IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL AND DIVISIONAL COURT
KING, FLAUX AND SINGH LJJ
[2020] EWCA Civ 918

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant/Cross-Appeal Respondent

v

SHAMIMA BEGUM

Respondent/Cross-Appeal Appellant

WRITTEN CASE FOR THE RESPONDENT

For ease of reference Ms Begum is referred to as "the Respondent" and the concurrent formation of the Court of Appeal and Divisional Court is referred to as the "Court of Appeal".

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A. INTRODUCTION

1. The power to deprive a person of British citizenship is one of the most severe and intrusive powers that Parliament has conferred on the Secretary of State. A deprivation order is far more serious in its consequences than most criminal penalties. Reflecting this, Parliament has guaranteed to every person who is subject to this power a right to have the deprivation decision redetermined by an independent tribunal which, unlike the Secretary of State, must hear both sides of the story. The statutory guarantee of a full merits appeal either to the First-Tier Tribunal ("FTT") or to the Special Immigration Appeals Commission ("SIAC") is integral to the statutory regime for deprivation of citizenship.

2. SIAC held that the Respondent cannot have a fair or effective appeal from the Secretary of State's decision to deprive her of her British citizenship. She is detained in the Al Roj camp in Northern Syria and cannot play a meaningful part in her appeal. Issue Nos. 1 and 3 concern the consequence that should follow from such a finding. Since they are inseparably connected, these Issues are addressed together in this Written Case as the "Fair and Effective Appeal Issue". Issue No. 2 is referred to as the "Article 2/3 Policy Issue" and is addressed separately.

i. The Fair and Effective Appeal Issue

3. The first question raised on this appeal is what should happen when an appellant cannot—as the Respondent cannot—exercise her right of appeal in a manner that is fair and effective so that it cannot fulfil the protective function that Parliament intended (Issues No. 1 and 3).

4. The Respondent submits that the Court of Appeal was right to hold that a person who cannot have a fair or effective appeal should be granted Leave to Enter the United Kingdom ("LTE") in order to allow them to pursue a fair and effective appeal. In the present case:

   (1) The Secretary of State deprived the Respondent of citizenship knowing that if she learned of the decision she would not be able to exercise her right of appeal effectively.

(2) Granting LTE was identified in previous cases to be (and argued by the Government in those cases to be) the appropriate way of ensuring that the statutory appeal can be exercised effectively in cases where this cannot be achieved by remote participation in an appeal; and

(3) Granting LTE therefore ensures that the statutory scheme is not frustrated and gives effect to Parliament's intention that SIAC should hear and consider both sides of the story.

5. If LTE is not the solution, then the Respondent submits that the deprivation order is unlawful and must be set aside. The power to deprive a person of British citizenship can only lawfully be exercised in circumstances that comply with natural justice. As will be explained, natural justice in this context is upheld and respected by the provision of a full merits appeal. If a person cannot have an effective appeal then the deprivation order is not consistent with natural justice and must be set aside.

6. There is no basis for implying into the statutory scheme an intention on the part of Parliament to override minimum conditions of fairness so that a deprivation order can be made even where natural justice cannot be accorded to the affected person.

7. Upholding the Court of Appeal's finding does not mean that every person who is overseas when a decision is taken to deprive them of British citizenship would be entitled to return to the United Kingdom or have their deprivation appeal allowed. On the contrary, in all previous cases in which the issue has arisen, SIAC has held that an appellant has been able to appeal fairly and effectively from abroad.[1] The present case is the only case to date in which SIAC has concluded that a person cannot fairly or effectively pursue an appeal from outside the UK.

ii. The Article 2/3 Policy issue

8. The second main issue before the Supreme Court concerns the Government's policy that it will not deprive persons of British citizenship where doing so will give rise to a real risk of the person suffering death, or cruel, inhuman or degrading treatment or

[1] *W2 v Secretary of State for the Home Department* [2017] EWCA Civ 2146, [2018] 1 WLR 2380; *S1 v SSHD* [2016] EWCA Civ 560, [2016] 3 CMLR 37; *G1 v SSHD* [2012] EWCA Civ 867, [2013] QB 1008

punishment.[2] The policy is intended to ensure that the protections of Articles 2 and 3 of the European Convention on Human Rights are applied even if a person might be outside the territorial jurisdiction of the United Kingdom ("the Article 2/3 Policy").

9. The Court of Appeal held that SIAC had erred in law by not considering for itself on the evidence before it whether the deprivation of the Respondent's citizenship exposed her to such a risk in breach of the Article 2/3 Policy. Instead, SIAC had asked whether the Secretary of State's conclusion, on the evidence before him, had been reasonable.

10. The Court of Appeal was correct so to have held. An appeal from a deprivation decision under s.40A(1) of the British Nationality Act 1981 ("1981 Act") and s.2B of the Special Immigration Appeal Commission Act 1997 ("1997 Act") is a full merits appeal. Where the Secretary of State has a policy or practice governing how a deprivation decision is to be taken it falls to FTT/SIAC to apply that policy itself to the facts and evidence before it.

11. SIAC failed to do that. It did not consider any of the evidence that had been adduced on the Respondent's behalf as to the risk of transfer to Bangladesh or Iraq or the prospect of British citizens being repatriated to the United Kingdom. It considered only the Ministerial Submission and concluded that the short conclusionary statements in that document were sufficient to demonstrate that the Article 2/3 Policy had been properly applied.

iii. [redacted]

[redacted]

[2] The Policy is set out at [**Appendix/478-479]**, [16].

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(1) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

(2) [redacted]

B. NATURE OF THE DEPRIVATION OF CITIZENSHIP POWER

17. The power to deprive a person of their British citizenship is set out in s.40 of the 1981 Act. The exercise of this power effects a permanent change to a person's civil status and will often fundamentally affect a person's life.

18. The deprivation of citizenship is far more severe in its effect than most criminal penalties in respect of which the highest standards of fairness are demanded.

19. The severity of a decision depriving a person of citizenship has been recognised judicially:

    (1) In *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, at [108] Lord Sumption JSC for the Court stated:

    > "A person's right in domestic law to British nationality is manifestly at the weightiest end of the sliding scale, especially in a case where his only alternative nationality (Vietnamese) is one with which he has little historical connection and seems unlikely to be of any practical value even if it exists in point of law."

    (2) In *Al-Jedda*, SC/66/2008, Judgment of 7 April 2009, at [4] Mitting J stated:

    > "Citizenship is the fundamental civic right. It is not necessary to go as far as Warren CJ in Trop v Dulles 356 US 86 in evaluating the importance of its loss as the total destruction of the individuals status in organised society; but, on any view, its loss, for the citizen, is a very serious detriment."

20. The statistics on the number of deprivation orders made are set out in an Annex to this written case. It is clear that the contemporary use of the deprivation of citizenship power against significant numbers of individuals overseas is a recent phenomenon which post-dates the main changes that Parliament has made to the power.

C. THE FACTUAL CONTEXT

21. The Respondent is now 21 years old. She was born and brought up in the United Kingdom as a British citizen. She was one of the three "Bethnal Green schoolgirls" who left the United Kingdom in February 2015 to travel to Syria. She was 15 years old at the time and had not even taken her GCSEs.

22. Her whereabouts were then unknown until she was discovered by journalists in February 2019 in Al-Hawl camp (also transliterated as Al Hol), an SDF[3]-run facility in north-east Syria where she was detained.

23. On 13 February 2019, the *Times* newspaper carried a report of an interview with the Respondent. She was expecting her third child (her first two children had died).[4]

24. On 19 February 2019, the Secretary of State decided to deprive the Respondent of her citizenship under s.40(2) of the 1981 Act.

25. The Secretary of State took the decision to deprive the Respondent of her citizenship despite being informed by the Security Service that she could not effectively pursue her statutory appeal from the camp and that there was no immediate prospect of that position changing. Thus, the Ministerial Submission at [3(h)] **[Appendix/134]** states that:

> "should BEGUM become aware of the deprivation decision whilst in al-Hawl it is difficult to see how she might effectively exercise her appeal right from that location".
>
> "BEGUM seemingly has no immediate prospect of leaving al-Hawl/travelling to the UK or another location so as to more effectively pursue the appeal..."

26. The Secretary of State's case against the Respondent is that she travelled to Syria and "*aligned with ISIL*" **[Appendix/136]**. The national security case also referred to

[3] The SDF are the Syrian Democratic Forces, a predominantly Kurdish militia opposed to the Assad regime.

[4] On 25 September 2020 the *Daily Mail* carried a story of an interview with the Respondent in which she reportedly stated that comments reported in her first interview whilst she was in Al-Hawl camp, had been made to protect herself and her child from ISIS women in the camp **[Appendix/970]**. ISIS stands for "Islamic State in Iraq and Syria", also known as "ISIL" (Islamic State in Iraq and the Levant) or "Daesh" (a transliteration of its Arabic acronym), all of which refer to a fundamentalist Islamic extremist militant group involved in large scale fighting since 2014 in Iraq and Syria.

comments that were reported in the *Times* article as allegedly showing a "*lack of remorse"* for aligning with ISIL.[5]

27. On 20 February 2019, the Bangladeshi Government issued a press release in the following terms **[Appendix/878]**:

> "The Government of Bangladesh is deeply concerned that [the Respondent] has been erroneously identified as a holder of dual citizenship shared with Bangladesh alongside her birthplace, the United Kingdom. Bangladesh asserts that Ms Shamima Begum is not a Bangladeshi citizen. She is a British citizen by birth and has never applied for dual nationality with Bangladesh. It may also be mentioned that she has never visited Bangladesh in the past despite her parental lineage. So, there is no question of her being allowed to enter into Bangladesh."

28. The Respondent was moved to Al Roj camp, another SDF facility, in late February 2019 where she remains detained today. This was reportedly because of threats to her life from ISIS following her engagement with the international media in Al Hawl **[Appendix/347]**.

29. On around 7 March 2019, sadly the Respondent's third child died, reportedly of pneumonia, in Al Roj camp.

30. On 2 May 2019, Bangladesh's Minister for Foreign Affairs was interviewed by ITN, where he reiterated the Bangladeshi Government's position **[Appendix/908]**:

> "We have nothing to do with Shamima Begum. She is not a Bangladeshi citizen. She never applied for Bangladeshi citizenship. She was born in England and her mother is British… [she is] nothing to do with us".

31. He stated that if she came to Bangladesh **[Appendix/909]**,

> "She will be put in prison and immediately, the rule is, she should be hanged."

32. The Secretary of State has refused to confirm that she will not rely on additional facts and matters against the Respondent and that her OPEN and CLOSED national security case will remain as it stands.[6]

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[5] Min Sub Annex A (Security Service Assessment – Shamima Begum) **[Appendix/136]**

[6] Special Advocates Non-LPP Communication Requests, 3 October 2019 **[Appendix/467-468]**; GLD letter 18 October 2019 **[Appendix/479]**

The decisions of SIAC and of the Court of Appeal

33. On 7 February 2020 SIAC gave judgment on three preliminary issues in the Respondent's appeal from the deprivation of her citizenship: the statelessness issue, the Article 2/3 Policy issue and the fair and effective appeal issue **[Appendix/75]**. The second and third issues were subject to a challenge by way of judicial review and are raised on this appeal.[7]

34. SIAC's judgment also stood as its reasons for rejecting a human rights appeal from the Secretary of State's refusal to allow the Respondent LTE. Mrs Justice Laing sitting as the Administrative Court gave a separate judgment addressing the Respondent's common law challenge to the refusal of LTE ([2020] EWHC 74 (Admin) at **[Appendix/130]**).

35. In its reasons concerning the Article 2/3 Policy, SIAC accepted that the conditions in Al Roj camp were sufficiently dire as to contravene Article 3 ECHR and it proceeded on the basis that the conditions in Al Hawl camp had been the same (SIAC at [130]). SIAC nonetheless considered that the Secretary of State had been "*reasonably entitled*" to discount the prospects of British citizens being repatriated to the UK from the camps or of the Respondent being removed to Bangladesh or Iraq following the deprivation of her citizenship. Therefore the Secretary of State had been entitled to conclude that the deprivation of the Respondent's citizenship did not breach the Article 2/3 Policy by exposing her to a risk of death or cruel, inhuman or degrading treatment or punishment (SIAC at [139]).

36. As to the fair and effective appeal issue, SIAC accepted that the Respondent could not have an effective or fair appeal whilst she is detained in the camp: *"in her current circumstances, A cannot play any meaningful part in her appeal, and that, to that extent, the appeal will not be fair and effective"* (SIAC at [143]).

37. SIAC nonetheless concluded that there was nothing it could or should do in the face of such unfairness. It held that it was for the Respondent's legal advisers to decide

[7] The Respondent intends to apply to appeal SIAC's conclusion on the statelessness issue following a final determination of the appeal pursuant to s.7 of the 1997 Act. Judicial review of SIAC is exceptional. However, the fair and effective appeal issue had to be resolved before the appeal took place and was therefore suitable for judicial review. The Article 2/3 Policy issue, although a distinct legal issue, is related to that issue in both fact and law. Mr Justice Swift granting permission accepted that these two issues were suitable for judicial review.

whether to seek a stay of the appeal. If the appeal was continued, and no evidence was filed by the Respondent, SIAC stated that it "*could lead*" to the appeal being struck out (at [191]).

38. In the Court of Appeal, Flaux LJ gave a judgment with which King and Singh LJJ agreed **[Appendix/14]**. On the Article 2/3 Policy, Flaux LJ found that SIAC had erred in failing to decide for itself whether the policy had been breached: "*the full merits appeal is a hearing de novo in which SIAC has to stand in the shoes of the Secretary of State and determine whether, on all the evidence before it, the conditions for making a deprivation decision are made out*" (at [125]).

39. On the fair and effective appeal issue, Flaux LJ rejected the Respondent's contention that her deprivation appeal should be allowed (at [111]) but also rejected the Secretary of State's submission that the deprivation appeal should be stayed. A stay would leave her in the SDF camp and would do nothing to remove the foreseeable risk of transfer to Iraq or Bangladesh (at [116]). It would also be "*wrong in principle*" (at [117]).

40. Therefore Flaux LJ concluded that the "*only way in which there can be a fair and effective appeal*" would be to allow the Respondent's appeals relating to the refusal of LTE. The Court of Appeal therefore ordered that the Respondent be granted LTE and provided with a travel document so that she can return to the United Kingdom **[Appendix/51]**.

D. THE FAIR AND EFFECTIVE APPEAL ISSUE

(a) The Appellant's inability to have a fair and effective appeal

41. SIAC held that the Respondent cannot meaningfully participate in her deprivation appeal. She will not have a fair opportunity to provide her side of the story or rebut the allegations against her. SIAC concluded that the Respondent cannot therefore have a fair and effective appeal.

42. That conclusion was not challenged by the Secretary of State in the Court of Appeal and it was not put in issue in the Secretary of State's Grounds of Appeal to this Court.

43. The Supreme Court panel that granted permission to appeal nonetheless stated that given the effectiveness with which the Respondent has pursued the preliminary issues the Court will wish to hear argument about her ability effectively to pursue her deprivation appeal.[8] This section therefore addresses this question.

44. The Respondent is detained in Al Roj camp by SDF forces. Those forces do not permit visits from lawyers nor do they permit detainees to speak to lawyers. Detailed evidence was filed in SIAC by Mr Furner of Birnberg Peirce solicitors explaining how he has obtained instructions and the reasons why he will, under the current constraints, be unable to obtain the instructions necessary to prosecute the substantive stage of the appeal.

45. Mr Furner's evidence explains the difficulties, risks and restrictions on communications with the Respondent. The evidence includes material covered by confidentiality orders in order to protect third parties. The evidence explains that communications with the Respondent are not confidential or secure, are intermittent and unreliable, and would not allow detailed or confidential instructions to be taken on the national security case against the Respondent nor for the national security case to be transmitted to her.[9]

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[8] Order of the Supreme Court (Lord Reed, Lord Lloyd-Jones, Lord Sales), 7 September 2020 **[Appendix/13]**

[9] First Witness Statement of Daniel Furner, 3 May 2019, [18]-[30] (CONFIDENTIAL) **[Appendix/165-167]**; Replacement CONFIDENTIAL witness statement of Daniel Furner, 30 August 2019, [7] (CONFIDENTIAL) **Appendix/171]**; Third OPEN Witness Statement of Daniel Furner, 21 October 2019, at [13]-[22] **[Appendix/262-263]**.

46. The Secretary of State did not challenge any of that evidence by way of cross-examination before SIAC and no evidence to the contrary was filed.

47. Indeed, as explained in [25] above, those advising the Secretary of State recognised that the Respondent could not exercise the statutory right to appeal in the Ministerial Submission dated 19 February 2020 **[Appendix/134]**. Whilst the Secretary of State now seeks to suggest that this was not a "*definitive*"[10] view, it was in fact a clear and explicit recognition of the issue on the part of those advising the Secretary of State.

48. The position that transpired is consistent with this assessment and expectation. The Respondent is unable to give instructions on any detailed issues of fact, as would be necessary at the substantive stage of her appeal. At the preliminary issues stage, as explained in [15]-[19] of Mr Furner's third OPEN witness statement **[Appendix/262-263]**, it has been possible to obtain the limited instructions necessary to pursue the legal issues currently before the Court: those issues do not require detailed instructions, including on the substance of the national security case, which will be necessary to prosecute the substantive appeal.

49. In light of the restrictions on communications between lawyer and client:

    (1) The Respondent cannot review the national security case filed by the Secretary of State including as it relates to ISIS and the situation in Syria during the relevant period of time.

    (2) The Respondent's solicitors cannot take a proof of evidence from her or provide confidential legal advice on the national security case against her in the light of such evidence.

    (3) The Respondent cannot have any meaningful participation in a hearing, such as by video link. She would not be able even to provide instructions on oral evidence given by the Secretary of State's witnesses during the course of a hearing.

[10] Written Case for the Secretary of State, page 10, fn 5.

50. The next step in the deprivation appeal for the Respondent to take would be for her to file her evidence. However, as explained above and in the evidence of Mr Furner, that is not a step that she can take.

51. Such impediments are not peripheral but central to the Respondent's ability to have a fair and effective appeal, particularly where the credibility of the individual and the presence of explanations or mitigations for past actions are likely to be significant: e.g. *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 at [67]-[71] (Lord Reed JSC for the Court); *Kiarie v Secretary of State for the Home Department* [2017] UKSC 42, [2017] 1 WLR 2380 at [61]-[63] (Lord Wilson JSC for the Court); *R (Smith) v Parole Board* [2005] 1 WLR 350 at [35] (Lord Bingham for the Appellate Committee of the House of Lords).

52. There have been other cases in which persons deprived of their citizenship have argued that they cannot have a fair or effective appeal, but all such contentions have been rejected and the facts of such cases differ markedly from the present:

    (1) In *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867, [2013] QB 1008 it was held that the fact that the appellant was in Sudan did not prevent him pursuing an appeal or giving evidence by video link, if necessary by going to a third country to do so (at [25]).

    (2) In *S1 v Secretary of State for the Home Department* [2016] EWCA Civ 560, [2016] 3 CMLR 37 the Court of Appeal held that the appellants' contentions that they had become unable to pursue their appeals from Pakistan were "*superficial and without particularity*" (at [73]). The appellants were free to travel anywhere in Pakistan, to meet their solicitors or to communicate with them via telephone, video link or email, including through independent video conferencing providers, others' telephones or emails and, had they obtained Pakistani passports sooner, they could also have travelled to third countries.

    (3) In *W2 v Secretary of State for the Home Department* [2017] EWCA Civ 2146, [2018] 1 WLR 2380, the Court of Appeal noted SIAC's finding that "*the evidence from W2 on [his inability to have a fair and effective appeal] was very thin"*, and that "*there was no evidence that… he could not travel outside that country [of his nationality] if he fears his communications are being monitored*" (at [30]).

53. Unlike those appellants, the Respondent is not free to travel to secure participation in her appeal, and the conditions in the camps preclude any such participation. SIAC was at least entitled to hold that the Respondent cannot have a fair and effective appeal from the deprivation decision.

54. Even if the Secretary of State had challenged SIAC's decision on this point in the Court of Appeal, this Court would be very slow to overturn a conclusion on an issue of fact: see, for example, *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, [67] (Lord Reed JSC for the Court); *Carlyle v Royal Bank of Scotland Plc* [2015] UKSC 13, [21]-[22] (Lord Hodge JSC for the Court); and *Volcafe v CSAV* [2019] AC 358, [41] (Lord Sumption JSC for the Court).

55. In her Written Case, the Secretary of State seeks to revive arguments that she advanced before SIAC for example as to the Respondent's ability to instruct lawyers through intermediaries and the existence of a camp telephone. Such matters were addressed in the evidence of Mr Furner,[11] which described how his communications with the Respondent are "*unpredictable and inherently not confidential"*; that there have been "*lengthy periods"* during which "*no contact can be achieved*"; that detainees' access to the camp telephone is "*to send outgoing messages only; there is no facility to make or receive calls*". It cannot be used to contact lawyers, which is prohibited.

56. Mr Furner's evidence also explained why, although he had been able to secure instructions for the preliminary issues stage of the appeal, he was not able to obtain the instructions necessary to prosecute the substantive stage of the appeal in which the Respondent's evidence on the national security case will be necessary.[12] Those matters were taken into account by SIAC in reaching its conclusion that the Respondent cannot have a fair or effective appeal. In short, the fact that Ms Begum has been able to instruct lawyers to date does not overcome the fundamental problem of her giving her account of events in response to the case against her, taking legal advice on that account, preparing evidence and participating in an appeal.

[11] Witness Statement of Daniel Furner, 3 May 2019, in particular at [25]-[28] **[Appendix/208-209]**. See also the Statement of Witness B, [33] **[Appendix/291]** and the Application for Leave to Enter, [33] at **[Appendix/179].**

[12] See above, fn 9.

57. Furthermore, the Secretary of State has also argued that SIAC's conclusion was somehow a limited *pro tem* ruling, which was subject to change. This is incorrect. SIAC followed the procedure specified by the Court of Appeal in *W2* to determine as a preliminary issue whether the Respondent could have a fair and effective appeal. It held that she could not. Its reference to her current circumstances was not an implicit finding that her circumstances could change. Indeed, no material change of circumstances was foreseeable. (The Secretary of State refers to a statement in paragraph 27 of Mr Furner's first witness statement when he referred to the unpredictable nature of conditions at the Al Roj camp; but he did not suggest that there was any prospect of the circumstances changing to allow a fair appeal and indeed over the last 18 months nothing in the conditions themselves has changed to improve that prospect.)

58. Of course, the Secretary of State now asserts that circumstances have changed because of steps the Secretary of State has taken. The fact that the Secretary of State has brought about a change of circumstances (the relevance and significance of which have not been determined) does not affect the points made above. Indeed, the Secretary of State never even hinted at this possibility before SIAC.

(a) The statutory scheme

59. The ability of a person meaningfully to challenge a decision to deprive them of citizenship before an independent judicial body represents an integral part of the safeguards that Parliament has required to accompany the power of deprivation of citizenship.

60. Section 40(5) provides that:

> "(5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—
>
> (a) that the Secretary of State has decided to make an order,
> (b) the reasons for the order, and
> (c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68)."

61. Section 40A(1) provides that a person who is served with notice under section 40(5) of a decision to make an order "*may appeal against the decision*" to the FTT. Subsection 40A(2) disapplies subsection (1) where the Secretary of State certifies that the decision was taken wholly or partly in reliance on the basis of information which cannot be made public in the public interest. Section 2B of the 1997 Act provides that a person may appeal to SIAC "*against a decision to make an order*" under s.40 of the 1981 if he is not entitled to appeal under s.40A(1).

62. Parliament has therefore ensured that there is a right of appeal from a deprivation decision to a tribunal that is able to view all of the relevant material. Furthermore, Parliament clearly intends that a person should have a meaningful opportunity to contest the deprivation decision since it requires reasons for the decision to be provided to the individual at the time the decision is taken.

63. Appeals under s.40A(1) of the 1981 Act and under section 2B of the 1997 Act are unrestricted in scope and represent a *de novo* redetermination of the issues by either the FTT or SIAC on the basis of the evidence before the tribunal, having heard both sides, which may be very different from the evidence that was before the Secretary of State:

    (1) As Mitting J stated in *Al Jedda v Secretary of State for the Home Department* [2009] SC/66/2008 "*An appeal is a challenge to the merits of the decision itself…*" (at [7]). He also stated that the constitution and procedures of SIAC enable, "*an exhaustive enquiry to be made of Secretary of State's reasons for making decisions about national security*". He continued:

> "The principal issues on national security are invariably: what has an appellant done?; and what inference can be drawn from his past actions and current capacity and beliefs about the threat, if any, which he poses to national security?. These are matters of individual assessment, which the Commission is particularly well placed to make. Indeed, its procedures almost certainly ensure that the case of an individual appellant is subjected to greater scrutiny than could be given to it by the Secretary of State." (at [8])

    (2) The Supreme Court in the same case stated that it is, "*for the appellant body to determine for itself whether the ground exists*" for deprivation of citizenship: *Al*

Jedda v Secretary of State for the Home Department [2013] UKSC 62, [2014] AC 253 at [30] (Lord Wilson JSC for the Court).[13]

(3) In *Pham*, Lord Sumption JSC for the Court[14] stated that in determining whether deprivation is conducive to the public good, SIAC must "*assess the appropriateness of the balance drawn by the Home Secretary between [a person's] right to British nationality and the relevant public interest engaged…"*: *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 at [108].

64. Parliament has therefore provided that a person has a right to be given the reasons for a deprivation decision and to have a redetermination of the decision by an independent tribunal that will make up its own mind on all of the relevant material. Where Parliament affords a right of appeal it is presumed to intend that it will be effective (*Kiarie* at [35]).

65. The right of appeal to the FTT or SIAC was introduced by the Nationality, Immigration and Asylum Act 2002 ("2002 Act"), but the deprivation power had previously been accompanied by a right for a person to refer a proposed deprivation decision to a committee of inquiry presided over by a judge.[15] Parliament has thus consistently required that a person deprived of their citizenship is entitled to have that decision referred to an independent judicial authority.

66. Furthermore, no deprivation order could be made if a person referred the matter to an inquiry. Similarly, the 1981 Act originally provided that no deprivation order could be made until the time for a person to appeal a deprivation decision had expired or until the conclusion of an appeal.[16] This provision was repealed from 4 April 2005 by

[13] Applied to s.40(3) 1981 Act in *BA (Deprivation of Citizenship Appeal) v Secretary of State for the Home Department* [2008] UKUT 00085 (IAC) at [44] (Lane J)

[14] Lord Mance agreeing at [98]

[15] BNA 1981 (as enacted) s.40(6), (7); British Nationality and Status of Aliens Act 1914 s.7(3); British Nationality Act 1948 s.20(6), (7). The deprivation power was originally only exercisable in limited circumstances in respect of naturalised subjects.

[16] Subsection (6) provided:

"(6) An order under section 40 may not be made in respect of a person while an appeal under this section or section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68)—
(a) has been instituted and has not yet been finally determined, withdrawn or abandoned, or
(b) could be brought (ignoring any possibility of an appeal out of time with permission)."

Schedule 2 paragraph 4 of the Asylum and Immigration (Treatment of Claimants) Act 2004 ("2004 Act"). From that date, a deprivation order could be made before an appeal had been commenced or concluded.[17]

67. In *Al-Jedda (No 2)* it was argued that given that an appeal does not suspend the operation of a deprivation order, natural justice requires that a person be given an opportunity to make representations before a deprivation decision is taken.[18] SIAC rejected this argument and held that Parliament's intention in this context is that the *de novo* appeal before the FTT or SIAC provides the necessary safeguards for natural justice: see *Al-Jedda (No 2)* at [141], [155]-[156] and [158]-[159].

68. The finding in *Al-Jedda (No 2)* is important because it makes clear that where an appeal cannot be effectively pursued this not only affects the fairness of the appeal but it goes to the fairness *of the deprivation decision itself*. The statutory appeal represents the mechanism for ensuring that a deprivation decision conforms to principles of natural justice.

69. Taken together, the legislative provisions evidence a consistent Parliamentary intention to the effect that a person subject to a deprivation decision should be able to have that decision reconsidered by a judicial authority and that it is through such a process that natural justice is respected.

70. This means that if a person cannot have a fair or effective appeal, a deprivation order will not be consistent with natural justice.

71. In its judgment in the present case, SIAC nonetheless drew the conclusion that Parliament did not intend that an appeal will necessarily be fair and effective. By reference to the amendment to section 40A made by the 2004 Act, which removed the prohibition on a deprivation order being made prior to an appeal being concluded, SIAC held that Parliament *"anticipated that such appeals would often, if not regularly, be brought* from *outside the United Kingdom"*. It also held that Parliament

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[17] *W2 v Secretary of State for the Home Department* [2017] EWCA Civ 2146 and [2018] 1 WLR 2380 at [62].

[18] *Al-Jedda v Secretary of State for the Home Department* SC/66/2008 (Flaux J, Judge Warr, Sir Stephen Elden) (*Al-Jedda (No 2)*).

recognised that some people would therefore face *"significant restrictions"* on their ability to participate in their appeals (SIAC at [151]).

72. SIAC concluded that it was *"not possible, still less necessary, to imply into this legislative scheme a rule that if a person … cannot effectively exercise her or their right or rights of appeal, the appeal should be allowed"* (at [152]).

73. SIAC's analysis of the statutory scheme is erroneous for three reasons:

(1) First, even if Parliament did anticipate that persons would sometimes have to appeal from outside the United Kingdom it does not follow that Parliament intended that they would not be entitled to a fair appeal. The fact that an appeal is outside the UK does not mean that minimum standards of fairness are not applicable to it.[19] The statutory scheme evinces a clear intention on the part of Parliament that individuals should have a meaningful opportunity to challenge a deprivation decision in an independent forum.

(2) Second, SIAC considered that basic principles of natural justice were excluded *by implication*. Indeed, SIAC sought positive evidence of a statutory intention that natural justice must be respected. This is to approach the question from the wrong end. Parliament is presumed to intend that an appeal should be fair and effective unless the opposite intention appears clearly and expressly: *"the legislature may certainly exclude or limit the application of the general rules [of natural justice]. But it has always been insisted that this must be done, clearly and expressly." Wiseman v Borneman* [1971] AC 297, 318 (Lord Wilberforce). Moreover, this is a context in which Parliament *has* expressly excluded principles of natural justice but only in the specific and limited context of disclosure of material where this would be contrary to the public interest. The certification procedure in s.40A(2) and the provisions of the 1997

[19] This was a point made by the Government itself when further changes to the deprivation of citizenship power were made by the Immigration Act 2014 enabling a naturalised citizen to be rendered stateless by a deprivation order. In response to a question from the Joint Committee on Human Rights:

> "**Q17. Would a person who is deprived of their UK citizenship while abroad have an effective remedy if required to conduct their appeal against the decision whilst out of the UK?**
> A number of appeals against deprivation decisions have been brought by individuals outside the UK. These have demonstrated that effective appeals may be pursued by individuals who are overseas." James Brokenshire MP, Immigration and Security Minister to Dr Hywel Francis MP, Chair JCHR, 20 February 2014

Act make explicit and detailed provision for material to be withheld from an individual even though this would unfairly limit his or her ability to meet the case against them. Given that Parliament has made express but carefully circumscribed derogations from natural justice in relation to deprivation appeals, the Court should not imply additional restrictions and limitations into the statutory scheme.

(3) Third, the Secretary of State has not established that the amendment made by Schedule 2 paragraph 4 of the 2004 Act were concerned to address overseas appeals. The mischief addressed by that provision, as recorded in the Explanatory Note[20], was to enable deportation orders to be made against individuals whom the Secretary of State had decided to deprive of citizenship (which could not be done if a deprivation order could not be made pending an appeal) so that deportation appeals and deprivation appeals could then be *pursued in tandem to the FTT or SIAC*. Moreover, at that time persons subject to concurrent deportation and deprivation orders could not be removed from the United Kingdom whilst their deportation appeal was pending.[21] The amendment does not therefore provide any basis for the implication that Parliament accepted that persons outside the UK would not necessarily have access to a fair or effective appeal.

74. In her Written Case at [36]-[37], the Secretary of State seeks to rely on the "service to file" provisions in regulation 10(4) of the British Nationality (General Regulations) 2003 as amended by the British Nationality (Amendment) Regulations 2018. She relies on them for the proposition that "Parliament has endorsed" a system in which a person might receive no notice at all of a deprivation decision for a long period of

[20] Explanatory Note, at [121].

> "This provision has the effect that appeals under this Act are handled in the same way as appeals under Part 5 of the 2002 Act, and the same provisions for higher court oversight and legal aid are applied. It also has the effect that a deprivation order can be made before any appeal is heard, thereby allowing deprivation and deportation proceedings to take place concurrently."

[21] The 2002 Act, sections 79(1) and 82(2) as enacted, conferred a right of appeal from a deportation order before deportation could be carried out. Such an appeal was always an in-country appeal: s.92(2) as then in force. SIAC at [150] suggested that the fact that these provisions do not apply to deprivation appeals means that deprivation orders are not intended to confer an in-country appeal. But a deprivation order does not itself remove a person from the United Kingdom; such removal is effected by a deportation order and a person could not be removed whilst such an order was subject to appeal. As the Explanatory Note states, it was intended that deportation and deprivation appeals would be heard together and that would have been an in-country appeal.

time. The regulations—the vires of which may be open to question[22]—do not provide any support to the Secretary of State's case:

(1) Regulations made under the 1981 Act cannot affect the meaning of that Act. The regulations are made under s.41 of the 1981 Act which provides that regulations can only be made where they carry into effect the purpose of the Act; they do not therefore control the purpose of the Act: "(1) The Secretary of State may by regulations make provision generally for carrying into effect the purposes of this Act, and in particular provision—…".

(2) The regulations "represent the will of the Executive"[23] not that of Parliament. The fact that each House had a power to annul them (s.41(7)) does not mean that "Parliament endorsed" the regulations either as a matter of fact or in any legally meaningful sense.

75. The analysis of the statutory scheme therefore shows that the right to a fair and effective full merits appeal is integral to the deprivation power.

(c) The Court of Appeal was correct to hold that the Respondent should be granted LTE

i. S1 and W2

76. The question about what should happen in circumstances where a person cannot have a fair and effective deprivation appeal has been raised in several previous cases. The courts in those cases did not consider, as SIAC did in the present case, that there was no remedy for the problem. On the contrary, they recognised that a person must be afforded a fair and effective appeal and identified the grant of LTE as the solution to achieve that.

77. Thus, in *S1 & ors v SSHD* [2016] EWCA Civ 560, [2016] 3 CMLR 37 Burnett LJ at [85]-[86] stated *obiter* that the appropriate course where a person claimed that they could not fairly from abroad pursue an appeal from a decision to deprive them of British citizenship was to apply for LTE and challenge any refusal by judicial review.

[22] Indeed, the vires of the Regulations are currently subject to challenge in *C3 and C4 v SSHD,* SN/167/2020 which is listed to be heard by SIAC on 23-27 November 2020.

[23] *R v Secretary of State for the Environment, Transport and the Regions, ex parte Spath Holme Limited* [2001] 2 AC 349, 383 (Lord Bingham quoting Lord Donaldson).

It was clearly anticipated that if a person could show that they could not have a fair or effective appeal they should be granted LTE.

78. This position was taken further in *W2*. The claimant applied for judicial review of a deprivation decision and sought interim relief to allow him to enter the United Kingdom. The Secretary of State resisted the claim on the basis that the claimant should have applied for LTE and challenged any refusal, or raised the issue in an appeal from a deprivation decision as a preliminary issue, in accordance with Burnett LJ's comments in *S1*. The Secretary of State's submissions are recorded in the judgment of Beatson LJ:

> "6. … It was submitted on behalf of the Home Secretary that SIAC is able to address the underlying question of whether W2's return to the United Kingdom should be facilitated. It could do so in an expedited appeal by him under section 2 of the Special Immigration Appeals Commission Act 1997 ("the SIAC Act 1997") against a refusal by the Home Secretary to grant him leave to remain [sic] ("LTE") outside the rules. It was also argued that the issue of whether W2 could effectively participate in his appeal under section 2B of the SIAC Act 1997 (as inserted by section 4(2) of the Nationality, Immigration and Asylum Act 2002) against the decision to deprive him of British citizenship if he is not in this country could be considered as a preliminary issue in that appeal."

79. Beatson LJ (with whom Davis and Singh LJJ agreed) accepted the Secretary of State's submission, holding that an appeal from an LTE decision would provide an effective remedy:

> "85. As Mr Fordham recognised, the question for this court is whether an appeal under section 2 or section 2B of the SIAC Act 1997 will be a practical and effective remedy for determining whether an out of country appeal against the decision to make the deprivation order would be "effective". … If he is successful in that and SIAC considers that his presence in the United Kingdom is necessary in order for his appeal to be effective it will allow the appeal."

80. The Court of Appeal's conclusion in the present case was therefore entirely consistent with these authorities and with the Secretary of State's own position in *W2*.

ii. The Secretary of State's knowledge when he took the deprivation decision

81. In the present case, there is an additional factor which was not present in either *S1* or *W2* which is that the Secretary of State was aware when he took the decision to deprive the Respondent of her citizenship that she would have no effective

opportunity to challenge that decision. The relevant extract from the Ministerial Submission is set out at [25] above.

82. The Secretary of State also knew that he had not heard any representations from the Respondent and did not know her version of events. In making the deprivation decision he therefore was aware that, unless LTE was granted in accordance with the position he had taken in *W2*, the deprivation order would be based on a one-sided assessment and the statutory scheme for independent redetermination of the deprivation decision would be negated.

83. This makes the grant of LTE even more appropriate in the present case.

iii. National security considerations

84. The Court of Appeal considered whether national security considerations required LTE to be refused. Flaux LJ held that the security risk posed by the Respondent could be managed in the UK (at [120]). He expressed the *"firm conclusion"* that considerations of fairness outweighed the national security considerations (at [121]).

85. The Respondent submits that Flaux LJ was right to dismiss the Secretary of State's reliance on national security considerations, for three reasons.

86. First, as a matter of principle, if the Secretary of State deprives a person of British citizenship they are entitled to a fair and effective appeal. Considerations of national security cannot override this protection which is, as has been explained, integral to the statutory scheme, unless (which is not here the case) Parliament expressly so provides: *Al-Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 at [22], [34], [44], [69] (Lord Dyson JSC), [71]-[74] (Lord Hope DPSC).

87. Second, in any event, Flaux LJ was correct in his analysis of the national security case against the Respondent.

(1) In W2's case, as has been explained, the Secretary of State accepted that it would have been open to SIAC to require LTE to be granted if the court concluded that W2 could not have had an effective or fair deprivation appeal. It is significant that the national security case against W2 was much more serious and specific than that against the Respondent. W2 was alleged to have

travelled to Syria, joined ISIL and returned with bomb-making instructions, which the police found at his home (*W2*, at [14]).

(2) Before the Court of Appeal the Secretary of State relied upon *U2 v SSHD* [2019] SC/130/2016 at [144] in which SIAC held that deprivation of citizenship – and exclusion from the UK – was more effective at combatting terrorism than measures such as the imposition of a Terrorism Prevention and Investigation Measure.[24] However, Flaux LJ was right to conclude that the allegations against the Respondent are also "*at a lower level of seriousness*" than U2, who had travelled repeatedly to Syria and who was alleged to be a highly committed and dangerous terrorist (at [119]).

(3) The national security case against the Respondent – in both OPEN and CLOSED – is very different. The case is no more than that she travelled to Syria and "*aligned with ISIL*".[25] It is not alleged that she fought, trained or participated in any terrorist activities, nor that she had any role within ISIL. It is not said that she has expressed or harbours any ill will against the United Kingdom. The evidence before SIAC and the Court of Appeal showed that of around 900 people who travelled from the UK to Syria and Iraq, approximately 360 had returned to the UK and have been assessed to pose "*no, or a low security risk*" **[Appendix/493]**. Whilst noting that those who remained included some of the most dangerous, there are, as noted, no specific allegations against the Respondent that could support such a conclusion in her case.[26]

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[24] See Terrorism, Prevention and Investigation Measures Act 2011

[25] Ministerial Submission, Annex A **[Appendix/136]**

[26] The exculpatory documents disclosed by the Secretary of State included the following statement **[Appendix/493]**:

"**The scale and nature of the threat**
Around 900 people have travelled from the UK to engage with the conflict in Syria and Iraq, against the advice of the Foreign Office. Of these, approximately 20% have been killed in the conflict and around 40% have returned to the UK. They have all been investigated and the majority have been assessed to pose no, or a low security risk. Those who remain in the conflict zone include some of the most dangerous, choosing to stay to fight, raise families or otherwise support Daesh. They turned their back on this country to support a group that butchered and beheaded innocent civilians, including British citizens. These individuals pose a greater threat to the UK than individuals who returned earlier in the conflict. They will have received combat training, intense indoctrination, and will have had the opportunity to expand their terrorist network."

(4) The Secretary of State in her Written Case contends that "*the Court of Appeal should have accepted the Security Service's assessment"* that Ms Begum presented a "*significant"* national security risk. However, it is clear that the Court of Appeal did proceed on the premise that the Respondent posed a national security risk (although it remains to be proved). In this regard, Flaux LJ confirmed at [92] that the Court kept in mind "*the public interest considerations, including the interests of national security which led to the deprivation decision*"; at [96] that "*in the present case, the deprivation decision is based on an expert assessment that it is in the interests of national security*"; at [109] that "*the deprivation decision was taken on the basis of a detailed ministerial submission as to the interests of national security*"; and at [119] that "*I am acutely conscious of the national security issues which Sir James emphasised"* and *"there is no question of prejudging the national security issue in circumstances where the appeal has not been heard*".

(5) The Secretary of State's Written Case also asks this Court to accept that the risk is *"best addressed"* by depriving the Respondent of her citizenship ([46]). But again (a) the national security assessment on which the deprivation decision was taken does not state that the risk is best addressed in this way, and (b) the national security assessment does not include any assessment of whether the any risk could be managed effectively in other ways, such as by a TPIM or TEO.

(6) The Secretary of State's Written Case also contends that the Court of Appeal had no proper basis for its conclusion given that it did not have the OPEN generic national security statement or CLOSED judgment or other CLOSED material. These however would not have made any material difference to the court's conclusion:

a. As to the CLOSED judgment of SIAC, the Secretary of State has stated that this has no relevance to the Fair and Effective Appeal Issue. According to the Secretary of State, it *"was concerned with the Article 2/3 risks"*.[27]

[27] Secretary of State's Application for Permission to Appeal, 20 July 2020, at [20].

b. As to the CLOSED national security case, the Secretary of State has accepted that this does not differ from the OPEN national security case.[28]

c. As to the OPEN generic national security case, at no stage in the proceedings below did the Secretary of State seek to rely on this or suggest that it added anything material to the national security case that is specific to the Respondent. As noted above, it is clear that the Court accepted as its premise that the Respondent had aligned with ISIL and that such a person poses a national security risk.

(7) It is also very telling that the national security case itself states that the Security Service "*would argue that it would be incorrect to allow her to return to the UK to engage with her appeal*" because the Respondent had "*been out of the UK for several years through her own choice*" (paragraph (h) **[Appendix/134]**). If the Security Service had been of the opinion that the return of the Respondent to engage with her appeal posed an unmanageable or unacceptable risk to national security one would expect the statement to have said so. But it did not. On the contrary, it stated that it would be incorrect to allow her to return when she had chosen to be outside the UK.

(8) Indeed, the Secretary of State has continued to place reliance on the relevance of the Respondent's "choice" to go to Syria. But this submission was rejected by Flaux LJ, at [92], for compelling reasons:

> "the circumstances in which Ms Begum left the UK and remained in Syria and whether she did so of her own free will should be irrelevant to the question of the legal and procedural consequences of SIAC's conclusion that she cannot have a fair and effective appeal. Furthermore, I would be uneasy taking a course which, in effect, involved deciding that Ms Begum had left the UK as a 15 year old schoolgirl of her own free will in circumstances where one of the principal reasons why she cannot have a fair and effective appeal is her inability to give proper instructions or provide evidence. One of the topics that could be explored on her appeal before SIAC is precisely what were the circumstances in which she left the UK in 2015, but that could only properly be determined after a fair and effective appeal. The Secretary of State's submission risks putting the cart before the horse."

[28] Min Sub Annex A – Security Service Assessment – Shamima BEGUM, 18 February 2019, footnote 2 **[Appendix/136]**

88. Flaux LJ was, accordingly, correct in his assessment of the national security case and its impact on the resolution of the preliminary issue.

89. Third, there is a more fundamental objection to the Secretary of State's claim that granting LTE would pose an unacceptable risk to national security: namely that, for any British citizen who does not have dual nationality, there is no power to exclude them from the UK. For all such people, the risk that they might pose is managed adequately through prosecution and domestic provisions such as those relating to TPIMs and asset freezing. [29]

90. Indeed, had the Respondent's parents been British or from a country that had different rules on inheriting citizenship, she would be able to return. The arbitrary nature of the situation is underscored by the fact that if the Respondent had been over twenty one years old when the deprivation order was made she also could have returned, as under Bangladeshi law if a person acquires dual citizenship at all it is lost once they reach the age of 21.[30]

91. Viewed in this light, the Secretary of State's contention that the grant of LTE to the Respondent would pose an unacceptable risk to national security should not be accepted.

(d) The alternatives to granting LTE: Allowing the deprivation appeal

92. If LTE is not granted, the Respondent's deprivation appeal should be allowed.

93. As the Court of Appeal held, none of the other solutions that were identified by SIAC in its judgment provide satisfactory solutions to the dilemma. These solutions were (i)

[29] Terrorism Prevention and Investigation Measures Act 2011. British citizens can also be subject to the provisions on managed return (called Temporary Exclusion Orders) under the Counter-Terrorism and Security Act 2015.

[30] Sections 5 and 14 of the Bangladeshi Citizenship Act 1951 quoted by SIAC at [55]. At the time the Secretary of State took the decision to deprive the Respondent of citizenship this provision had been applied in *G3 v Secretary of State for the Home Department* SC/140/2017; see now *E3 v Secretary of State for the Home Department* [2019] EWCA Civ 2020, [2020] 1 WLR 1098. It is apparent from these cases that whether a person inherits a second citizenship often turns on highly obscure questions of foreign nationality law on which expert views differ.

the appeal being stayed, (ii) the appeal continuing, or (iii) the appeal being struck out without prejudice to an out of time appeal in the future.

94. To stay the appeal would be to compound the unfairness. The Respondent's detention in Syria is indefinite and any stay of the appeal would likewise be indefinite. Magna Carta 1297, section 29[31] provides a statutory prohibition on the deferral of justice:[32] "*we will not deny or defer to any man either Justice or Right."*

95. Flaux LJ was correct to reject this possibility **[Appendix/46]**:

> "…essentially for two reasons. First, the suggestion that Ms Begum's appeal should be stayed indefinitely in circumstances where she is being detained by the SDF in the camp, does nothing to address the foreseeable risk if she is transferred to Iraq or Bangladesh, which is that in either of those countries she could be unlawfully killed or suffer mistreatment.
>
> Second, it seems to me that simply to stay her appeal indefinitely is wrong in principle. It would in effect render her appeal against an executive decision to deprive her of her British nationality meaningless for an unlimited period of time."

96. In addition to these reasons, an indefinite stay would mean that SIAC would not reach a "*final determination*"[33] from which the Respondent could appeal SIAC's determination that she has dual nationality.[34]

97. The second option would be for the deprivation appeal to go ahead. The only way that Ms Begum could hope to re-obtain her British citizenship within any reasonable period of time (if this Court does not allow her cross-appeal on the fair and effective appeal issue) would be to pursue her deprivation appeal to conclusion. But she would be challenging the Secretary of State's decision with - metaphorically speaking - both hands tied behind her back. SIAC would not hear her story, in circumstances where it has accepted that renders her appeal unfair.

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[31] Clause 40 in the original Charter.

[32] SIAC is a Superior Court of Record: Special Immigration Appeals Commission Act 1997 s.1(3)

[33] 1997 Act s.7(1); see fn 7 above.

[34] To date, challenges to a determination by SIAC as to whether a deprivation order would render a person stateless (s.40(4) of the 1981 Act) have followed a final determination of an appeal by SIAC, rather than by way of exceptional judicial review.

98. As Flaux LJ held, such a situation is "*unthinkable*":

> "112 … With due respect to SIAC, it is unthinkable that, having concluded that Ms Begum could not take any meaningful part in her appeal so that it could not be fair and effective, she should have to continue with her appeal nonetheless. On this hypothesis, the Secretary of State would be able to present her case justifying the deprivation decision and the national security case in particular, without Ms Begum and her legal advisers being able to mount an effective challenge to that case. …
>
> 113. It is one thing for an appeal to proceed without the participation of the appellant against an appellant who chooses not to participate. It is quite another to proceed with an appeal without the participation of the appellant because the appellant is unable to participate meaningfully and effectively. Far from remedying the unfairness, this would seem to compound it. As Singh LJ said in the course of argument, it is difficult to conceive of any case where a court or tribunal has said we cannot hold a fair trial, but we are going to go on anyway."

99. The third option of striking out the appeal does not alleviate or remedy the unfairness. To strike out a claim but allow an out of time appeal in the future is "*no more than a refinement of the first course*" which "*compounds the unfairness*" (Flaux LJ at [114]). In any event, the Court now cannot know whether it is an option: it is subject to the discretion of SIAC in the future to extend time for an appeal.

100. The correct result, it is submitted, is that the Respondent's deprivation appeal should be allowed in circumstances where she establishes that she cannot have a fair and effective appeal (which will be the position if the refusal of LTE is upheld). This is because once SIAC concluded that she cannot have a fair and effective appeal this necessarily entailed the conclusion *that a deprivation order cannot fairly be made*. Since there is nothing in the statutory scheme that expressly or even impliedly overrides the principles of natural justice, the consequence is that the deprivation order must be set aside.

101. Cases such as *Al-Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531 stand for the proposition that courts will not try cases that cannot be heard consistently with basic principles of justice and fairness (at [22] (Lord Dyson JSC), [72] (Lord Hope DPSC), [84], [86] (Lord Brown JSC), and [88] (Lord Kerr JSC). As Lord Dyson JSC stated in *Al-Rawi*:

> "the court's power to regulate its own procedures is subject to certain limitations. The basic rule is that (subject to certain established and limited

exceptions) the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice ..." (at [22])

102. The comments of Singh LJ quoted in [113] of the judgment of Flaux LJ (at [98] above) are fully in accord with this statement of principle.

103. In other contexts where Parliament has provided a right of appeal or review from an administrative decision imposing coercive powers, such as in the context of control orders and TPIMs, the courts have held that where such statutory review or appeal cannot be conducted in a manner that meets minimum conditions of fairness and justice, the challenge to the administrative decision imposing the measures must be allowed and the measure cannot be continued: *GG v SSHD* [2016] EWHC 1193 (Admin), [14]-[15] (Collins J); *AN v Secretary of State for the Home Department* [2010] EWCA Civ 869 at [31] (Maurice Kay LJ for the Court); *Secretary of State for the Home Department v AF (No. 3)* [2010] 2 AC 269 at [82] (Lord Hope) and [96] (Lord Scott).[35]

104. Whilst such situations have involved different statutory regimes, nonetheless,

(1) They demonstrate that a statutory regime can require that an appeal or review of a decision imposing a coercive order or measure should be allowed when that review or appeal cannot be fairly conducted.

(2) The reason why such a consequence follows is directly analogous to the present case, namely, that it is through the full review process that natural justice is ensured. There is no right for individuals to make representations before a decision such as to impose a TPIM is taken; instead Parliament has provided for a full rehearing before a court at which the individual presents their side of the story. If that process cannot be fairly conducted then the decision itself cannot be allowed to stand. The power and the appeal are

[35] Those authorities concern disclosure to an individual. But there is in principle no difference from the present context. Both situations are concerned with ensuring that individuals are able to present their case to the court. The principle is clear: if a person cannot effectively answer the case against them, given the fundamental impact on their rights, the appeal/review must be upheld. The ability to disclosure material might also not be within the control of the Secretary of State, where for example the material has been provided by a foreign intelligence source.

integrally connected in the statutory scheme, just as they are in this context: see *Al-Jedda (No 2)*.

(3) Whilst both the Court of Appeal and SIAC sought to distinguish these cases by reference to the different statutory context, they did not identify anything that was materially different in the statutory context and failed to confront the analogy of principle (Flaux LJ at [110]; SIAC at [174]).

105. Indeed, wider analogies point to the same result. It would be unjust for the Respondent to be convicted of a criminal offence or disciplinary charge without being able to participate in her trial where her absence was involuntary (e.g. *R v Jones* [2003] 1 AC 1 at [13] (Lord Bingham); *Tait v Royal College of Veterinary Surgeons* [2003] UKPC 34), and the deprivation of citizenship is, as has been explained, just as serious.

106. None of the points relied upon by Flaux LJ for reaching a contrary conclusion are persuasive:

(1) Flaux LJ stated that *"[f]airness is not one-sided"* and that it would be wrong to allow the appeal without considering the national security case (at [95]). However this is precisely what does occur in the statutory contexts set out above where a person cannot exercise their statutory rights to review or appeal consistently with minimum guarantees of fairness. SIAC will accept significant impediments to a person's ability to participate in a deprivation appeal but there comes a point at which the appeal cannot be conducted in a way that meets basic minimum conditions of fairness and effectiveness. As SIAC held, this is such a case. At this point it frustrates the statutory scheme for a deprivation decision to be upheld.

(2) If, however, the issue is one of balance, then there is no unfairness to the Secretary of State in circumstances where he knew when he took the decision that the Respondent could not exercise her appeal rights effectively and therefore that the Respondent would not be able to exercise the right to a judicial redetermination. The deprivation decision was taken in full appreciation of the circumstances and without there being any immediate prospect of the Respondent returning to the UK.

(3) Flaux LJ also reasoned (at [96]) that Parliament must have contemplated that deprivation appeals would be conducted from overseas. However, even if correct - which as explained above at [73(3)] it is not - it does not follow that Parliament anticipated and impliedly approved the ability of a Secretary of State to deprive a person of citizenship where basic principles of fairness could not be protected and the statutory appeal would be ineffective.

(4) Next, Flaux LJ pointed to the fact that Burnett LJ had stated *obiter* in *S1* that if an appeal could not be pursued fairly, the remedy was for a person to make an application for LTE (at [99]). However the premise of these submissions is that the Supreme Court upholds the Secretary of State's appeal from the Court of Appeal's ruling that LTE should be granted, in which case Flaux LJ's reliance on *S1* does not apply.

(5) Fourth, Flaux LJ stated that *W2* is not authority for the proposition that SIAC could allow a deprivation appeal that was unfair and ineffective (at [101]). However, the plain reading of [85] of Beatson LJ's judgment, particularly when read in the context of the Secretary of State's submissions quoted by Beatson LJ at [6], is that SIAC could *either* grant LTE *or* allow the deprivation appeal. Indeed, there is no other explanation for why the court held that SIAC could consider whether an appeal could be fairly conducted as a preliminary issue in a deprivation appeal.

107. Therefore, the correct solution if LTE is not granted is that the deprivation appeal must be allowed. It would frustrate the statutory scheme for the deprivation order to be upheld contrary to natural justice. There is moreover no other fair or just step that can be taken. None of the reasons given by the Court of Appeal for reaching a different conclusion are, for the reasons explained above, correct.

E. THE ARTICLE 2/3 POLICY ISSUE

(a) The Article 2/3 Policy and its application by SIAC and the Court of Appeal

108. The Secretary of State has a policy or practice that the deprivation of citizenship power will not be exercised where it would expose a person to a real risk of suffering death or mistreatment of a severity that would contravene Articles 2 or 3 ECHR if it applied. The policy is expressed in the Ministerial Submission in the following terms **[Appendix/137]**:

> "1. The Security Service is aware that the Home Secretary has a practice of not depriving individuals of British citizenship when they are not within the UK's jurisdiction for ECHR purposes, if he is satisfied that doing so would expose those individuals to a real risk of mistreatment that would constitute a breach of Articles 2 or 3 if they were within the UK's jurisdiction and those Articles were engaged." (Annex C, [1])

109. The Ministerial Submission formulated the question as follows **[Appendix/140]**:

> "The correct question for the purposes of this Article 2/3 assessment is are there substantial grounds for believing that the removal of British nationality would expose an individual to a risk of mistreatment/loss of life that would not have occurred if s/he had retained British nationality?" (Annex D, [13]).

110. It is common ground that the date of the relevant risk is the date the deprivation order is made.

111. Before SIAC, the Respondent contended that the deprivation of her citizenship exposed her to a real risk of death or mistreatment for three reasons, taken separately or together:

(1) it exposed her to a real risk of transfer to Bangladesh where she would be mistreated and/or arbitrarily killed or subjected to the death penalty;

(2) it exposed her to a real risk of transfer to Iraq where she would be mistreated and/or subject to the death penalty following an unfair summary trial, and/or

(3) it exposed her to a real risk of extended detention in Syria in conditions inconsistent with Article 3 given that it was a realistic scenario that British citizens would be able to return to the UK in the future.

112. The Respondent relied upon the Secretary of State's acceptance in the case of *X2 v SSHD*, SC/132/2016, 18 April 2018 that where a person is in detention abroad, the risk of onward transfer to a third state would be a direct consequence of a deprivation decision (by contrast with cases where an individual was at large and had a choice about whether to travel to third countries such that the risks in such countries would not be a direct consequence of the deprivation decision). The Secretary of State's position in *X2* was recorded in the judgment at [50] as follows:

> "[The Secretary of State's Counsel] gave two practical examples of cases in which the Secretary of State's practice would prevent deprivation. The first was if a British citizen is detained in a state which routinely subjects prisoners to article 3 ill treatment, but in which British citizens are better treated in detention than citizens of other states. In such case, a direct consequence of the deprivation would be exposure to the requisite level of risk, and the practice would apply. <u>The second is a British citizen who is detained in a second state which, if he were deprived of his nationality, would deport him, rather than to the United Kingdom, to a third state in which he would be at risk of torture</u>." (underlining added).

113. The Ministerial Submission and associated material supplied by the Secretary of State strongly supported the Respondent's submissions on this issue. Thus:

(1) Material supplied by the Secretary of State showed that humanitarian conditions in both camps were dire, consistent with the Respondent's evidence that conditions in the camps were "*wretched*" and "*squalid*". Indeed, in a two-month period, 35 children died from cold or malnutrition in Al-Hawl. So difficult is survival in Al-Hawl that it had earned the nickname *"Camp of Death"*.[36]

(2) The Ministerial Submission recognised that repatriation of British citizens from the camps is a realistic possibility: "*although speculative, it is possible that, at some point in the future, British nationals will be treated differently, insofar as arrangements may be made to return some individuals to the UK*" (Annex C, [5], **[Appendix/137]**). And:

> "It is also the case that arrangements could be made to lawfully return a detained UK-linked (British, or, more exceptionally, non-British)

[36] National Post, *"As ISIL holds onto last Syrian foothold, upwards of 25000 civilians flee battlefield for "Camp of Death"* (12.2.2019); The Telegraph "*Video Dispatch: Inside the Syrian 'Camp of Death' holding thousands of foreign women and children"* (15.2.2019); both cited at **[Appendix/186]**

individual to the UK. It is assessed that such arrangements would most probably be exceptional and unlikely to arise in the foreseeable future. That is because solutions are first required to complex problems such as (i) the status of non-state actors, (ii) non-British nationals having no right of abode in the UK, and (iii) the practicalities of any transfer." (Annex D, [10], **[Appendix/139]**).

(3) The Ministerial Submission recognised that there was a real risk of mistreatment in Bangladesh (Annex C, [7], **[Appendix/137]**):

> "Open source reporting indicates that there is a risk that individuals in Bangladesh could be subject to conditions which would not comply with the ECHR; there is some media reporting to suggest that the Bangladeshi authorities may have carried out extra-judicial killings (JKs) of detainees and other enemies of the state."

(4) The Ministerial Submission also recognised that persons were being transferred by Kurdish forces to Iraq (Annex D, [10], **[Appendix/139]**):

> "HMG is aware of some examples of ISIL-linked individuals being returned to their country of origin. The US policy is to seek the repatriation of ISIL nationals to their countries of origin. We also note that those detained by a non-state actor could be transferred to Iraq."

(5) It also acknowledged "*serious concerns about mistreatment in detention facilities across Iraq*". It referred to the practice of torturing confessions from suspects and continued:

> "The number of prisoners who have died in Iraqi facilities remains a source of concern. There are widespread media reports of the use of torture while in detention in Iraq for both criminal and terrorist suspects." (Annex D, [15], **[Appendix/140]**).

114. Whist the Ministerial Submission contained evidence supporting the Respondent's case, it nonetheless concluded that the Article 2/3 Policy was not breached.

115. The Ministerial Submission did not consider whether the prospect of return to the UK combined with camp conditions exposed the Respondent to a real risk of prolonged exposure to conditions that violate Article 3.

116. As to the risks of transfer to Bangladesh and Iraq, the Ministerial Submission discounted transfer to Bangladesh as not a "*foreseeable*" risk (Annex C, [6], **[Appendix/137]**), and stated that the Secretary of State "*may consider that there is no real risk of return*" to Bangladesh (Annex C, [6], **[Appendix/137]**). This was

not a firm conclusion and was impossible to reconcile with the fact that the Respondent was allegedly a citizen of Bangladesh and would thus not be left stateliness was the premise for the deprivation decision.

117. The Ministerial Submission also discounted the risk of transfer to Iraq on the basis that it was "*not possible to speculate*" as to whether a detainee would be removed to his or her country of nationality, to a country to which he/she "*had elected to travel*" or be released (Annex D, [10], **[Appendix/139]**).

118. No witness statement was filed by the Secretary of State and no witness was tendered for cross-examination on the material on which the Secretary of State had relied.

119. Evidence was also filed on behalf of the Respondent in support of her case which included:

(1) Evidence from an employee of an NGO who has visited the Al Roj camp and received detailed descriptions of conditions from the family members of detainees.[37] The evidence in Witness B's statement is that press reports on the degrading and potentially life-threatening conditions in Al-Roj camp are consistent with the accounts received from family members. The lack of medical care in the camps has led to a humanitarian crisis, and the food provided to detainees is inadequate in quantity and fails to meet basic nutritional standards.

(2) Media and NGO reports about conditions in the Syrian camps. According to the UN, conditions are "*deeply substandard*" **[Appendix/935]**; Médecins Sans Frontières has deemed them "*alarmingly bad*" **[Appendix/959]**.

(3) A ruling of the Berlin Administrative Tribunal holding that German residents in the camps must be repatriated citing the camp conditions which "*pose a threat to life and limb"*.[38]

[37] Statement of Witness B **[Appendix/284-307]**. Anonymity orders and reporting restrictions are in place to protect Witness B's identity.

[38] *AAA v Federal Republic of Germany,* Administrative Tribunal of Berlin, 34.245/19, Decision of 10 July 2019 **[Appendix/959]**; the ruling begins at **[Appendix/955]**.

(4) Media and other reports about the risks of onward transfer to Iraq. This showed that the SDF and the UK Government[39] had been seeking the assistance of the Iraqi Government. Hundreds of alleged ISIS members, including women, had been transferred to Iraq and summarily sentenced to death and executed in trials lasting minutes and based on confessions coerced from them and not translated into their native language.[40] An Agence France Presse (AFP) report on 10 February 2019 stated,

> In August AFP attended the Baghdad trial of 58-year-old French citizen Lahcene Gueboudj, who said he had been spirited from Syria to Iraq by US troops. Belkis Wille of Human Rights Watch said the organisation knows of at least five instances in which US forces handed foreign detainees over to Iraq's Counter Terrorism Service. They Include Australian and Lebanese citizens transported out of Kurdish-controlled areas, at least one of whom was eventually sentenced to death in Iraq. Iraqi Justice can be harsh and its courts have doled out death or life sentences to hundreds of foreigners accused of being IS members, including some 100 women. Others who come from Syria can expect similar treatment. "They are at risk of torture and unfair trials in Iraq," Wille warned.[41]

(5) In addition, the expert witness on Bangladeshi law and human rights in Bangladesh referred to a substantial amount of evidence of mistreatment and disappearances of persons, including women, considered to be Islamic extremists in Bangladesh.[42]

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[39] "UK Government signals it could back Britons in Syria facing death penalty in Iraq" Reprieve, 11 April 2019: "The UK Government has given the clearest indication yet of its preferred destination for British nationals detained in North East Syria, explicitly opposing their transfer to the Assad regime or the US facility at Guantanamo Bay, but confirming it is in "regular discussions" with the Government of Iraq about how to "achieve justice" **[Appendix/899]**.

[40] *Human Rights Watch*: "Iraq: French Citizens allege torture, coercion", 31 May 2019 **[Appendix/928]** and "Transfer of Isis suspects, including foreigners, to Iraq raises torture concerns", 4 March 2019 **[Appendix/887]**; see also the *New York Times*, "France hands ISIS suspects to Iraq, which sentences them to hang", 29 May 2019 **[Appendix/918]**.

[41] *AFP*, "Caught in Syria, foreign jihadist suspects might face trial in Iraq", 10 February 2019 cited at **[Appendix/76]**.

[42] e.g: the Bangladeshi authorities have "*relied primarily on blunt and indiscriminate force, including alleged enforced disappearances and extrajudicial killings"* in their fight against terrorism **[Appendix/842]**. There have been as many as 2000 staged killings of individuals suspected of involvement with extremist groups since 2001, with 154 such extra judicial killings in 2017 **[Appendix/844]**.

120. In its judgment, SIAC first dealt with the position in the camps and held at [130] that the conditions were Article 3 non-compliant (and in the case of Al Hawl that it would accept without deciding that it was Article 3 non-compliant).

121. SIAC went on to state that it was "*not deciding this question on its merits*" and that it was applying principles of judicial review (at [138]). It concluded that the Secretary of State had been reasonably entitled to rely on the Ministerial Submission and that on that basis he had been entitled to dismiss the risks of transfer to Iraq or Bangladesh or repatriation to the UK as he "*was not required to speculate about the future*" (at [139]).

122. SIAC did not itself assess the risks and did not take into account the evidence filed by the Respondent outlined at [119] above.

123. The Court of Appeal agreed with the Respondent that SIAC had erred in its approach to the application of the Article 2/3 Policy. At [125], Flaux LJ held that the correct approach is for SIAC to:

> "stand in the shoes of the Secretary of State and determine whether, on all the evidence before it, the conditions for making a deprivation decision are made out. That is as true of the issue whether as a direct consequence of the deprivation decision there are substantial grounds for believing that there is a real risk of mistreatment or unlawful killing that would constitute a breach of Article 2/3 if it occurred in the jurisdiction (the issue under the extra-territoriality policy) as it is of the issue of statelessness, which SIAC did decide for itself…"

124. Further, at [126]-[127]:

> "126 … the issue in relation to risk under Articles 2 and/or 3 where they are directly applicable is one which is for SIAC to decide for itself on the basis of all the evidence before it, as the Court of Appeal said at [50] in *AS & DD* which I cited at [68] above. In my judgment, there is no principled reason why SIAC should adopt a different approach to assessment of risk where the extra-territorial policy applies, given that the test under the policy is the same as applies where the ECHR has direct effect and the policy proceeds as if Articles 2 and 3 had extra-territorial effect.
>
> 127. Because SIAC erroneously approached this issue on the basis that it was applying the principles of judicial review, it did not make that independent assessment of the issue of risk. Contrary to the submission made by Sir James, I do not consider that SIAC considered the evidence on behalf of Ms Begum on risk of transfer to Iraq and Bangladesh and mistreatment there or if it did it

discounted it, because it considered the Secretary of State had been right to conclude that evidence of risk other than in Syria was irrelevant or speculative. SIAC failed to evaluate the evidence of risk if she were transferred to Iraq or Bangladesh which established an arguable case of "real risk" as defined in [60] of *AS & DD*. It also failed to evaluate at all the issue whether the effect of the deprivation decision was to prolong Ms Begum's detention in the camp, where, as SIAC accepted at [130], conditions were such as would have breached her Article 3 rights if that Article applied."

(b) Submissions on Article 2/3 Policy

125. The Supreme Court is invited to uphold the judgment of the Court of Appeal which was consistent with both authority and principle.

126. First, the Court of Appeal was right to conclude that SIAC's jurisdiction is not a judicial review jurisdiction but a full *de novo* appeal:

(1) The appeal jurisdiction in s.2B is to be contrasted with that conferred by ss. 2C-2E of the 1997 Act which is a judicial review jurisdiction.

(2) The appeal jurisdiction is intended to be a full merits appeal in which SIAC stands in the shoes of the Secretary of State and considers all the evidence even if it was not before the Secretary of State (see the cases referred to in [63] above).

(3) Therefore. where the Secretary of State sets out criteria that govern the power to deprive a person of their citizenship, it is for SIAC to apply those criteria on the evidence before it. This required SIAC to consider whether the deprivation order did in fact expose the Respondent to a real risk of death or mistreatment to which she would otherwise not have been exposed.

127. Secondly, SIAC should have therefore adopted the same approach that it takes in deportation cases where it considers whether deportation of a person will expose them to a real risk of death or mistreatment overseas. The approach is elaborated by the Court of Appeal in *AS & DD v Secretary of State for the Home Department* [2008] HRLR 28, [2008] EWCA Civ 289.

128. In that case, the Court held that SIAC had to ask itself whether there was a real risk that a person would face mistreatment on return: *"[t]hat is a question of fact which*

it was SIAC's responsibility *to resolve"* (at [41]). The Court of Appeal rejected the Secretary of State's submission that the *"real risk"* test is a high threshold, holding that *"it is more than a mere possibility…"* (at [60]). It approved the approach taken in *Saadi v Italy* (2008) 47 EHRR 17 [GC] that the Court must consider *"the material placed before it or, if necessary material obtained proprio motu"* (at [63]; *Saadi* at [128]). And it rejected the Secretary of State's submission that SIAC had been wrong to take into account future events that were unpredictable or involved speculation (at [77]-[81]). If *"that involved a consideration of the hearts and minds of Colonel Qadhafi and members of his regime, so be it"* (at [41]). Furthermore, where evidence of a real risk is produced, "*it is for the Government to dispel any doubts about it*" (*Saadi*, at [120]).

129. SIAC clearly did not apply such an approach in the present case.

130. Thirdly, even if SIAC had been right that it should adopt the same approach as a court would adopt in a judicial review claim, SIAC failed to recognise that a court in a judicial review claim would ask if the Article 2/3 policy was breached, looking at all the available evidence. Where the Secretary of State has a policy as to how a statutory power will be exercised, a person has a right for a decision affecting his or her interests to be taken in accordance with that policy (unless the policy is consciously departed from, which is not the case here): see *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59, [2015] 1 WLR 4546 at [29] (Lord Wilson JSC for the Court); *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 WLR 1299 at [36] (Lord Hope DPSC); *In the matter of an application by JR17 for Judicial Review (Northern Ireland)* [2010] UKSC 27, [2010] HRLR 27 at [50]-[51], [57] (Sir John Dyson JSC) [84] (Lord Phillips), [86] (Lord Rodger), [100] (Baroness Hale); *R (AM) v Secretary of State for the Home Department* [2012] EWCA Civ 521 at [25]-[26] (Rix LJ for the Court). This approach is quite different for the *Wednesbury* approach adopted in the planning context when a planning authority applies policies that contain broad statements of policy: see *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] UKSC 13, [2012] PTSR 983 at [18]-[19] (Lord Reed).

131. In *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin) the Divisional Court decided a judicial review of the decision of the Foreign Secretary

to transfer British-captured fighters to the Afghanistan security service. The Secretary of State had a very similar policy to the Article 2/3 policy in this case, which stated that the armed forces should not transfer a detained person from UK custody where there was a real risk that the detainee would suffer torture or serious mistreatment (see [21]).

132. The Court rejected the Secretary of State's submission that it should not apply the policy directly to the facts and evidence before it to decide whether the transfer of detainees breached the Secretary of State's policy: *"In our judgment, the question whether the Secretary of State's practice complies with his policy requires the court to determine for itself whether detainees transferred to Afghan custody are at real risk, and it is therefore for the* court *to make its own assessment of risk rather than to review the assessment made by the Secretary of State. That is how we have proceeded. …"* (at [240])

133. The Divisional Court in that case went on to examine the evidence in detail and assessed for itself the risk that UK-captured detainees faced after being transferred to Afghan custody.

134. Finally, in *W (Algeria) v Secretary of State for the Home Department* [2012] UKSC 8, [2012] 2 AC 115 Lord Brown JSC for the Court emphasised the importance of SIAC considering human rights protection issues concerning Article 3 on the basis of all the available evidence to ensure that human rights protections are effective: "*In the last analysis"* he held, nothing "*outweighs the imperative need to maximise SIAC's chances of arriving at the correct decision on the article 3 issue before them and their need, therefore, to obtain all such evidence as may contribute to this task."* (at [18]).

135. The Court of Appeal was therefore correct to have held that SIAC erred in its approach by falling to assess the risks for itself on the totality of evidence before it.

136. The Secretary of State in her Written Case contends that even if the Respondent's arguments were correct, it would not assist her because "*SIAC reached its own view"* in "*substance"* ([68]-[69]). This submission is made on the basis of [139] of SIAC's judgment.

137. However, SIAC begins the passage on which the Secretary of State relies with the words, *"[t]he material before the Secretary of State did not suggest that…"*. It is clear therefore that SIAC based its reasons on the conclusionary statements in the Ministerial Submission, which themselves had been formulated without any representations having been made on behalf of the Respondent. This is not only a judicial review approach but it is a judicial review approach applied to a decision that has been reached without the decision maker having heard what the affected party would say. This is very far from SIAC reaching its own conclusion on the evidence before it.

138. The passage on which the Secretary of State relies also fails to address the risk that the deprivation of the Respondent's citizenship would expose her to a real risk of treatment contrary to Article 3 in the three ways set out at [115] above.

139. Flaux LJ was therefore correct in his reasoning and this Court should uphold the Judgment below.

F. CONCLUSION

140. The Respondent invited the Court to dismiss the Secretary of State's appeal and uphold the Judgment and Order of the Court of Appeal for the following

Reasons

(1) BECAUSE the Court of Appeal was correct in law to find that the Respondent should be granted Leave to Enter the United Kingdom in order to allow her to pursue a fair and effective appeal against the decision to deprive her of British Citizenship.

(2) BECAUSE the Court of Appeal was correct in law to find that SIAC had erred in law by not considering for itself on the evidence before it whether the deprivation of the Respondent's citizenship exposed her to a real risk of suffering death, or cruel, inhuman or degrading treatment or punishment in breach of the Secretary of State's policy on Article 2/3.

LORD PANNICK QC

TOM HICKMAN QC

JESSICA JONES

ANNEX

Between 1949 and 1973 at least 10 deprivation of citizenship orders were made.[43] Thereafter the position is as follows:

Year		**Number of deprivation orders made**[44]
1973 - 2002[45]		0
2002 - 2006		- no data published -
2006 - 2010		annual numbers not published as fewer than 5 deprivation decisions per year; but a total of 9 deprivation orders over this period.[46]
2011		6
2012		6
2013		18
2014		23
2015[47]		19
2016		35
2017[48]		104

Of the 81 deprivation orders made between 2006 and 2015, 36 were made under s.40(2) (conducive to the public good) [49]. 14 of the deprivation orders made in 2016 were under s.40(2), while all persons who were deprived of citizenship in 2017 were deprived under s.40(2).[50]

[43] Letter of James Brokenshire MP to the JCHR, 20 February 2014 Q20.
[44] Statistics relating to deprivation decisions in 2018-2020 have not been published.
[45] Home Office, Secure Borders, Safe Haven: Integration with Diversity in Modern Britain, Cm 5387, February 2002, p.35
[46] A Home Office FOI response on June 2016 stated that 81 deprivation orders were made between 2006 and 2015, and provided annual figures for 2011-2015. Those annual figures total 72, such that there must have been 9 orders made in 2006-2010.
[47] T. McGuiness and M. Gower, Deprivation of British citizenship and withdrawal of passport facilities, House of Commons Briefing Paper, 9 June 2017 (data 2006- 2015)
[48] HM Government Transparency Report 2018, Disruptive and Investigatory Powers, July 2018, page 27 (data 2016-2017)
[49] Home Office FOI response, 20 June 2016
[50] HM Government Transparency Report 2018, Disruptive and Investigatory Powers, July 2018, page 27 (data 2016-2017)