 and *R v SSHD, ex p Doody* [1994] AC 531, considered whether the conclusion in *al Jeddah no. 2*, that the existence of a s.40A appeal dispensed with any prior obligation to consult, had survived the clarification of the functions of SIAC in *Begum no. 1*. It concluded (i) that “on the premise that an individual has a “full merits appeal” the conclusion in *Al-Jedda* was correct” (§328); (ii) that if, however, Shamima Begum’s appeal were “precisely analogous to judicial review, the instant case would [...] be undistinguishable from *Bank Mellat*” (§334); but (iii) that Shamima Begum’s appeal right “is not precisely the same as judicial review” because the appellant’s case and any exculpatory evidence can be “very thoroughly tested during the proceedings” (§335); but that (iv) “in the absence of a full merits appeal it cannot be said that common law fairness has been impliedly excluded” (§337).

Tab 98,  
p.2208

36. In *U3 v SSHD* [2023] EWCA Civ 811, [2024] KB 433, a case (like *Begum*) where the person affected by a deprivation order was outside the UK, the Court of Appeal noted that “the procedure for deprivation is inherently unfair, on two accounts: the appellant has no input into the decision and the decision is based in part on material which she never sees” and concludes that “[t]hose [two] factors suggest that the appeal which Parliament has given an appellant is a forum in which such decisions should be examined as meticulously as possible” (§171<sup>20</sup>).

Tab 98,  
p.2260

<sup>19</sup> For similar assessments see also SIAC’s decisions in *B4 v SSHD* (SC/159/2018 §§16-18) and *Begum (no 2) v SSHD* (SC/163/2019 §§53-56).

Tab 68,  
p.1069

<sup>20</sup> The Court continued: “[t]his appeal may well be the appellant’s first and only opportunity to influence a decision-maker. SIAC is entitled to expect that by the time of the appeal it will have been

- Tab 71,  
p.1220
37. In *Begum (No. 2) v SSHD* [2024] EWCA Civ 152, [2024] 1 WLR 4269, the Court of Appeal reviewed the question whether Parliament had by necessary implication excluded a right to prior representation when the Secretary of State was considering making a deprivation order. It noted (§§106, 109-110) that “*what is required depends on the legislative purpose and context*”; that a main purpose of BNA 1981 s.40(2) was “*to protect the public from a threat to national security*”; that the “*exhaustive procedural code*” in BNA 1981 s.40(5) might not be sufficient to exclude a right of representation “*if s.40 were to be construed in isolation*”; but that to construe it in isolation “*underrates the distinctive nature of an appeal to SIAC*”; and that therefore “[s]ection 40 must be read alongside s.2B [of the SIAC Act]”. Drawing on the Court of Appeal’s decision in *U3*, it summarised the elements of this “*distinctive*” appeal, including the Special Advocate, the disclosure process, the admission of a wide range of evidence from the appellant, the “*powerful microscope*”, and the fact that, in the course of appeal, the evidence would be reviewed, an updated assessment would be provided, and a witness would be made available to be cross-examined on the assessment (§111). The combination of the “*existence and distinctive nature of this right of appeal*” with “*the risk of pre-emptive action by the appellant if prior notice is given*” amounted to “*compelling reasons to construe s.40(5) as excluding the right of prior consultation before a deprivation decision is made on grounds of national security*” (s.112)<sup>21</sup>.
- Tab 71,  
p.1251
38. Lord Reed PSC recently reiterated and consolidated these principles in *U3 v SSHD* [2025] UKSC 19, [2025] 2 WLR 1041. An appeal to SIAC “*is an appeal in reality as well as in form, and is not equivalent to an application for judicial review*” (§43). The differences between a SIAC appeal and a judicial review include the following:
- Tab 97,  
p.2188
- (i) First, SIAC is “*not confined to considering material which was or ought to have been available to the Secretary of State at the time when the decision under appeal was taken*” but “*can consider other material, including evidence which has only subsequently come into existence*” (§45);
- Tab 97,  
p.2189

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given an updated national security assessment which takes on board the evidence which the appellant has served [...]” (§171).

<sup>21</sup> See also the similar consideration in *B4 v SSHD* [2024] EWCA Civ 900, [2024] 1 WLR 5342 §§60-61.

- Tab 97,  
p.2189
- (ii) Second, the decision is based on the SSHD's natural security assessment “*that assessment is kept under review by the Secretary of State throughout the appellate proceedings, in the light of the evidence and submissions put forward on behalf of the appellant [...] An updated assessment is normally prepared and placed before SIAC [...] As a result, evidence which becomes available after the decision was taken, including the evidence of the appellant, can be, and is, taken into account by the Secretary of State during the appeal. Accordingly, unlike in judicial review proceedings, it is not necessary for the decision to be set aside and taken afresh in order for new material to be taken into account. [...] In accordance with the Carltona principle] the review carried out by the Secretary of State's departmental officials is a review carried out by the Secretary of State*” (§46). SIAC therefore “*only gets to the point of carrying out its own assessment of the evidence if the Secretary of State has decided to maintain his or her decision, having received and updated the national security assessment in the light of the evidence and submissions advanced on behalf of the appellant during the appellate proceedings*” (§47).
- Tab 97,  
p.2189
- (iii) Third, “*it follows from the fact that the procedure allows for the admission of evidence that it must be within SIAC's jurisdiction to make findings of fact*” (§48)<sup>22</sup>.

39. On the admissibility of post-decision evidence, Lord Reed observed that “[t]he question is whether the evidence in question is relevant to deciding whether the appeal should be allowed. In that regard, it is important that the Secretary of State's decision is reviewed and the national security assessment updated during the appeal proceedings, in the light of the appellant's evidence and submissions. As a result, the decision before SIAC when it decided the appeal is in reality a decision which has been re-considered and re-affirmed by the Secretary of State at the time of the appeal hearing in the light of the evidence adduced in the appeal. In those circumstances, it is possible that evidence relating to matters post-dating the original decision may have a bearing on whether the deprivation of citizenship remains appropriate. It is accordingly incorrect for SIAC to proceed on the basis that the issue it has to decide is the rationality of the

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Tab 97  
p.2191

<sup>22</sup> The Court in *U3* gives further consideration to the ways in which SIAC's findings of fact about the evidence can and cannot be used in its decision-making (see §§54-62, 86-93).

- Tab 97,  
p. 2199
- decision at the time it was made, and that it cannot take account of evidence relating to matters arising subsequently” (U3 SC §84). A consequence of this is, in R’s submission, that if the SSHD receives post-decision evidence which may be relevant to the question whether deprivation of citizenship remains appropriate, and if she does not review her decision in light of it, or reviews her decision without regard to it, or otherwise errs in her approach to that evidence, she may leave herself vulnerable at appeal.*
- Tab 97,  
p.2198-  
2199
40. Dealing with the functions of SIAC on appeal, Lord Reed reiterated (§82) that “*all the principles of administrative law are potentially relevant, except to the extent that they are inconsistent with the statutory scheme*”. By way of example, “*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 the Secretary of State’s decision-making process at the time when the decision is taken*”. R understands the “*statutory scheme*” to which Lord Reed refers (like the “*distinctive*” appeal referred to by the Court of Appeal in *Begum no. 2*) to be made up of sections 40-40A of the BNA 1981, s.2B of the SIAC Act 1997 and the Procedure Rules made under the SIAC Act.
- Tab 80,  
p.1488
41. Most recently, in *D5, D6 and D7 v SSHD; C9 v SSHD [2025] EWCA Civ 957*, the Court of Appeal has addressed the question whether SIAC should take a different approach to cases where the s.40(2) power is exercised on the ground of a person’s involvement in serious organised crime from that which it takes when the power is exercised in national security cases. Much of the judgment is concerned with questions about the different factual and institutional contexts of the two categories of case, and the approach to factfinding and the burden of proof. These are not issues which arise on the present appeal. The Court also briefly considered, in respect of one of the appellants (C9) whether he should have been given an opportunity to make representations before the Secretary of State deprived him of his citizenship (§§120-122). It concluded 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*” (§121) and, specifically, that “*SIAC was right [...] to decide that it was not unlawful to make the decisions in these cases without giving the appellants a chance to make representations*” and that there is “*no such right in a section 40(2) case which is certified, so that any appeal is to SIAC*” (§122, emphasis added). The Court in *D5, D6,*
- Tab 80,  
p.1515-1516
- Tab 80,  
p.1516

*D7 and C9* was concerned with appeals to SIAC. It did not address the question whether the statutory context may be different when an appeal from a s.40(2) decision lies to the FtT rather than by way of the “*distinctive*” appeal to SIAC.

### ***Consequences for the present proceedings***

42. The present Respondent’s appeal took place in the FtT, rather than in SIAC. The measures adopted by SIAC (including the Special Advocate system, the processes of exculpatory review, the opportunities to file further evidence, the system of reconsideration by the SSHD following admission of that evidence, and SIAC’s focus on an updated decision rather than solely on the original decision) are designed to address the *double* unfairness identified in *Begum no. 2* (reliance on material which the person affected will not be permitted to see, and absence of pre-decision representations).

Tab 71,  
p. 1220

43. While the first of these sources of unfairness will not normally affect proceedings in the FtT, so that CLOSED proceedings and special advocates will not be necessary in the FtT, there is no reason why the other mitigating procedures should not be in place in FtT appeals. It would plainly be possible for the FtT to ensure that a s.40A appeal before it would partake of the procedural protections which give a s.2B SIAC appeal its “*distinctive nature*”; it is similarly open to the SSHD to mitigate the unfairness created by the absence of prior representation by unilaterally inviting further representations and evidence, conducting an exculpatory review, conducting a substantive reconsideration of the deprivation decision in light of that evidence and representations, and issuing a supplementary decision. These systems are not in place in the FtT at present; more importantly for present purposes, they were plainly not in place or operated when R’s own appeal came before the FtT in spring 2022.

Tab 43,  
p.481  
Tab 45,  
p.500

### ***Policy, conduciveness and the discretion***

44. There is no statutory guidance as to the meaning of “*conducive to the public good*” in s.40(2) of the BNA 1983. The Secretary of State publishes detailed policies about citizenship, and at the time of the Decision in this case, and of R’s appeal before the

Tab 43,  
p.477

- Tab 40,  
p.449
- FtT, A's deprivation policy was found in her Nationality Instructions, Chapter 55 (Deprivation and Nullity of British Citizenship)<sup>23</sup>. The only explanation of "conducive to the public good" was under the heading 'Definitions', para. 55.4.3: "*Conduciveness to the Public Good*" means depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours."
- Tab 40,  
p.453
45. On 13 May 2020, Fiona Johnstone, an official at the Home Office's Migrant Criminality Unit, wrote a ministerial submission to A, to the Minister for Immigration Compliance and the Courts and to the Security Minister entitled "*Deprivation of British Citizenship*" [**the May 2020 Submission**]. The submission 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."<sup>24</sup>
- Tab 37,  
p.362
46. The May 2020 Submission cited the Government's Serious Organised Crime Strategy, published in November 2018, which had set out a government objective of "relentless disruption and targeted action against the highest harm serious and organised criminals and networks" and an intention to "maximise use of immigration and nationality powers against individuals involved in serious organised crime, including, where appropriate, depriving individuals of British citizenship". Against that background, the May 2020 Submission "recommend[ed] focussing the policy on the highest harm offences", expressed the expectation that "the number of serious criminality cases meeting the threshold [would] be very low", stated that "[f]ocus will be given to organised crime, particularly that involving violent, sexual and other high harm offences such as trafficking, organised drug importation and child sexual exploitation" and emphasised that "[w]e will make clear that decisions must be reasonable and proportionate, balancing the impact deprivation will have on the individual with the prevailing public interest in denying them the privilege of holding British citizenship" [emphasis added]. In that context, the May 2020 Submission
- Tab 37,  
pp.362-364

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<sup>23</sup> Since then, the Nationality Instructions have been broken down into individual sections, which are published separately online.

<sup>24</sup> A accepts that, prior to the May 2020 Submission, there had been no regular use of the s.40(2) deprivation power on grounds of serious organised crime.

confirmed that other considerations “will include” the “individual’s strength of ties to the UK” (along with the organised nature of the crime and the individual’s role).

47. The SSHD accepted the advice given in the May 2020 Submission and, following its disclosure to R on 18 March 2020, the FtT noted [FtT/70] that it was “now common ground that [the SSHD’s] policy is to be found in Chapter 55 of the Nationality Instructions, The Government’s Serious and Organised Crime Strategy (November 2018), and the Recommendation of 13 May 2020” and that it was “accepted on behalf of the Respondent that the propositions advanced in this document were accepted by her as policy”.

Tab 7, pp.  
162-163

### Fairness

48. The requirements of procedural fairness are summarised in the well-known passage from Lord Mustill’s opinion in *R v SSHD, ex p. Doody* [1994] 1 AC 531 at 560:

(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

Tab 93,  
p.1978

49. In *Bank Mellat v HM Treasury (no. 2)* [2013] UKSC 39, [2014] AC 700 §179, Lord Neuberger identified the rule that “before a statutory power is exercised, any person

Tab 69,  
p.1154

*who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity*". Where it is argued that the presumption in favour of representations in advance is to be displaced on grounds of impossibility, impracticality or pointlessness, this argument should be "very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute."

Tab 69,  
p.1154

50. In *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, [2018] 4 WLR 123 §68, Singh LJ concluded that "*the duty to act fairly or the requirements of procedural fairness (what in the past were called the rules of natural justice) will readily be implied into a statutory framework even when the legislation is silent and does not expressly require any particular procedure to be followed*".

Tab 77,  
p.1397

51. All of these authorities were reviewed in *R (Balajigari) v SSHD* [2019] EWCA Civ 673, [2019] 1 WLR 4647, where Underhill LJ further noted that "*unless the circumstances of a particular case make this impracticable, the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness*". The opportunity for prior representation is (i) "*conducive to better decision-making*"; (ii) respectful to "*the individual whose interests are affected*"; and (iii) valuable in ensuring that a person potentially affected by a decision is heard "*before the mind of the executive becomes unduly fixed*".

## **ISSUES**

### **D. ISSUE 1: Procedural fairness, pre-decision and post-decision representations**

52. A argues that, while the Court of Appeal was right to conclude that the SSHD legitimately operated a system in which she informed the person affected by a deprivation decision only once it had been made, it was wrong to find that the SSHD should have had told R, at the time of the decision, "*that she was willing to review her*

Tab 2,  
p.28-29

*decision by conducting a merits based evaluation in the light of any representations or evidence which that person supplies”* [Appellant’s Case §§28-30]. She argues specifically that the Court of Appeal’s approach was inconsistent with authority binding on it, was founded on misconceptions about the nature of the s.40A(1) right of appeal from a deprivation decision, was founded on a misunderstanding of the facts of R’s case, and was “*wrong in principle, introducing uncertainty into established principles of public law and the principle of procedural fairness*” (§30). None of those criticisms of the Court of Appeal’s judgment are made out.

53. For the purposes of this ground, R proceeds on the basis that the SSHD was entitled to conclude that there was a real risk that he would be able rapidly to renounce his Albanian citizenship if he was given prior notice of a decision to make a deprivation order<sup>25</sup>. R’s case is that, if that is the case - if a no-notice s.40(5) procedure is necessary to avoid frustrating the purposes of deprivation and there is no full merits appeal thereafter – then the s.40(5) must, at the least, be accompanied by a clear opportunity to make representations after the Order but before the appeal hearing (i.e. during the appellate process), which the SSHD will consider on the merits before that hearing<sup>26</sup>; and that if and when the FtT comes to hear an appeal, the target of the appeal must be the reconsidered decision. Those are the minimum protections required to mitigate the procedural unfairness caused by a no-notice decision. Further, there is nothing wholly unorthodox about them: they do no more than reflect the distinctive nature of an appeal before SIAC as described most recently in *Begum no. 2* and *U3 SC*. And these protections were absent from the proceedings before the FtT in 2021 and early 2022 in the present case.

54. The body ultimately charged with responsibility for ensuring the fairness of a deprivation process is the relevant tribunal SIAC or, with proper procedures in place, the FtT which has the function both:

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<sup>25</sup> See Issue 3 below for the reasons why this is not conceded on the facts of R’s case.

<sup>26</sup> A submits that, notwithstanding the wording of para. 27 of the Judgement, it is perfectly clear that the Court of Appeal had in mind representations made before the hearing of an appeal, not before the making of an order.

- Tab 72,  
p.1293
- (i) Of allowing an appeal where the SSHD “*has been guilty of some procedural impropriety*” (*Begum no. 1* §71), including by failing to adopt a fair practice or procedure or failing to review material properly placed before it; and
- Tab 98, pp.  
2260-2261 ;
- Tab 97,  
p.2199
- (ii) Of adapting its own procedure and practices with a view to ensuring fairness (see e.g *U3 CA* §171; *U3 SC* §84)). There is a direct line from the unfairness of a person not having the opportunity to make pre-decision representations and the ‘distinctive’ features of the SIAC appeal procedures, which enable the appellate tribunal to take account of evidence which was not before the decision-maker at the date of the deprivation order, and to shift its focus of review to the Secretary of State’s response to that evidence.
55. A understandably relies on the conclusion of the Courts that procedural fairness in appeals from s.40(2) decisions are in fact protected by the appeal process. But that conclusion depends on the nature of the s.2B appellate process in SIAC, with all of its procedural protections, including not only the availability of closed proceedings, but also the important procedures allowing for (a) admission of evidence and the use of a ‘*powerful microscope*’ to assess that evidence; (b) significant disclosure obligations (including obligations for the SSHD to search for and disclose exculpatory material); (c) a merits-based review by a person of appropriate experience and authority acting on behalf of the SSHD under the *Carltona* principle; and (d) the shift in focus of the ultimate appeal in SIAC from the original decision to any updating review.
56. R accepts that, A has argued, the jurisdiction of the Appellant body in an appeal against a s.40(2) decision (*Begum no 1* §71), whether under s.2B of the SIAC act or to the FtT under s.40A of the BNA 1981, is the same, and that it should exercise the same functions. R also accepts that both SIAC and the FtT have the jurisdiction and are required to act as primary decision-makers on certain matters (human rights claims, fraud or dishonesty (in appeals against s.40(3) decisions), statelessness (s.40(4), N3)).
- Tab 72,  
p.1293
- Tab 88,  
p.1797
57. What actually happened in R’s case was, however, very different from the SIAC system as described by SIAC itself and by the courts: very late disclosure; no merits review by the SSHD or officers; new evidence treated as irrelevant. The FtT followed the approach set down in *Ciceri* while the UT directed itself in accordance with *Chimi*.
- Tab 76,  
p.1374
- Tab 75,  
p.1342

58. Even now in the FtT, the procedures for disclosure (including disclosure of exculpatory evidence), admission of evidence, review by a Home Office official, and moving targets identified in U3(SC), which necessarily supplement the bare s.40 jurisdiction / functions, are absent in or far less developed (see discussion of FtT procedures above). R's legal representatives are unaware of any rules or Practice Directions which give effect to *U3* SC in the context of FtT deprivation appeals or which specifically address s.40A appeals.

Tab 97,  
p.1274

59. A argues that the Court of Appeal is creating an “*unorthodox*” category (Written Case Tab 2, p.44 §56) of “*contingently lawful*” decisions (§55) i.e. decisions whose lawfulness depends on what happens next. Specifically, she argues (para. 52) that, a decision cannot generally be challenged “*on the basis of material or events which post-date its making*” because “*a judicially reviewing court is assessing the legality of the decision as at the date it was taken [...]*”.

Tab 2, p.42

60. But there is nothing unorthodox in the procedure the Court of Appeal envisaged (the Court of Appeal deliberately avoided being prescriptive about what the SSHD or the Tribunal should do). The Court of Appeal in the present case envisaged a procedure where, after the appealable decision had been taken and appealed, evidence was disclosed and submitted, representations made, and an updating assessment made; and the focus of the appeal shifted to the quality of that latest decision. That is precisely the kind of “*distinctive*” appeal process which SIAC operates (*U3* 82).

Tab 97,  
pp.2198-2199

61. The SSHD further argues that the opportunity to make submissions would have made no difference. She gives three reasons, none of which is persuasive:

- (a) First, the SSHD argues (§41(1)) that evidence of rehabilitation could have made no difference because, in light of the Court of Appeal’s decision in *Pham v SSHD* [2018] EWCA Civ 2064 §52, she was not required to demonstrate that R posed a risk of reoffending in order to find the deprivation of his citizenship conducive to the public good. It is common ground that there a risk of reoffending is not a condition precedent to a deprivation decision (*Pham*). But it does not follow that a the level (or absence) of a risk of reoffending is an irrelevant consideration. When

Tab 89,  
p.1828

determining whether it is conducive to the public good to deprive a person of his/her nationality, and/or whether it is “*reasonable*” or “*proportionate*” to do so, it is plainly capable of being relevant (and in R’s submission likely to be relevant) to consider whether R was likely to continue to be involved in Serious Organised Crime if he remained British and in the UK. The fact that the SSHD might ultimately decide to deprive him of his citizenship in any event does not mean that she can treat the likelihood of reoffending as irrelevant *in limine*, or that there is an *a priori* presumption that future offending risk is irrelevant. In any event, on the facts of this case it is clear that the Secretary of State *was* referred to the NCA’s view that R posed a risk of reoffending. The very purpose of a right to make representations before a decision is that the person affected can address such a case before a final decision is made; and the normal principles of procedural fairness would require that s/he have the opportunity to put his/her own contrary evidence to the decision maker before the deprivation decision was made.

(b) Second, A argues that she was *entitled* to find that R met the ‘*highest harm*’

Tab 37, p.364 threshold identified in the May 2020 Submission. But again that is a matter on which R should have been heard prior to the decision to make a deprivation order. He was able to point out that, in terms of sentence, value and nature of offence, his offending was not the most serious, and that he did not fall into one of the specific offending categories identified in the May 2020 Submission. It is no answer to his argument - that he should have been able to put these issues to a decision maker in advance of a decision - that a Tribunal retrospectively finds that the decision-maker would have been *entitled* to reject them (see FtT/80 for an example of the FtT taking this approach).

(c) Finally, A argues that any submissions R might have made would have been irrelevant because the relevant question under the policy is “*whether there has been involvement in serious organised crime*”. Again, that is no answer to A’s complaint:

Tab 37, p.364 First, that assertion is inconsistent with the May 2020 Submission (which plainly requires (a) more than just involvement in serious organised crime; and (b) an assessment of proportionality in any event); Second, it does not reflect the 2-stage process under s.40(2); and third, it is inconsistent with A’s own submission elsewhere (Written Case §69) that matters such as the best interests of children were taken into account at the discretion stage.

Tab 2, p.51

62. A also argues that the Court of Appeal was wrong to rely on the fact that the SSHD had been given the misleading information that there would be an opportunity to make representations after the decision because (i) in fact A did have the opportunity to make representations on family life and BIOC; (ii) under the “*distinctive*” appeal process A would be able to make those submissions and adduce any relevant evidence; and (iii) those submissions would have made no difference anyway. In fact, at the time when the statements were made (*pre-Begum*) the (incorrect) understanding was any appeal would in itself be a full merits review based on all of the evidence. But when *Begum no. 1* was handed down it should have become clear to A<sup>27</sup> that the law had been clarified and those statements were no longer correct, she was required to ensure that she took her own steps to invite the further evidence which her officials had told her would be forthcoming. The FtT, which is the arbiter of fairness, should have appreciated that the SSHD had been wrongly told that she could safely take a decision which potentially affected UK national children because evidence about their best interests would be admitted later; the SSHD herself not only accepts but asserts in her submissions on Issue 5 that they were relevant to the exercise of her statutory discretion (and not merely R's or the children's Article 8 rights)

63. There was an obligation on the SSHD to invite further evidence and in any event to consider any further evidence and undertake a reasoned reconsideration on the merits. She did not do so. The CoA was right to conclude that the SSHD's decision had been taken and/or maintained unfairly. The FtT, which was empowered and required to determine this matter, should have allowed the appeal on either procedural fairness or (in light of the approach identified in *U3 SC*) rationality grounds. So the CoA's decision should be upheld.

Tab 97,  
p. 2174

64. Finally, the SSHD criticises the CoA for failing to lay down a procedure which would comply with procedural fairness. The CoA was right not to attempt to dictate specific procedure to either the SSHD or the FtT (indeed the SSHD elsewhere criticises the CoA for what she terms “*judicial legislation*” [A's Written Case §56]). It seems likely that

Tab 2, p.44

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<sup>27</sup> In fairness to the SSHD and to the FtT, there was a period of time after *Begum no. 1* when the consequences of that judgement were unclear.

an appropriate starting point might be the SIAC procedure explained in U3. No doubt if this Court upholds the decision of the Court of Appeal, the FtT and the appropriate department(s) of the Home Office may wish to adapt or refine their own procedures, to deal with for the very small minority of their cases which arrive by way of s.40A(1) appeals from s.40(2) decisions.

**E. ISSUE 2: Did the Court of Appeal Have Power to Quash a Deprivation Order When Allowing an Appeal under Section 40A(1) of the British Nationality Act 1981**

65. It is common ground, in light of the decision of Lord Sales and Lord Stephens in *N3*

Tab 88,  
p.1812

§§90-91 (see above para. 20) that a deprivation order ceases to have any ongoing effect if the FtT or SIAC allows an appeal against a decision to make an order. The outcome of the FtT's or SIAC's decision to allow the appeal simply binds the SSHD. The Court nonetheless recommended that “*as a matter of good practice and for good order [...] 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*” but the binding effect of the allowed appeal does not depend upon the taking of such an administrative step. The issue raised by the SSHD's Ground 2 therefore appears to have no practical consequences for the parties to this appeal (in any event the SSHD has identified none).

66. In the present case, the SSHD sent the Court of Appeal an agreed draft order including a provision quashing the deprivation order, and the Court of Appeal approved the draft and sealed the order on 17 January 2025. On 31 January, the SSHD lodged grounds of

Tab 14,  
p.190-194]

appeal in which she challenged the lawfulness of that provision and argued that the Court “*should therefore declare the decision to have been unlawful, without quashing the deprivation order*”. Within those grounds, she informed the Court of Appeal that she would “*seek to agree a revised draft order with [the Respondent], subject to the approval of the Court of Appeal*”. The SSHD did not contact the R's representatives to seek to agree an order or otherwise. R would have been willing to agree to an order containing a declaration in the terms sought by the SSHD. Then on 14 February 2025, the Clerk to the Vice-President of the Court of Appeal wrote to the parties on behalf of the Vice-President, setting out the Court's preliminary view that it had the power to

Tab 12,  
p.187

quash the deprivation order, but inviting the SSHD to make a separate formal application to vary the Order “[i]f the point [was] of substantive significance to the /SSHD]”, and to identify whether the application was made under the slip rule (CPR 40.12) or on another basis. The SSHD did not communicate further with the Court of Appeal. Again, R would have been perfectly willing to consent to an application to vary the order, most likely pursuant to CPR 3.1(7) rather than CPR 40.12.

67. R agrees that the slip rule was unlikely to be an appropriate vehicle for changing a quashing order into a declaration, but there is no obvious reason why the general power to vary or revoke an order under CPR 3.1(7) could not have been used, particularly in circumstances where the application would have been unopposed, would not have prejudiced either party, and would have facilitated, rather than impeded, finality of litigation (see *Tibbles v SIG Plc* [2012] EWCA Civ 518, [2012] 1 WLR 2591 §§38-41 of that judgment for the breadth of the discretion and the factors relevant to a discretionary decisions whether to exercise that power or not). Again, while there is a presumption against using CPR 3.1(7) to discharge a final order (see *Vodafone Group Plc v IPcom GmbH and Co KG* [2023] EWCA Civ 113), this is a presumption rather than a hard-edged rule, and the proposed application would be for variation rather than discharge or revocation of the order. It is impossible to know whether the Court of Appeal would have exercised its discretion under CPR 3.1(7) on an unopposed application, because the application was never made.

68. On the substance of the Ground, R agrees with A that the right of appeal exists against the deprivation decision rather than the order, and that once SIAC has allowed an appeal against the deprivation order, nothing more is required to be done (although as a matter of good practice the Secretary of State should withdraw it (N3 §93). Neither of these points, however, establishes that the Court of Appeal lacks the power to quash a deprivation order. If anything, it would follow from the fact that the order is merely the implementation of the decision that a tribunal allowing an appeal against the latter does not exceed its powers by quashing the former, just as the SSHD does not exceed her power by withdrawing an implementing order when the decision which it implements has been overturned.

Tab 96,  
pp.2168  
-2170

Tab 88,  
p.1813

69. Similarly, on an appeal from the UT, the Court of Appeal has all of the powers of the UT, but again that does not make good the SSHD's argument. As this Court observed in *N3* (§50), there are no statutory provisions dealing with the powers of SIAC on an appeal against the decision to make a deprivation order, and there appear, similarly, to be no statutory provisions dealing with the powers of the FtT on a s.40A appeal. The SSHD identified no good reason why, for example, the parties to an appeal before the UT could not agree a consent order including a provision quashing a deprivation order (or indeed simply recording in a preamble that the SSHD has withdrawn the order, in line with the belt-and-braces approach suggested by this Court in *N3*).

70. R reiterates that it appears to him that, particularly in light of what is now established by the *N3* judgment, the question whether the Court of Appeal could or could not have quashed the deprivation order is now academic (it has no impact at all on the future relations between the parties).

#### **F. ISSUE 3: Is denial of an opportunity to make prior representations justified on the facts of this case?**

71. As set out above, the principles of procedural fairness will normally require that a person likely to be adversely affected by the exercise of a statutory power will be given the opportunity to make representations in advance. R accepts, for present purposes, that if it were established that, by providing him with that opportunity, the executive would enable him immediately to renounce his Albanian citizenship, and thereby render deprivation impossible, the presumption would be disapplied<sup>28</sup>, either because the statutory purpose would be frustrated or because it would be impractical to provide him with that opportunity, which would effectively predetermine the deprivation decision (see also *N3* §§ 56, 60, 86, 90). R accepts that a real risk, properly established on the facts, that he would renounce his second nationality before a deprivation order could be made, would be likely to justify the denial of the opportunity to make representations in advance.

<sup>28</sup> R adopts this position subject, of course, to his argument in line with the Court of Appeal's judgment that there must be a post-decision reconsideration and appeal structure sufficiently robust to ensure an opportunity to make post-decision representations, have them reconsidered on the merits, and have that reconsideration assessed by way of a s.40A appeal (see Issue 1 above).

72. In the present case, the SSHD's contention was that R "would have **immediately**

Tab 6, p.138      **renounced his Albanian citizenship**" (see e.g. UT/47). When the matter is 'very closely

Tab 69,      examined' (*Bank Mellat* §179), however, the SSHD has not established sufficient risk  
p.1154      in the present case, or indeed sought to do so:

(a) The SSHD has not attempted to prove in this case that there was a real possibility  
that a person in R's position would in fact be able to renounce his Albanian  
nationality "*immediately*" or even rapidly.

(b) The SSHD has identified no basis for a generic assumption that he could do so.

(c) By way of example, the domestic renunciation provisions are in s.12 BNA 1981.

These require that a person be "*of full age and capacity*" (s.12(1)) and that the SSHD  
be satisfied (s.12(3)) that renunciation will not make a person stateless (or that if it  
will, s/he will be able to acquire another nationality within 6 months)<sup>29</sup>. By s.12(2),  
renunciation takes effect on registration and not on the date of application for  
registration. Further, renunciation applications must be accompanied by a  
mandatory fee and by specified documents (including documents proving identity  
and proving possession of or entitlement to another nationality)<sup>30</sup>.

(d) The fact that some British-Pakistani dual nationals convicted in relation to  
organised child sexual exploitation had attempted to renounce their British  
nationality does not establish a real prospect that R, an British-Albanian dual  
national would in fact have been able to do so<sup>31</sup>.

(e) It would not be unduly onerous to require the SSHD to establish a real risk of rapid  
renunciation by reference to foreign law provision. Parliament has shown that it  
expects the Secretary of State to familiarize herself with foreign citizenship laws

Tab 43,  
p.478

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<sup>29</sup> This provision has been held to be necessary in order that the UK comply with its obligations under the 1961 Convention on the Reduction of Statelessness (see *Teh v SSHD* [2018] 1 W.L.R. 4327, [2018] EWHC 1586 (Admin) §34).

<sup>30</sup> Home Office, 'Nationality policy: renunciation of all types of British nationality' v.3.0, 30.01.2018 pp.5-6.

<sup>31</sup> As the Secretary of State will be aware, for example, Albania is a signatory to the 1961 Statelessness Convention while Pakistan is not ([https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-4&chapter=5&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=en)).

R does not suggest that this fact is determinative of the procedures which either state adopts, but it demonstrates the danger of relying on generalised assumptions.

(f) And the risk of renunciation would be further limited, in a case where there is no process of ‘instant’ renunciation, by providing a limited period between the service of the renunciation decision and the signing of the order.

73. In all the circumstances, A did not establish on the facts of the present case that any departure from the presumption in favour of prior representations was justified on grounds of pointlessness or impracticality, and A’s appeal should be dismissed on that basis also. R recognizes that this issue will be academic to him if the Court dismisses A’s Ground 1.

#### G. ISSUE 4: Unpublished policy

Tab 29,  
p.322

Tab 29,  
p.319-320

Tab 7,  
p162-163

74. The Ministerial submission of 13 May 2020 (“May 2020 submission”) was not disclosed until 23 March 2022 shortly before the 5 April 2022 hearing. For its contents and context, see [44-47] above. The FtT recorded that it was common ground before it that “*the propositions advanced in this document [the 13 May 2020 submission] were accepted by her as policy*” (FTT/70). They set out factors which A would take into account when determining whether to decide to deprive someone of their nationality. In those circumstances, fairness required that A provide R with the opportunity to make meaningful submissions to her by reference to the policy before A reached a final conclusion about GK’s citizenship. A’s failure to do so compounds the unfairness of the failure to give prior notice of the deprivation decision (or, alternatively the failure to have in place a procedure for meaningful and merits-based review).

75. A policy consists of set of guidelines adopted by a public authority to promote consistency in decision-making, which must guide, but not rigidly dictate, the exercise of discretion by creating general guidelines about how a particular class of case might be dealt with when exercising discretion. Such policies should generally published in the interests of transparency and, particularly when they affect the rights of individuals, should be followed unless there is a good reason not to do so (see *British Oxygen Co Ltd v Board of Trade* [1971] AC 610 at 616 F-H); (*R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 §§20; 34-35; 38) (‘**Lumba**’); *Mandalia v SSHD* [2015] UKSC 59 at §29-30) (‘**Mandalia**’); *R (All the Citizens) v Secretary of State for Digital, Culture, Media and Sport* [2022] EWHC 960

Tab 85,  
p. 1717

Tab 85,  
pp. 1721-1722

Tab 86,  
pp.1743-  
1744

Tab 65, p.999 (Admin); [2022] 1 WLR 3748 ('*All the Citizens*'); *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52; [2021] PTSR 190 ('*Friends of the Earth*').

Tab 82,  
p.1542

*What policy must be published ?*

76. In *Lumba* §38 the Court discussed the types of policy that should be made public to allow a fair opportunity to make representations on them: "*The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us [...] What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made.*"

77. In *All the Citizens* §§99-115, the Divisional Court made the following summary observations about policy:

- Tab 65,  
p.1023
- (a) Policy serves the purpose of promoting good administration (§99);  
(b) Cases in which a failure to comply with a policy without good reason amounts to a breach of public law have generally been concerned with interferences to individual rights or decisions conferring benefits of significant value to an individual (including naturalisation) (§100-101);  
(c) By contrast, policies which govern the internal administration of Government departments and do not involve the exercise of public power are unlikely to be enforceable as a matter of public law (§110); and  
Tab 65,  
p.1025
- (d) The epitome of "government policy" is "*a formal written statement of established policy*" (see also *Friends of the Earth Ltd* §§105-107).
- Tab 82,  
p.1570

Tab 37,  
p.362-366

78. In that context, the May 2020 Submission was a policy which should have been published to enable R to address it because:

- (a) It was developed specifically in order to set criteria governing the way in which the deprivation power should be exercised generally, and to promote consistency.  
(b) It set out criteria which would impact on individual rights.  
(c) It was not an inward-looking document, concerning internal administration, but was aimed at being applied to individuals within a particular class.

- Tab 35,  
p.345-346
- (d) As is made plain in the letter of 17 December 2020 to the Home Secretary, it was a formal written document which had been agreed by the Secretary of State, which was ‘identifiable’ as containing the criteria which would be applied to the class of persons within which R fell, and which was specifically applied to R.
- (e) It qualifies A’s Good Character guidance which plainly is treated as policy.
- (f) It further regulates the exercise of the discretionary power under the Good Character guidance by restricting the circumstances in which deprivation decisions under the policy will be taken (see the extremely broad outlines of the ‘conduciveness’ definition in the published policy [para 44 above] as contrasted with the May 2020 submission which limited SOC deprivation to the “*highest harm*” offences (estimated to be rare); (ii) focused on violent, sexual and other high-harm SOC offences (trafficking, organised drug importation, child sexual exploitation); (iii) required decisions to be “*reasonable and proportionate*” (suggesting an approach which is, at the very least, more nuanced than reliance on historic offending alone); and (iv) required a balance between the impact of deprivation on the individual and the “*prevailing public interest*”. The UT was wrong (see UT/49, 53) to conclude that the May 2020 Submission was no more than clarification of the published policy.
- Tab 37,  
pp.362-366
- (g) Parts of the May 2020 Submission were later incorporated into the Home Office policy Deprivation of British Citizenship v.1.0, published in May 2023.
- Tab 6,  
pp.138-139
- Tab 81, p. 1526 79. A relies on the SIAC decisions in *D5, D6 and D7* (SC/176-178/2020 §§57 and 95-99) and *C9* (SC/173/2020 §§32-35) in each of which it was concluded that the May 2020 Submission was not a policy. That reliance is misplaced.
- Tab 73,  
pp.1320-1321
- (a) As set out above, the May 2020 Submission, adopted by the SSHD, and expressly applied to individuals in circumstances affecting their fundamental rights under common law, has all of the features of a policy; in *D5, D6 and D7*, and in *C9*, SIAC erred in concluding otherwise.
- (b) In particular, in those cases, SIAC erred by failing to take into account the fact that the May 2020 Submission is applied when decisions are made in individual cases about the fundamental rights of individual citizens.
- (c) Further, the context in which the May 2020 Submission is considered in the SIAC cases is different from that in the present case. There, the complaint was that a policy had *not* been applied to the appellants. By contrast, in R’s case, there is clear

Tab 28,  
p.308

evidence that the policy *was* applied to him (see Parsons Submission; SSHD's Skeleton Argument in the FtT §22; FTT/70; and the May 2020 Submission itself, which refers to itself (at para. 7) as "*the policy*".

Tab 37,  
p.364 §[7]

Tab 7,  
pp.162-163

(d) As noted, before the FtT it was "*common ground [...] that the propositions advanced in this document were accepted by [A] as policy.*"[FTT/70]. That does not appear to have been the Secretary of State's position in those cases. The parties were correct to take that common ground.

80. In those circumstances, the May 2020 Submission fell into the category of policy which "must be published" (*Lumba* §38) because it was "*that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made.*". Publication of the policy was necessary in order to give proper substance to R's right to "*make representations [...] either before the decision [was] taken with a view to producing a favourable result; or after it [was] taken, with a view to procuring its modification; or both*" (*Doody* at 560).

Tab 93,  
p.1978

81. R's inability to address the May 2020 Submission was material:

Tab 37,  
p.364 §[7]

(a) The May 2020 Submission makes clear that the SSHD should have regard to the "*prevailing public interest*" and the question whether deprivation is both "*reasonable and proportionate*". These are broad and open-textured considerations, and R was entitled to refer to them as indicitors that evidence about his risk of re-offending was relevant either to the SSHD's assessment of 'conduciveness' or to the exercise of her discretion (or both). When R did obtain post-decision evidence about his offending risk, the FTT assessed that it was immaterial to the position at the date of decision [FTT/61]. The failure to publish the policy until very shortly before the FtT hearing, coupled with the failure to conduct a merits-based reconsideration after receipt of R's evidence, gave rise to unfairness.

Tab 7,  
p.160]

(b) The May 2020 Submission refers (i) to the deprivation power being saved for the "*highest harm offences*"; and (ii) to "*[f]ocus [...] given to organised crime, particularly that involving violent, sexual and other high harm offences such as trafficking, organised drug importation and child sexual exploitation.*" Had R been aware of this policy in advance of the initial decision or of any merits-

Tab 37,  
p.364 §[7]

based reconsideration, he would have been able to make submissions to the SSHD (and not merely in the context of litigation on public law grounds) based on the sentencing criteria applied to him<sup>32</sup>, on the fact that his offence was not of the “*highest harm*”, and on the absence of any evidence that he was involved in any of the categories of crime upon which the policy places a “*particular[...]*” focus.

82. To be clear, R does not assert that the policy created a substantive legitimate expectation of the outcome of A’s decision-making. Rather, he submits that the policy should have been published so that he could make representations, by reference to it, to seek to persuade the decision-maker that no deprivation decision should be taken against him.

#### **H. ISSUE 5: exercise of discretion and the UT’s decision**

- Tab 2,  
p.51      83. A accepts [Appellant’s Written Case §69] that deprivation did not “*follow automatically once the threshold of involvement with serious organized crime was met*” and that she was required to exercise discretion thereafter. A argues it was “*entirely clear from the [Parsons] Submission and the decision letter, taken as a whole, that the SSHD was well aware that she had a discretion.*” It is common ground that s.40(2) creates a statutory condition (that the SSHD is satisfied that deprivation is conducive to the public good) “*which must be satisfied before the discretion can be exercised*” (*Begum No. 1* §67).

Tab 72,  
p.1292

84. R does not submit that A was unaware that she had discretion. Rather, R submits that the SSHD either failed to exercise that discretion or failed to show by her decision that she had done so.

85. R does not accept that the Decision should be read as incorporating the Parsons Submission or the annexes to it:

- Tab 35,  
pp. 343-358      (a) the Parsons Submission was not disclosed until over a year after Notice was given of the Decision;

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<sup>32</sup> Under the Sentencing Council guidelines, a court assesses both culpability and harm. Harm, based mainly on the amount laundered, sets the sentencing range: category 1 (over £10 million) starts at £30 million; category 2, into which R fell, covers £2–£10 million with a starting point of £5 million. Further, the guidelines provide for an uplift in sentence length for underlying criminality, but none was present in R’s case.

- Tab 31, (b) the covering letter of 18 February 2022, disclosing the Parsons Submission, asserted  
pp.332-334 that A had no duty to disclose it: it was clearly not intended to be treated as part of  
the decision;  
(c) further or alternatively, in order to enable a person to bring an effective appeal  
against a deprivation order, the notice given pursuant to s.40(5) of the BNA 1981  
must itself provide an adequate indication of the matters and materials which have  
been considered and given weight.

86. As for the wording of the notice itself, it proceeds directly from A's assessment of the seriousness of the offending (and from A being "*satisfied*" that deprivation would be conducive to the public good) to the deprivation itself. The UT was correct to conclude, for the reasons it gave (UT/65), that the reference to the best interests of R's children did not demonstrate that discretion had been exercised.

Tab 6, 87. A contended before the UT [UT/50] that "*[p]rior offending was [...] been the sole basis for the decision.*" The UT was entitled, and right in those circumstances, to reach the conclusion that A had "*progressed directly from her assessment of the seriousness of the offending to a conclusion that [R] should be deprived of his citizenship*" [UT/62–63]. In so concluding, the UT reflected the submission which had been made to it.

Tab 6, 88. Alternatively, as the UT found [UT/63], the notice was inadequately reasoned: it gave p.143 no indication that factors relevant or potentially relevant to discretion were considered. R did not challenge that conclusion in the Court of Appeal, and the Court of Appeal upheld it [CoA/36]. R has not challenged that part of the Court of Appeal's decision on this appeal.

Tab 5, p.116

## **CONCLUSION**

89. In the circumstances, the Court is invited to dismiss the appeal for the following among other reasons:
- (1) The Court of Appeal did not err in finding that A's decision to deprive R of his British citizenship without notice, without promising or granting him a right to make further representations for a merits-based evaluation of the deprivation

decision, was made or maintained in breach of the principles of procedural fairness.

- (2) The Court of Appeal did not err in quashing the deprivation decision; in any event, the matter should have been raised with the Court of Appeal.
- (3) The Court of Appeal's decision should be further upheld for the reasons that:
  - (a) A acted unfairly, in all the circumstances of the case, by deciding to deprive R of his British citizenship without any prior notice.
  - (b) A unfairly failed to publish a policy on which she relied when exercising her discretionary power to make a deprivation order.
  - (c) The Court of Appeal was wrong to conclude that, when making a deprivation order against R, the SSHD exercised her discretion under s.40(2) of the BNA 1983.

DAVID CHIRICO KC  
ONE PUMP COURT

GLEN HODGETTS  
GREAT GEORGE STREET CHAMBERS

BEN BUNDOCK  
ONE PUMP COURT

MARK LILLEY-TAMS  
OTB LEGAL

14 October 2025