Neutral Citation Number: [2020] EWCA Civ 918

Case No: T2/2020/0644,T3/2020/0645 and T3/2020/0708

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION (T2/2020/ 0644)
(SITTING ALSO AS A DIVISIONAL COURT IN CO/798/2020) (T3/2020/0708)
AND
ON APPEAL FROM THE ADMINISTRATIVE COURT (T3/2020/0645)
MRS JUSTICE LAING

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/07/2020

Before:

LADY JUSTICE KING
LORD JUSTICE FLAUX
and
LORD JUSTICE SINGH

- -

Between:

SHAMIMA BEGUM	**Appellant**
- and -	
SPECIAL IMMIGRATION APPEALS COMMISSION	**Defendant**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
-and-	
(1) THE UN SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDEMENTAL FREEDOMS WHILE COUNTERING TERRORSISM	
-and-	
(2) THE NATIONAL COUNCIL FOR CIVIL LIBERTIES ("LIBERTY")	**Intervenors**

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Mr Tom Hickman QC and Ms Jessica Jones (instructed by **Birnberg Peirce**) for the **Appellant**
Sir James Eadie QC, Mr Jonathan Glasson QC and Mr David Blundell QC (instructed by **The Government Legal Department**) for the **Respondent**
The **Defendant, the Special Immigration Appeals Commission,** was not represented
Mr Angus McCullough QC and Mr Adam Straw (supported by **Special Advocates' Support Office**) **Special Advocates** representing the interests of the **Appellant**
Mr Guglielmo Verdirame QC, Mr Jason Pobjoy and Ms Belinda McRae (instructed by **Leigh Day**) for the **First Intervenor** (by written submissions only)
Mr Richard Hermer QC and Ms Ayesha Christie (instructed by **Liberty**) for the **Second Intervenor** (by written submissions only)

Hearing dates: Thursday 11 June and Friday 12 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 16 July 2020.

Lord Justice Flaux:

Introduction

1. This appeal concerns the decisions of the respondent (to whom I will refer as the Secretary of State) (i) on 19 February 2019 to deprive the appellant (to whom I will refer as "Ms Begum") of her British citizenship in respect of which Ms Begum issued an appeal pursuant to section 40A of the British Nationality Act 1981 ("the BNA") and section 2B of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") and (ii) on 13 June 2019 to refuse her application for leave to enter ("LTE") the United Kingdom to pursue her appeal before the Special Immigration Appeals Commission ("SIAC") against that deprivation of citizenship. The latter decision was challenged by Ms Begum in two ways: (a) by an appeal against that refusal in so far as the decision determined a "human rights claim" which appeal was to SIAC under section 2 of the 1997 Act because the Secretary of State had certified that the decision was taken in reliance on information which he considered should not be made public in the interests of national security; and (b) by judicial review proceedings in the Administrative Court challenging the decision on common law grounds.

2. SIAC identified three preliminary issues for determination at a hearing which was fixed for 22 October 2019:

   (1) Whether the effect of the Secretary of State's decision dated 19 February 2019 rendered Ms Begum stateless as at the date of the decision;

   (2) Whether the Secretary of State's deprivation decision dated 19 February 2019 was unlawful because of its direct and foreseeable consequence of exposing Ms Begum to a real risk of mistreatment which would constitute a breach of Article 2 or 3 ECHR and/or would be contrary to the Secretary of State's practice as set out in a Supplementary Memorandum published in January 2014;

   (3) Whether Ms Begum could have a fair and effective appeal against the deprivation of citizenship from outside the United Kingdom and in Syria.

3. By Orders of the Administrative Court and SIAC, the deprivation appeal and LTE appeal together with a rolled-up hearing of the judicial review were ordered to be heard together. The linked hearings took place on 22 to 25 October 2019 before SIAC (Elisabeth Laing J, UTJ Blum and Mr Roger Golland) with the claim for judicial review heard by Elisabeth Laing J.

4. On 7 February 2020 the following judgments were handed down:

   (1) An OPEN judgment of SIAC determining all three preliminary issues against Ms Begum. There was no separate judgment in SIAC in respect of the LTE human rights appeal.

   (2) A judgment of the Administrative Court granting permission to apply for judicial review but dismissing the substantive claim for judicial review of the LTE decision.

   (3) A CLOSED judgment of SIAC in the deprivation appeal. Since SIAC had said in its OPEN judgment that it had been able to resolve the preliminary issues in OPEN, that CLOSED judgment was not relevant to the present appeal and application.

Shortly before the present hearing we refused an application by the Secretary of State for the Court to read the CLOSED judgment.

5. Because the right of appeal under section 7 of the 1997 Act only arises upon a final determination by SIAC and there is yet to be a final determination of the deprivation appeal, Ms Begum's challenge to the determination of SIAC on the preliminary issues can only be by way of judicial review. On 6 April 2020 Swift J granted permission to apply for judicial review of the decision of SIAC on the second and third preliminary issues. Ms Begum did not seek to challenge by way of judicial review the decision of SIAC on the first preliminary issue that the deprivation decision had not rendered her stateless, so we do not need to consider that issue further. In relation to that claim for judicial review, we sat as a Divisional Court.

6. On 14 April 2020, Elisabeth Laing J gave Ms Begum permission to appeal in respect of the two LTE decisions and in relation to those appeals, we sat as a Court of Appeal.

The factual background

7. Ms Begum's father was born in Bangladesh in 1958. He came to the United Kingdom in November 1975 (when he was granted indefinite leave to enter) and he was granted indefinite leave to remain in 1993. He has never naturalised as a British citizen. Her mother was born in 1964 in Bangladesh and married her father there in March 1980. She obtained indefinite leave to enter on coming to the United Kingdom to join Ms Begum's father in November 1981. She naturalised in November 2009.

8. Ms Begum was born on 25 August 1999 in the United Kingdom, where she was brought up. At birth, she held British citizenship under section 1(1) of the BNA because her parents were both settled in the United Kingdom. SIAC found (in its decision on the first preliminary issue) that she also holds Bangladeshi citizenship by descent through her parents by virtue of section 5 of the Bangladesh Citizenship Act 1951.

9. On 17 February 2015, when she was 15, Ms Begum left the United Kingdom with two school friends, Kadiza Sultana and Amira Abase, and travelled to Syria via Turkey. She used her older sister's passport to do so. Shortly after arriving in Syria she married an ISIL fighter. She then lived in Raqqah, the capital of ISIL's self-declared caliphate. Her whereabouts were unknown until she was discovered by journalists in February 2019 in the Al-Hawl camp run by the Syrian Democratic Forces ("SDF"), by whom she was and is detained. She had remained in Syria since arriving there in 2015 and had aligned with ISIL.

10. Whilst in the Al-Hawl camp she gave birth to her third child, a boy. Both her other children had died before she arrived at the camp. On 13 February 2019 she gave an interview to a Times journalist, stating her desire to return to the United Kingdom. She was moved to another camp, the Al-Roj camp, some time in late February 2019, reportedly because of threats to her life following publication of the interviews she had given in the international media.

11. On about 7 March 2019, her baby died, reportedly of pneumonia, a result of the dire condition in the SDF-run camps and the lack of effective medical treatment. In its judgment at [130], SIAC accepted that the conditions in the camp are so bad that they

meet the threshold of inhuman or degrading treatment for the purposes of Article 3 of the European Convention on Human Rights ("ECHR").

The submissions to the Secretary of State and the deprivation decision

12. Before the Secretary of State made the deprivation decision on 19 February 2019, he received submissions from his officials and the Security Service. An OPEN summary of the deprivation submission was disclosed to Ms Begum in the SIAC proceedings, some of which was originally in CLOSED but was brought into OPEN following a Rule 38 hearing attended by the Special Advocates. So far as relevant to the issues we have to determine, that provides:

> "(e) SCU [the Special Cases Unit] notes that individuals such as BEGUM who were radicalised whilst minors may be considered victims. This does not change the threat the Security Service assesses that BEGUM poses to the UK. Whilst accepting that BEGUM may well have been a victim of radicalisation as a minor, SCU does not consider this justifies putting the UK's national security at risk by not depriving her of her citizenship, for this reason.
>
> (h) SCU considers 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. However, SCU's position is that where she has been out of the UK for several years through her own choice, we would argue that it would be incorrect to allow her to return to the UK to engage with her appeal. In any event 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, and neither can HMG facilitate BEGUM's travel out of Syria. President Trump has recently reiterated the US expectation that countries take back their own detainees.
>
> (i) SCU considers that there are no substantial grounds to believe that a real risk of mistreatment contrary to Articles 2 (right to life) or 3 (prohibition of torture) of the ECHR arises as a result of BEGUM being deprived of her British citizenship while in Syria. We do not consider that any potential Article 2/3 risks that may arise in countries outside Syria are foreseeable as a consequence of the deprivation decision. SCU's legal position is that the ECHR does not have extra-territorial effect in relation to this case. Notwithstanding that legal position, it has been the publicly stated practice of the Home Office to consider the Article 2 and 3 risks associated with deprivation action and only recommend deprivation action if SCU considers that such action would not give rise to a real risk of a breach of Articles 2 or 3 of the ECHR were those articles to be engaged. This practice was confirmed publicly in an ECHR memorandum during the passage of the Immigration Act 2014, which stated that as a matter of practice the (then) Home Secretary would not deprive

> anyone of citizenship where she was satisfied that such action would constitute a breach of Articles 2 or 3 had they been within the jurisdiction and those articles therefore engaged. A Mistreatment Risk Statement specific to BEGUM's circumstances in Syria (Annex C) and a broader statement on conditions in Syria which was updated in January 2019 (annex D) is provided."

13. Annex A to the submission is the Security Service assessment on Ms Begum. The Key Assessment is that "Shamima BEGUM travelled to Syria and aligned with ISIL". In a footnote it is stated that for the purpose of the SIAC deprivation appeal and at this stage in the proceedings, this assessment is the only assessment relied upon in both the OPEN and CLOSED case. The Annex then expands on the assessment including assessing that she made a conscious effort to conceal her travel from the authorities by using her sister's passport, which suggested she had taken steps to plan her travel to Syria. The Annex then refers to some of what she said in her interview with The Times. It notes that she said that following her arrival in Raqqah she applied to marry an English-speaking fighter between 20 and 25 years old and shortly after married Yago Riedijk, a Dutch national. It refers to what she said about seeing a severed head in a bin for the first time: "it didn't faze me at all. It was from a captured fighter seized on the battlefield, an enemy of Islam".

14. In the Mistreatment Risk Statement at Annex C under the heading "Direct consequence/causation", at [3] reference is made to what SIAC had said in its judgment in *X2* as to what the Secretary of State was required to assess in order to comply with his stated practice:

> "SIAC concluded that the risks which the Home Secretary is required to assess are risks of harm which would breach articles 2 or 3 of the ECHR (if they applied) that are a direct consequence of the decision to deprive. SIAC described a two-stage test which it drew from the case law of the European Court of Human Rights: (i) a test of 'direct consequence' as the criterion for establishing state responsibility, liability being incurred if a state takes action which as a direct consequence exposes the individual to the relevant risk; and (ii) a test of 'foreseeability' as the criterion for establishing whether there are substantial grounds for believing the individual would be exposed to the relevant risk. The risk must be both foreseeable and a direct consequence of the deprivation."

15. Under the heading "Syria" at [5] it is stated:

> "A UK-linked individual who has been deprived of his/her British nationality is likely to receive broadly the same treatment (for better or worse) as an individual who retains British nationality; 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."

16. Under the heading "Bangladesh: Risk of mistreatment in Bangladesh and relevance of deprivation" it is stated:

> "6. It is not possible to speculate what will happen to women in refugee and IDP camps, whether or not they are suspected of being ISIL-linked. We do not consider that a repatriation to Bangladesh is a foreseeable outcome of deprivation and as such the Home Secretary may consider that there is no real risk of return-let alone of mistreatment on return-for the purpose of complying with his practice. However, for completeness we consider those risks here.
>
> 7. Open source reporting indicates that there is a real 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 (EJKs) of detainees and other enemies of the state."

17. Annex D was the Cross HMG Article 3 Assessment concerning mistreatment risk in the conflict zone of Syria and ISIL-controlled territory in Iraq dated 28 January 2019. [10] of that Annex states that the Government is aware of some ISIL-linked individuals who had been returned to their country of origin, and that some of those detained by non-state actors could be transferred to Iraq. However, the Government's view was that it was not possible to speculate as to whether someone detained by a non-state actor might be removed to his/her country of nationality, to another country to which he/she had elected to travel or been released. Any removal would depend on the relationship between the detaining group and the third country to which it wanted to remove the individual. The assessment was that arrangements to return a British person to the UK "would most probably be exceptional and unlikely to arise in the foreseeable future". This was because solutions were first required to complex problems such as the status of non-state actors, non-British nationals having no right of abode in the UK and the practicalities of any transfer. [12] of Annex D points out that it is difficult to speculate about the many possible combinations of facts which might arise as a result of people's choices to travel or to stay put. [15] and [16] describe the risks in Iraq of detention breaching the standards of the ECHR, and the fact that the death penalty is applied in terrorist cases.

18. On 19 February 2019, the Secretary of State sent written notice of the deprivation decision to Ms Begum's family in the United Kingdom. The ground for the decision was that: "The Security Service (MI5) assesses that [A] travelled to Syria and aligned with ISIL … The Security Service considers that an individual assessed to have travelled to Syria and to have aligned with ISIL poses a threat to national security". A deprivation order was made the same day.

The judgment of SIAC

19. Having set out the outline facts, the judgment of SIAC deals, at some length, with the first preliminary issue, whether the deprivation decision rendered Ms Begum stateless. As already noted, it is not necessary to consider that issue further. Having concluded that the deprivation decision did not render her stateless, SIAC turned to the second

preliminary issue, which is whether the deprivation decision breached the Secretary of State's practice or policy (as referred to in the submission as quoted at [12] and [14] above). At [129] SIAC noted that the policy had been interpreted in its decision in *X2 v Secretary of State for the Home Department* SC/132/2016 where SIAC held that the effect of the policy was that the Secretary of State is only obliged to consider risks which are foreseeable and which are a direct consequence of the deprivation decision.

20. At [130], SIAC said:

> "We pay tribute to the industry of [Ms Begum's]'s legal team in amassing the evidence which they have on this issue. We accept that conditions in the Al Roj camp would breach [Ms Begum's] rights under art.3 , if art.3 applied to her case. We are also prepared to accept, for the sake of the argument, but without deciding, that, at the date of Decision 1, conditions in the Al Hawl camp would also have breached A's art.3 rights had art.3 applied. That makes it unnecessary for us to consider art.2 risks."

21. SIAC then referred to the passages from Annexes C and D to the ministerial submission to the Secretary of State which we have already referred to at [14] to [17] above. The judgment then summarised the parties' submissions, noting the reliance by Mr Hickman QC, counsel for Ms Begum, on [50] of *X2*, where counsel for the Secretary of State gave two practical examples of cases where the policy would prevent the Secretary of State from depriving a person of her nationality, the second of which was where the person was detained in a second state which if he were deprived of his nationality, would deport him, not to the UK, but to a third country where he would be at risk of torture. He submitted to SIAC that Ms Begum's was a stronger case because, when the deprivation decision was made, she was at risk of removal to Iraq and Bangladesh. SIAC also noted his submission that the deprivation decision meant she was exposed to the Article 3 risks in the camp for longer than if the decision had not been made.

22. At [136] SIAC noted Mr Hickman QC's submission that it was foreseeable that Ms Begum would be sent back to Bangladesh and that the evidence suggested she could face the death penalty or detention in conditions breaching Article 3. He also relied upon evidence that more than 40 women suspected of being terrorists had been sentenced to death in Baghdad after hearings lasting 10 minutes. He also mentioned the risk of Ms Begum being sent to Guantanamo Bay. In the case of Iraq and Guantanamo Bay, there was a foreseeable risk of a breach of Articles 2 or 3. It was 100% likely she was going somewhere and she only had to show that there was a real risk.

23. At [137], SIAC recorded the submission of Mr Glasson QC, counsel for the Secretary of State, that the Secretary of State had been correctly directed as to the effect of the policy and had taken expert advice. The question was whether the Secretary of State had complied with the policy, which he had.

24. SIAC then dealt with this issue in two paragraphs of the judgment. At [138] it stated:

> "The question which the Policy posed for the Secretary of State was whether it was a foreseeable and a direct consequence of Decision 1 that there were substantial grounds for believing that A would be exposed to a real risk of ill treatment breaching the

> ECHR. We consider that Mr Hickman's submissions tended to conflate those two separate requirements of the Policy, and to treat them as interchangeable. The question for us is whether the Secretary of State was entitled, on the material before him, to decide that it was not. We remind ourselves that we are not deciding this question on its merits. We must approach it, rather, by applying the principles of judicial review."

25. At [139] SIAC noted that the material before the Secretary of State did not suggest that Ms Begum as a person deprived of British nationality would be treated any differently from a British woman not so deprived, but otherwise in the same situation, associated with ISIL and detained by the SDF. She was in that situation as a result of her own choices and the actions of others but not because of anything the Secretary of State had done. SIAC said that it was crucial that the only material which the Secretary of State had was the material in and annexed to the ministerial submission. SIAC concluded:

> "In our judgment, the Secretary of State was reasonably entitled to rely on that material. The Secretary of State's assessment of the material reasonably entitled the Secretary of State to decide that, as respects [Ms Begum's] circumstances at the time of Decision 1 [the deprivation decision], Decision 1 would not breach the Policy, because a change in the relevant risks was not a foreseeable and direct consequence of Decision 1. We also consider that, on the material in Annex C and Annex D, the Secretary of State was not required to speculate about the future: for example, the possibility that [Ms Begum] might be removed from Syria to Bangladesh or to Iraq. Nor was he required to speculate about the possibility that, at some point in the future, British or British-linked adults might be returned to the UK. Those conclusions mean that, despite their apparent attractions, we must dismiss Mr Hickman's arguments."

26. SIAC then turned to consider the third preliminary issue which was whether Ms Begum could have an effective appeal and if not, whether her appeal should be allowed. At [140] to [142] it recorded Mr Hickman QC's submissions. At [143] SIAC concluded that her appeal will not be fair and effective, saying: "We accept that, 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." However, it could not accept that if she could not have a fair and effective appeal, her appeal must succeed. At [144] it stated:

> "The difficulty at the heart of Mr Hickman's submissions is that, if they are right, the fact that a person who has been deprived of her nationality on grounds of national security outside the UK and is unable, for whatever reason, to instruct lawyers and/or to take part in her appeal by video link, entails, in and of itself, that her appeal should succeed, without any examination of its merits, and, in particular, without any consideration of the national security case against her."

27. SIAC was of the clear view that Mr Hickman QC's submission could only be accepted if there were binding authority to that effect so it was necessary to review the relevant

authorities in some detail but first it considered if there was any support for the submission in the legislative framework. At [145] it said that it readily accepted that Parliament can be taken to have intended, where possible, that appeals against deprivation decisions should be fair and effective but did not consider there was any warrant for a universal rule to that effect in the statutory scheme. SIAC said at [145]: "the effect of such a rule would be to convert a right of appeal on the merits into an automatic means of overturning a deprivation decision, regardless of its merits, if, for whatever reason, an appellant is unable to take part in her appeal."

28. It noted at [146] that Parliament could be taken to know that a sub-set of appellants like Ms Begum had been deprived of their nationality for reasons of national security. A murderer who posed a risk to national security and was in solitary confinement in a third country was not able to have a fair and effective appeal, yet such a rule would ensure his appeal succeeded. At [147], SIAC continued:

> "An intention to enact such an (implied) universal rule cannot sensibly be imputed to Parliament. Once that is accepted, we consider that it is impossible to craft an implied rule which is sufficiently granular to apply to some people with whom the court might have sympathy, while not protecting those with whom the court does not sympathise… The design of such a rule is a job for the legislator, Parliament, and not for the court."

29. SIAC considered that this view was supported by the legislative scheme and by three decisions of the Court of Appeal. It noted at [149] that the right of appeal against a deprivation decision had originally been suspensive as section 40A(6) of the BNA had prevented the Secretary of State from making a deprivation order while an appeal could be brought against a notice of intention to deprive and, if an appeal were brought, until the appeal had been decided. However, that subsection had been repealed from which it followed that: "Parliament intends that the Secretary of State should be free to make a deprivation order immediately after giving notice of her intention to deprive the person concerned of her citizenship, whether or not the person concerned wishes to, or later does, appeal against the notice."

30. At [150] SIAC noted that sections 78 and 92 of the Immigration Nationality and Asylum Act 2002 (preventing removal while an appeal is pending and rights of appeal exercisable in country) do not apply to appeals under section 40A of the BNA so that Parliament did not intend that an appeal under section 40A was only exercisable in-country or exercisable in-country in certain types of case or that such an appeal should be a bar to removal. At [151] SIAC concluded:

> "…Parliament clearly anticipated that such appeals [under section 40A of the BNA] would often, if not regularly, be brought from outside the UK. Once that is recognised, it seems to us to follow that Parliament must also be taken to have recognised that such appeals would be brought by appellants whose circumstances outside the UK would vary in many different respects, and that some, at least, would, or might, face significant restrictions, depending on where they are when they appeal, on their ability to take part in their appeals (as we think Mr Hickman accepted). It is striking, we consider, that

> Parliament has not stipulated that the Secretary of State should take any steps to make it easier for such appellants to exercise their right of appeal. Nor has Parliament stipulated that the ability of an appellant effectively to exercise her right of appeal should have any bearing on the fate of the appeal."

31. SIAC considered that the rule for which Mr Hickman QC contended would subvert two clear intentions of the legislative scheme: (i) that the appeal is not suspensive; and (ii) unless the appellant happens to be in the UK when the decision is made the right of appeal is to be exercised in the general run of cases from abroad and the Secretary of State has no control over the way the appellant can exercise or might be inhibited or prevented from exercising her right of appeal.

32. SIAC then went on to consider the three decisions of the Court of Appeal which it considered supported its view. I propose to consider those decisions and SIAC's analysis of them in some detail at this stage which will avoid repetition later in this judgment. In *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867; [2013] QB 1008, the Secretary of State deprived the appellant of his nationality and made an exclusion order while he was in Sudan. This Court rejected the argument that there was any legislative intention that an appeal under section 40A should be conducted from the United Kingdom after the repeal of section 40A(6). Laws LJ rejected the argument that the Secretary of State owed the appellant a duty to facilitate his return to the UK to conduct his appeal. He held that there was no general common law right to be present at an appeal and that an in-country appeal can only be guaranteed by legislation. SIAC noted at [154] that Laws LJ did not clearly decide the question of legal principle whether that general rule was displaced in this type of case, but upheld the decision of Mitting J that the appellant had not shown that he could not effectively exercise his rights of appeal and that, on the facts, the Secretary of State could not be criticised for not allowing him to return to prosecute his appeal, as if he were held on appeal to be a threat to national security, that would be liable to frustrate the decision to exclude him and deprive him of his nationality. Although the Court of Appeal did not clearly decide the issue of principle, SIAC considered that this decision supported its construction of the statutory scheme.

33. *L1 v Secretary of State for the Home Department* [2015] EWCA Civ 410 was an appeal from SIAC which concerned an appellant who regularly travelled between the UK and Sudan. The officials asked the Secretary of State to decide in principle to deprive him of his nationality the next time he was in Sudan and exclude him from the UK, in order to mitigate the risk of the appellant establishing himself in the UK to conduct terrorism-related activities. The Secretary of State made such a decision and a little later the appellant went to Sudan and the Secretary of State made a deprivation decision. As SIAC noted at [157], the issue was whether this was lawful or an abuse of power because it deprived the appellant of an in-country right of appeal. SIAC considered Laws LJ's statement at [15] of his judgment that someone notified of a deprivation decision enjoyed an in-country right of appeal was wrong for the reasons it had given in analysing the legislative scheme.

34. It was argued by the appellant that the Secretary of State had frustrated the policy or purpose of the provisions conferring the right of appeal. As SIAC noted at [157] the Secretary of State would have done so, if the deprivation decision had been taken to gain a litigation advantage which would have been an improper motive, but at first

instance SIAC in that case accepted the timing of the decision was based on considerations of national security. Laws LJ held that the Secretary of State was not prevented by the legislative scheme from taking steps which hampered the exercise of a right of an in-country appeal if that would or might damage national security. The scheme did not guarantee an in-country right of appeal. SIAC considered that the reasoning in *L1* also supported its construction of the statutory scheme. It noted that the Court of Appeal did not suggest that difficulties in exercising the right of appeal from abroad made the deprivation decision unlawful.

35. The third Court of Appeal decision was *S1 v Secretary of State for the Home Department* [2016] EWCA Civ 560; [2016] 3 CMLR 37 which concerned three appellants who were deprived of their nationality when they were in Pakistan where they had been since 2009. One of their arguments before SIAC was that they had not been allowed to return to the UK to take part in their appeals. SIAC decided a preliminary issue against them which was whether the appeals should be allowed because it was impossible to decide them fairly as the appellants were in Pakistan. They submitted that they were inhibited from giving full instructions to their solicitors who had visited Pakistan three times, although they had put in written statements. The Secretary of State pointed out that they had not engaged with the substance of the OPEN national security case against them. They submitted that SIAC should either have allowed their appeals or in their parallel application for judicial review the deprivation orders should be quashed and orders made that the appeals be heard again with the appellants enabled to return to the UK to pursue them.

36. SIAC noted that at [61] of his judgment, Burnett LJ (as he then was) approved the "simple answer" of SIAC in that case to the appellant's argument that the timing of the deprivation order made it impossible for them to return, which was that there are two stages to the statutory process: the deprivation decision and the deprivation order and SIAC had no jurisdiction to consider an appeal against an order, let alone its timing. Burnett LJ noted that the orders were made when they were to prevent the appellants from travelling to the UK but that timing had nothing to do with potential appeals, rather, as in *L1*, they had been made to safeguard national security. SIAC referred at [162] of its judgment in the present case to the point made by Burnett LJ at [69] of his judgment that the contention that: "her decision might give rise to difficulties in any subsequent appeal cannot … affect the question whether her earlier decisions to deprive or the subsequent deprivations were unlawful. Indeed, it was not even clear that there would be any appeals and if so from which of the eventual appellants. One only has to contemplate the possibility that some, but not all, appealed, to expose the difficulty". As Burnett LJ pointed out, all the decisions were taken at the same time on the same material but on this argument, if only one of them appealed, it could be said the decision in his case was unlawful.

37. SIAC noted at [163] that Burnett LJ considered the appellants' evidence [as to the difficulties they faced in conducting their appeals from Pakistan] as "superficial and without particularity". At first instance SIAC had declined to decide what it would or could have done if it had accepted the appellants' argument that they were genuinely inhibited from engaging with the appeals because of fears for their safety. On appeal, it was argued that if SIAC had found this was so, it would have been obliged to allow the appeals. Burnett LJ considered that there was nothing in the Special Immigration Appeals Commission (Procedure) Rules 2003 ("the 2003 Rules") which gave SIAC a

"disciplinary power" requiring the Secretary of State to facilitate entry to the UK to take part in an appeal. He concluded at [85] that he was not persuaded that, even if the appellants had made good their concerns, there was anything in the power of SIAC to help them. He said that the appropriate course was for the appellants to apply for entry clearance outside the Immigration Rules to take part in their appeals and to challenge any refusal by way of an application for judicial review. The circumstances in which such an application would succeed would be: "rare and would require clear and compelling evidence to support the proposition that, absent physical presence in the UK the person concerned could take no meaningful part in the … appeal. Even then, the decision would have to be reviewed in the light of public law principles …". The Court of Appeal dismissed the appeal, gave permission to apply for judicial review of the refusal to facilitate the appellants' return, but dismissed the substantive application.

38. At [166] of its judgment in the present case, SIAC considered that *S1* supported its view of the statutory scheme for three reasons: (i) later difficulties with an appeal cannot affect the lawfulness of the decision to make a deprivation order; (ii) even if the appellants had made good their concerns about the effectiveness of their appeals, SIAC had no power to do anything about that; and (iii) the correct course was to apply for entry clearance and challenge any refusal to grant it, the circumstances in which the Court would review the refusal being rare and exceptional. SIAC concluded: "Importantly, Burnett LJ did not decide that the fact that an appellant could take no meaningful part in his appeal meant that his challenge to a refusal of entry clearance should succeed."

39. SIAC then went on to consider whether, as Mr Hickman QC submitted, their views about the statutory scheme and the effect of those three decisions of the Court of Appeal should be displaced by the decision of the Supreme Court in *Kiarie v Secretary of State for the Home Department* [2017] UKSC 42; [2017] 1 WLR 2380 or the decisions of the Court of Appeal in *AN v Secretary of State for the Home Department* [2010] EWCA Civ 869 and *W2 v Secretary of State for the Home Department* [2017] EWCA Civ 2146; [2018] 1 WLR 2380.

40. At [171] SIAC concluded that there were three reasons why *Kiarie* was not relevant: (i) it concerned a different statutory appeal regime; (ii) unlike Ms Begum, those appellants were able to invoke the procedural protections attached to Article 8 of the ECHR; and (iii) the appellants in that case argued successfully that in issuing the section 94B certificates, the Secretary of State breached section 6 of the Human Rights Act 1998. Accordingly, SIAC determined that *Kiarie* was not authority for a universal rule that every appeal must be fair and effective.

41. *AN* concerned a non-derogating control order ("NCO") which had been made without the disclosure required by the decision of the House of Lords in *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28; [2010] 2 AC 269. The issue was whether it should be quashed. As SIAC recorded at [172], Mr Hickman QC relied upon the case as demonstrating that if an appeal is not fair, the appeal succeeds *a fortiori* if the Secretary of State knows, when he makes the impugned decision, that the appeal will not be fair. At [174], SIAC concluded that *AN* did not support that argument. The Court of Appeal had not allowed the appeal on the broad ground that the decision to make the NCO was unlawful because the Secretary of State knew that, in the absence of disclosure, AN would not be able to challenge it. It allowed the appeal on the ground that the Secretary of State was not able to satisfy the court that the statutory test for

making the NCO was met and because it was unlawful for the Secretary of State to take steps to make an NCO if he knew that later on he would have to rely upon material which he was unwilling at any stage to disclose. In any event, even if Mr Hickman QC's submission were right, the statutory scheme was completely different from the present one, so SIAC did not consider the case was authority for any principle which bound it in this statutory scheme.

42. SIAC then engaged in a close analysis of the decision of the Court of Appeal in *W2*. As with *G1, L1* and *S1*, I propose to consider its analysis in some detail to avoid repetition later in this judgment. *W2* concerned an appellant who was deprived of his nationality when he travelled outside the UK. He appealed to SIAC against the deprivation decision. He also sought to apply for judicial review of the deprivation order and by way of interim relief, for an order requiring the Secretary of State to return him to the UK to prosecute his appeal. The Administrative Court refused permission and interim relief holding his grounds were either unarguable or should be raised in his appeal to SIAC which was a suitable alternative remedy.

43. Before the Court of Appeal, as SIAC recorded at [176], one of the appellant's arguments was that the deprivation order was unlawful because it was made whilst he was outside the UK and could not therefore play a meaningful part in his appeal. One of the issues considered by the Court of Appeal was whether SIAC had jurisdiction to address that argument and, if so, what relief it could give. As SIAC said in its judgment in the present case at [176] the Secretary of State argued that SIAC could address the underlying issue whether the appellant's return should be facilitated either as a preliminary issue in the appeal or, if the appellant applied for it and the Secretary of State refused it, in an expedited appeal against the refusal of entry clearance.

44. It was also argued that the decision to make a deprivation order whilst W2 was abroad violated his Article 8 rights by compromising his ability to take part in his appeal and was an abuse of power because if the decision had been taken when he was in the UK the risk of a violation of his Article 3 rights in his home country would have made him irremovable. His counsel argued that on the basis of the decision in *S1*, SIAC did not have jurisdiction to consider an argument about the timing of the deprivation order and because SIAC could not grant interim relief, the appeal was not, at the interlocutory stage, a suitable alternative remedy. Justice required the appellant to be returned to the UK to take part in his appeal, but the appeal could not be a forum for deciding whether it was necessary for him to be in the UK. An appeal against a refusal of LTE was also not a suitable alternative remedy.

45. As SIAC noted at [179] of its judgment in the present case, Beatson LJ in giving the judgment of the Court considered first whether SIAC had jurisdiction to consider whether the deprivation order was unlawful because it was made when W2 was outside the jurisdiction. He treated [61] of Burnett LJ's judgment in *S1* as critical but considered there was no inconsistency between that and *L1*. He said in many cases the interval between the deprivation decision and the deprivation order was short and, if the challenge to the order was no more than a collateral attack on the deprivation decision, SIAC could consider that challenge.

46. SIAC then considered the detail of Beatson LJ's analysis of the question whether SIAC could decide whether, in order for his appeal to be effective, W2 had to be in the country, including his reference to the decision of the European Court of Human Rights

in *K2 v United Kingdom* (2017) 64 EHRR SE 18 (the application of the appellant in *G1* to that Court) that G1/K2's application was inadmissible, which concluded that his argument that the deprivation decision breached his Article 8 rights was manifestly ill-founded. Beatson LJ noted that the European Court of Human Rights thus seemed to have taken a different approach from the Supreme Court in *Kiarie*.

47. The critical part of what the Court of Appeal decided in *W2* for present purposes is in [85] to [88] of the judgment. As SIAC noted at [184]:

> "In [85] of the judgment, Beatson LJ said that the question was whether an appeal to SIAC would 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'". Beatson LJ distinguished the circumstances considered in paragraph 65 of *Kiarie*. W2 would be appealing against a decision of the Secretary of State. "If he is successful in that and [the Commission] considers that his presence in the UK is necessary in order for his appeal to succeed, it *will* allow the appeal". That decision would bind the Secretary of State…That meant that an effective remedy would be available in the Commission…It would consider the evidence submitted by him in support of his argument that an out-of-country appeal would not be effective for him. The Commission would then be able to see what was necessary to secure an effective remedy (at [87]). It could consider his litigation difficulties, and the extent to which oral evidence was necessary, and decide, in the light of *Kiarie* , whether the refusal of entry clearance was unlawful. It could consider whether there "is a Convention-compliant system" for the conduct of the appeal from abroad in (at [87])."

48. At [185], SIAC said that in [88] of the judgment Beatson LJ summarised the Secretary of State's submissions distinguishing an appeal to SIAC from the facts in *Kiarie* and said: "I express no views on these matters because in this appeal, the role of this court is to consider whether [the Commission] is able to decide these matters and give a practical and effective remedy in respect of them". He concluded at [89] that there was no reason why SIAC in the course of an appeal against refusal of LTE could not decide and "give a practical and effective remedy to the question whether it is necessary for W2 to be in this country for his appeal to be effective and to do so before the hearing of the substantive appeal. This could be done by hearing the appeal against a decision to refuse LTE …, together with its consideration of this issue as a preliminary issue in the appeal".

49. As SIAC then said at [187], unsurprisingly Mr Hickman QC relied heavily upon these statements of Beatson LJ that W2 could rely on his effective appeal argument both in the appeal against the deprivation order and in an appeal against a refusal of LTE and that, if SIAC felt that his presence in the UK was necessary to enable his appeal to be effective, it would allow his appeal. The question for SIAC was whether it was bound by these statements. At [188] it recorded that Mr Hickman QC accepted that *W2* was an Article 8 case so not strictly binding in the present case, but he submitted that the approach of the Court of Appeal chimed with common law principles. SIAC said that concession was important. Further, the overall question for the Court of Appeal had

been whether the judge had been right to refuse permission to apply for judicial review and interim relief. It considered the detailed reasoning as to what SIAC could or should do on the appeal was *obiter*.

50. However, SIAC went on at [189] of its judgment to explain why it did not consider that it could follow the statements of Beatson LJ. It identified four potential difficulties with the approach of the Court of Appeal:

> "i. If and in so far as the statements in [85] relate to W2's deprivation appeal, they are inconsistent (without explanation) with the express reasoning in [83]–[85] of *S1*.
>
> ii. If the statements relate to the LTE appeal, they go further, without explanation, than [86] of *S1*. They assume that the fact that an applicant can play no meaningful part in his appeal imposes, either, a duty on the Secretary of State to grant entry clearance, or a duty on the court, if entry clearance is refused, to order the Secretary of State to grant entry clearance. That cannot be right, as the Secretary of State will have to balance, when considering whether to grant entry clearance, the appellant's procedural difficulties against the public interest in keeping him out of the UK because of the threat he poses to national security, as will the court on any appeal (in an art.8 case) or application for judicial review (in a non-art.8 case).
>
> iii. The definite terms of [85] are not consistent with the last sentence of [88] of the judgment, which appears to recognise that the Commission might have to consider a range of issues before it could allow an appeal.
>
> iv. The Court of Appeal may have been led by the submission from Mr Fordham QC, recorded at the start of [85] of the judgment, to think that it could not hold that an appeal or appeals to the Commission were a suitable alternative remedy to judicial review unless it decided that the Commission would be bound to grant a remedy on the facts. We consider that the question was whether the Commission had jurisdiction to consider the issues raised by the appellant, rather than whether the Commission was bound to grant him the remedy he sought."

51. SIAC went on to say at [190] that the approach of the Court of Appeal in *W2* did not express any common law principles which it should follow. The two statements of Beatson LJ were inconsistent with SIAC's understanding of the statutory scheme and with the Court of Appeal's approach to it in *G1, L1* and *S1*. Accordingly, at [191], it said that it rejected the submission that the appeal must succeed because Ms Begum cannot have a fair and effective appeal, although it emphasised that that did not mean that her appeal failed. It would be for her in consultation with her advisers, to decide what to do next. SIAC said there were at least three possibilities:

> "Firstly, she could continue with the appeal. Secondly, she could ask for a stay of the appeal, in the hope that, at some point in the

> future, she will be in a better position to take part in it. Thirdly, if she does not ask for a stay, a possible consequence is that she might, in due course, fail to comply with a further direction of the Commission pursuant to r.40 of the Procedure Rules. We accept that that could lead the Commission, after complying with r.40, to strike out the appeal. But, if [Ms Begum's] circumstances were to change in the future, it might be open to her to apply to reinstate her appeal under r.40(3), if the Commission were satisfied that [Ms Begum] had not complied with the direction because circumstances outside her control made it impracticable for her to comply with it."

The judgment of the Administrative Court

52. As I have said, there was no separate judgment from SIAC on the LTE appeal. However, Elisabeth Laing J did give a short judgment on the application for judicial review of the refusal of LTE on common law grounds. She gave permission to apply for judicial review, but refused the substantive application, adopting [140] to [191] of the SIAC judgment. She noted that, at an earlier stage of the Administrative Court proceedings, the Secretary of State had made a written application under section 6 of the Justice and Security Act 2013 to rely upon CLOSED material and had been given permission by the judge to do so. In the event, there had been no reliance on CLOSED material.

53. At [7] the judge set out the steps in Ms Begum's argument: (i) that she had a constitutional right of access to the court; (ii) that the decision refusing LTE interfered with that right and should go no further than is reasonably necessary to achieve a legitimate objective; (iii) Parliament had given her a statutory right of appeal under the 1997 Act and must have intended that right to be effective; (iv) the appeal will not be effective unless she can take part in it and (v) if she cannot take part in her appeal, either her deprivation appeal should succeed or her appeal against the refusal of LTE. At [8] the judge noted that there was a significant gap between those two outcomes. The first would give Ms Begum the remedy she seeks in the deprivation appeal. The second would oblige the Secretary of State to grant LTE but would not guarantee she would be able to take part in the appeal (as she is detained in Syria) still less give her the remedy she seeks.

54. At [9] the judge noted that the argument for Ms Begum assumed that if she could not have a fair and effective appeal, either her deprivation appeal must be allowed or the Secretary of State must grant her LTE. For the reasons given in the SIAC judgment, that assumption was not correct, which disposed of the application for judicial review. That conclusion meant that the judge did not need to decide whether or not the Secretary of State was irrational in insisting that Ms Begum provide biometric data before he would consider the application for LTE.

The parties' submissions

55. On behalf of Ms Begum, Mr Hickman QC dealt first with the fair and effective appeal issue. He noted that, at [140] of its judgment, SIAC had accepted that Ms Begum's appeal was a "full merits" appeal. He referred to *Al Jedda v Secretary of State for the Home Department* [2014] SC/66/2008 where, in the judgment of SIAC presided over

by me, the argument of the appellant that the Secretary of State was under a duty to consult before making a deprivation decision was rejected on the basis that the right of appeal before SIAC was to a full merits appeal. As was said at [158]-[159] of the judgment:

> "158. Second, we consider that the duty to consult identified by Lord Sumption in *Bank Mellat* and by the majority of the Court of Appeal in *Ex parte Fayed* is one which arises in cases of judicial review or its equivalent. That is really made clear by the passage in [37] of Lord Sumption's judgment which we quoted above, where he says: "It would I think be surprising if the mere fact that the right of persons affected to apply for judicial review had been superseded by a statutory application with substantially the same ambit, were to make all the difference to the content of the Treasury's common law duty of fairness."
>
> 159. In our judgment, he is not purporting to deal with cases where there is a full merits right of appeal. We agree with Mr Swift that the procedural rights and obligations which the common law has recognised in the case of judicial review such as the obligation on the decision maker to consult before a decision is made arise precisely because judicial review is not a merits right of appeal. Where there is a full right of appeal on the merits such as in the present case, in our judgment the absence of prior consultation does not render the decision procedurally unfair."

56. Mr Hickman QC submitted that this analysis demonstrated that, in the case of a deprivation decision, procedural fairness required that the appellant have a fair and effective full merits appeal. He submitted that at [143] in its judgment in the present case, SIAC had found in clear and unqualified terms that Ms Begum could not play any meaningful part in the appeal, which therefore could not be fair and effective. Although SIAC had not set out the evidence on which that finding was based, it was clear that it was accepting the evidence of Mr Daniel Furner, Ms Begum's solicitor, who had produced both OPEN and confidential statements explaining the difficulties he faced in communicating with his client and obtaining instructions from her. Mr Hickman QC referred this Court to his witness statements where he describes the significant difficulties in communicating with Ms Begum. Mr Furner says that he could not properly take instructions from her in relation to the Secretary of State's OPEN national security case. He draws the obvious distinction between the lawyer/client relationship and the interviews she has given to the press upon which the Secretary of State had relied as indicating that he could obtain instructions. At [7] of the judgment, SIAC refers to having read his statements and to the fact that he was not cross-examined. In other words, his evidence was unchallenged.

57. Mr Hickman QC noted that in the skeleton argument for the Secretary of State before this Court, the same points are raised as had been raised before SIAC including a point that whilst as matters currently stand, Ms Begum cannot give instructions, that situation might change over the coming weeks and months, a point which was emphasised by Sir James Eadie QC in his oral submissions to this Court on behalf of the Secretary of State. Mr Hickman QC submitted that these points were not open to the Secretary of

State who had not sought to cross-appeal or challenge SIAC's finding that Ms Begum could not have a fair and effective appeal.

58. He relied upon the fact that in the ministerial submission to the Secretary of State, it had been recognised by his officials that Ms Begum would not be able to have an effective appeal and that this was not going to change, but that the key justification for going ahead with the deprivation decision was that she had been out of the UK for some years of her own choice. He noted that this was part of the reasoning of SIAC at [144] and the Secretary of State mentioned the point in one form or another in seven places in her skeleton argument. It was said that in a number of cases, the circumstances in which the appellant left the UK had been highly relevant. Thus in *G1* at [16] Laws LJ made the point that the reason why the appellant had to conduct his appeal from outside the UK was not the deprivation decision, but the fact that he had fled the jurisdiction before he was required to surrender to his bail. The same point was made when his case got to the European Court of Human Rights as *K2* (see [60] of the judgment) and also in the case of *S1* at [80]. However, that point arose in the context of whether the appeal could be fair and effective. Where, as here, SIAC had decided the appeal could not be fair and effective, Mr Hickman QC submitted that the fact that it was said Ms Begum had left of her own choice was not relevant to the question of what the consequences should be of her inability to have a fair and effective appeal.

59. He submitted that it was erroneous and unfair to rely upon factual assertions as to the circumstances in which Ms Begum had left the jurisdiction and gone to Syria, when the unchallenged evidence of Mr Furner was that he had not sought instructions on her travel to Syria and how she left the UK and where the finding of SIAC was that she could not fairly engage with the appeal on issues of fact. He also submitted that the evidence before SIAC did not support this conclusion in any event. When Ms Begum left the UK she was only 15 and had not taken her GCSEs. The ministerial submission recognised at (e) (quoted at [12] above) that she may have been the victim of radicalisation. He also relied upon various newspaper articles about young people being brainwashed by extremists over social media and the Core Script and Q&A on Foreign Terrorist Travellers updated to 17 April 2019 produced by the Government. The latter document made the point that of the 900 people who had travelled to Syria or Iraq to engage with the conflict some 40% had returned to the UK, the majority of whom were assessed to pose no, or a low, security risk. The Secretary of State relied on the media interviews Ms Begum had given which could not be taken at face value. One simply does not know what the position is and cannot draw conclusions.

60. In terms of the statutory scheme, Mr Hickman QC drew attention to the requirement in section 40(5) of the BNA that the written notice of a deprivation decision which the Secretary of State is required to give to the affected person specifies the person's right of appeal under section 40A(1) or under section 2B of the 1997 Act. This made clear Parliament's intention that the person should have an effective right of appeal, the appeal being the mechanism through which fairness was afforded, as was clear from the passage in the SIAC judgment in *Al Jedda* quoted above.

61. He accepted that, as recorded in [151] of the judgment of SIAC in the present case, with the repeal of section 40A(6) of the BNA, Parliament was expressly contemplating some appellants would have to exercise their rights of appeal from outside the UK. However, certain minimum requirements of fairness had to be maintained by the Court or tribunal so that the appellant could have a fair and effective appeal. If she could not, as in this

case, the appeal should be allowed until she could have an effective appeal. The national security considerations could not trump that requirement of fairness, since if that were right there could be circumstances where the deprivation decision was made on the basis of mistaken identity or a case which, albeit unintentionally, was clearly erroneous. On the basis of the judgment of SIAC in the present case, that decision would have to stand without any effective oversight by the court, which would be contrary to the rule of law and a manifest breach of natural justice.

62. He contended that his submission that if Ms Begum could not have a fair and effective appeal, the appeal should be allowed was supported by (i) authority; (ii) common law principles of natural justice; (iii) international law; and (iv) other merits appeals contexts.

63. In relation to authority, Mr Hickman QC submitted that the passages in [85] and [89] of the judgment of the Court of Appeal in *W2* quoted at [47] and [48] above were part of the *ratio* of that case and so binding on SIAC and this Court. The *ratio* of the decision was that a deprivation or LTE appeal before SIAC was an effective alternative remedy to interim relief in a judicial review. One of the reasons for that conclusion was that, as Beatson LJ said at [85]: "He would be pursuing an appeal against a decision by the Secretary of State. 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." This was part of the *ratio* and binding on this Court. He accepted that before SIAC he had said that because *W2* could invoke Article 8, that case was not on all fours with the present, but he submitted before us that that was not a material ground of distinction.

64. In relation to the common law principles of natural justice, he submitted that statutory powers were presumed to comply with those principles and clear words were required to set that presumption aside. He relied upon the principles derived from *R (Osborn) v The Parole Board* [2013] UKSC 61; [2014] AC 1115 stated by Singh LJ in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 at [82]-[83].

65. Mr Hickman QC relied upon Article 15 of the Universal Declaration of Human Rights ("UDHR") which provides: "Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". The UDHR, submitted Mr Hickman QC, is part of customary international law. This is a point which is developed in the written submissions made by Mr Verdirame QC, Mr Pobjoy and Ms McRae on behalf of the UN Rapporteur as intervenor, which emphasise the need for sufficient procedural guarantees and safeguards to protect against the risk of arbitrariness and the minimum requirements of a right to an independent review of a deprivation decision by a judicial or administrative body. Mr Hickman QC relied upon the strong presumption that the statutory scheme should be interpreted in a way which does not place the UK in breach of its international obligations: see [122] of the judgment of Lord Dyson JSC in *Assange v Swedish Prosecution Authority* [2012] UKSC 22; [2012] 2 AC 471. On this basis also, the right of appeal under section 40A of the BNA has to be fair and effective.

66. Mr Hickman QC also relied upon full merits appeals in other contexts such as control orders and TPIMs. In *AN v Secretary of State for the Home Department* [2010 EWCA Civ 869, the Court of Appeal held that if the Secretary of State made a control order

which it was later found could not be maintained without sensitive material being disclosed to the individual which the Secretary of State was not willing to disclose, then the order was unlawful from the time it was made. He submitted that this demonstrated that, even in cases where there are issues of national security, there are minimum requirements of fairness and if they cannot be observed, the relevant restriction cannot be imposed. Although the Secretary of State sought to distinguish these cases on the basis that they were dealing with different statutory schemes, he submitted that at root the principles of fairness are immutable.

67. In relation to the second issue before the Court concerning the extra-territoriality policy of the Secretary of State, Mr Hickman QC submitted that the fundamental error made by SIAC was in approaching this issue on the basis of the principles of judicial review ([138] of the judgment). This ignored the fact that the issue arose in the context of a full merits appeal and therefore SIAC should have dealt with it on that basis and considered for itself the issue of whether Ms Begum was exposed to a real risk of treatment contrary to Articles 2 and 3 of the ECHR, having regard not just to the material which was before the Secretary of State but all the evidence which was before SIAC, including that adduced on behalf of Ms Begum. That this was the correct approach in a full merits appeal is clear from the first SIAC judgment in *Al Jedda* [2009] SC/66/2008 at [3] to [7] and from [30] of the judgment of Lord Wilson JSC when that case went to the Supreme Court: [2013] UKSC 62; [2014] AC 253.

68. He also submitted that the purpose of the policy was not to create a different legal test from that which applied where Articles 2 and 3 of the ECHR were directly applicable but to proceed as if those Articles had extra-territorial effect. If the Articles had applied directly, the principles set out by the Court of Appeal in *AS & DD v Secretary of State for the Home Department* [2008] EWCA Civ 289 would be applicable. At [50] of its judgment, the Court said: "The question what, if any, risks a deportee would face on return is a question of fact for SIAC. In considering that question SIAC must consider all the relevant evidence."

69. Mr Hickman QC also relied upon the approach of the Divisional Court in *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin). That case concerned a not dissimilar policy in relation to British-captured detainees in Afghanistan and whether their transfer to the Afghan security service breached Article 3. The Secretary of State did not accept that detainees captured on the battlefield were within the jurisdiction of the UK for the purposes of the ECHR, but had a policy that UK forces would comply with Article 3 on the assumption that captured detainees were entitled to ECHR protection. At [240] of the judgment, the Court (Richards LJ and Cranston J) said:

> "Mr Eadie submitted that, since the court is engaged in an exercise of review, the relevant question is strictly whether the Secretary of State could properly have concluded that there is no real risk. He accepted, however, that the court would apply anxious scrutiny in answering that question and that it would make no material difference in practice whether the court proceeded by way of review of the Secretary of State's conclusion or made its own independent assessment of risk on the evidence before it, as it would in a case under article 3. 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. We agree, however, that in practice the two approaches lead to the same answer in this case."

70. Mr Hickman QC submitted that, by parity of reasoning, even if this case were approached through the lens of judicial review as SIAC thought, the interpretation of the extra-territorial policy was for SIAC which should have considered all the evidence, including the material produced on behalf of Ms Begum, which it had simply failed to do.

71. Furthermore, by accepting the ministerial submission that the Secretary of State was not required to speculate about the future, specifically the risk of Ms Begum being transferred to Bangladesh or to Iraq where she would be subject to non-compliant treatment, SIAC had fallen into error. Mr Hickman QC relied upon the definition of "real risk" in this context of the test under Article 3 (which corresponded with the test under the policy) at [60] of the judgment in *AS & DD*: "A real risk is more than a mere possibility but something less than a balance of probabilities or more likely than not." The argument on behalf of the Secretary of State that SIAC was only required to consider immediate risks, not future risks, was strikingly similar to an argument rejected by the Court of Appeal in that case.

72. Mr Hickman QC submitted that the risk of Ms Begum being transferred to Bangladesh or to Iraq with consequent mistreatment was a foreseeable and real risk of which the Secretary of State should have taken account, not merely speculative. SIAC had wrongly failed to recognise that this was exactly the sort of risk which leading counsel for the Secretary of State had conceded the application of the policy would lead to the person not being deprived of his or her nationality in her second example referred to in [50] of the judgment in *X2*. Furthermore, he submitted that deprivation had created the risk of Ms Begum remaining longer in the camp in inhumane conditions than would have been the case if she had retained her nationality and the UK government had sought to repatriate her. The Secretary of State had failed to consider that risk at all and SIAC had not reached its own conclusion about that risk because of its erroneous approach.

73. In relation to the LTE appeal, Mr Hickman QC relied upon the unchallenged evidence of Mr Furner, in his third OPEN witness statement dated 21 October 2019, that in her application for LTE she had requested the issue of a UFF travel document in accordance with the Secretary of State's entry clearance policy. He said that he had no reason to believe that if Ms Begum had access to such travel documents and was explicitly permitted to enter the UK, she would be unable to return. The Kurdish authorities have repeatedly made clear, in public, their determination to facilitate such returns. Mr Hickman QC submitted that the LTE appeal should be allowed or in the alternative that she should be allowed to return to prosecute her appeal.

74. In addition to the written submissions from the first intervenor, the UN Rapporteur, to which I have already referred, we also received written submissions from Mr Richard Hermer QC and Ms Ayesha Christie on behalf of the second intervenor, Liberty. With no disrespect to those submissions which we found extremely helpful, it is not

necessary to set them out as the ground they covered was essentially dealt with by Mr Hickman QC in his submissions.

75. On behalf of the Secretary of State Sir James Eadie QC placed great emphasis, in relation to the first issue of whether there could be a fair and effective appeal, on the words "in her current circumstances" in the first sentence of [143] of SIAC's judgment (which I quoted at [26] above). He submitted that SIAC was not saying that she could not have a fair and effective appeal for all time, but only *pro tem*. Some of her problems were susceptible to immediate change, for example she might gain sufficient access to a telephone and then to a video link. He said he was not seeking to reopen SIAC's clear finding at [143] but just illustrate SIAC had not reached any final view. The difficulties in communicating with her lawyers were relative. She had been able to communicate with them on a range of issues and give detailed interviews to the press. There was a possibility of some response from her however attenuated, so [143] of the judgment was not a determination that it would not be possible for her position to be ameliorated.

76. Sir James advanced five core submissions on the first issue. First, he submitted that the problems Ms Begum faced were nothing to do with the Secretary of State. Excusable or otherwise, they were entirely created by Ms Begum. He submitted that the case law had repeatedly recognised the relevance of the appellant's absence from the jurisdiction being self-inflicted. He referred to [16] in *G1* and [60] when that case went to the European Court of Human Rights, passages to which I have already referred at [58] above. He also referred to [80] of *S1*. However, essentially he accepted Mr Hickman QC's point, again recorded at [58] above, that in those cases, absence being self-inflicted went to whether the appellant could have a fair hearing, not to what happens if the appellant cannot have a fair hearing.

77. Sir James emphasised these matters: (i) at a minimum the situation in the camp was not a consequence of anything done by the Secretary of State (see [139] of the judgment); (ii) the deprivation decision was taken for proper and important national security reasons and it could not be said the Secretary of State was misusing the power to gain a litigation advantage; (iii) there were no findings or suggestions in the media interviews that Ms Begum had been trafficked or groomed and radicalised, but that would not draw the sting from the national security case.

78. His second core submission was that, in any event, there was nothing preventing Ms Begum from applying for a stay of the appeal. She chose to engage in the preliminary issues and the Secretary of State was not seeking a final determination. An adjournment or stay of the appeal was a way of dealing with the issue of unfairness. It would also allow the Court to acknowledge that, as he put it, the road was not exhausted, and put off the evil day of confronting extremely difficult issues.

79. His third core submission was that the factors for and against allowing the appeal now strongly favour SIAC's approach of not allowing the appeal and suggesting alternative courses which would address unfairness. The Court should not in principle have to choose between unattractive alternatives and did not need to do so yet. Mr Hickman QC had focused on one of the extremes, but it was important to bear in mind the national security considerations and the public interest in protecting the public from the most dangerous in society. He relied upon the decision of this Court in *R (XH) v Secretary of State for the Home Department* [2017] EWCA Civ 41; [2018] QB 355 which upheld

the continued existence of the Royal prerogative to withdraw passports notwithstanding the enactment of the TPIM Act 2011. At [98], this Court said:

> "Those areas of security risk resulting from the inability to serve a TPIM notice on a UK passport holder personally would be alleviated by, and can only be alleviated by, exercise of the prerogative power to cancel the individual's passport wherever the individual may be. It seems highly unlikely that Parliament would have intended to increase the risk to public security by abolishing the power to cancel passports in such circumstances without any express provision to that effect; and particularly unlikely in a statute which creates a new and wide-ranging suite of anti-terrorism powers."

80. Sir James submitted that if the appeal were allowed, there was no guarantee that the Secretary of State would be given any warning if the situation of Ms Begum's detention changed and for example she were released into Turkey. There was every prospect that she would go invisible. In relation to the suggestion that if she were allowed into the jurisdiction, restrictive measures could be taken against her such as a TPIM, that was exactly the submission which was rejected by SIAC in its open judgment in *U2 v Secretary of State for the Home Department* [2019] SC/130/2016 at [144]:

> "We do not consider that there is a choice of equally effective measures. Deprivation, which ensures that U2 cannot ever come to the United Kingdom unless he gets entry clearance, is the most effective way of managing the risk which he poses. Lesser measures, such as a TEO, or a TPIM, would not be as effective in managing that risk. We reject Ms Harrison's submission that risk can be better managed if a person is in the United Kingdom. It seems to us obvious that no amount of conditions, or careful watching of a person who is in the United Kingdom, can achieve the assurance of knowing that they are outside the United Kingdom permanently. We also reject her submission that the best way of managing any risk is to allow U2 to return and to prosecute him."

81. If the position were that the Court had to simply allow the appeal without any consideration of the merits, Sir James submitted that the national security pass would have been sold so far as Ms Begum was concerned without any consideration of the merits of that national security case. He submitted that contrary to Mr Hickman QC's submission, Parliament cannot truly have intended that in a case where an appellant could not have a fair and effective appeal, the appeal should simply be allowed without any consideration of the merits of the deprivation decision or the national security case against the appellant. It was much more likely that Parliament would expect everything to be done within the powers of the Courts to avoid that conundrum if there was a realistic alternative, which there was: to leave the deprivation decision in place and for there to be a stay or adjournment of the appeal until Ms Begum's position improved.

82. His fourth core submission was that there was nothing in the legislative scheme that suggests that problems of this kind should lead to the overturning of a deprivation decision. The starting point was the common law position as described by Laws LJ in

[22]-[23] of *G1*, that there was no presumption of a right to be present at a statutory appeal, that an in-country right of appeal could only be guaranteed by legislation, which it was not under section 40A of the BNA and that section 92(1) of the 2002 Act indicated a view on the part of Parliament that out-of-country appeals to the First-tier Tribunal are in principle neither unfair nor ineffective. That analysis was accepted by Burnett LJ at [71] of *S1*. Parliament knew full well that there was a quantity of appellants deprived of their British nationality who would be abroad and yet it had removed the suspensive effect of a deprivation decision by repealing section 40(6) of the BNA. It thus recognised that such appellants would have to appeal from outside the UK and might face considerable restrictions.

83. His fifth core submission was that authority does not require the outcome for which Mr Hickman QC contended and is positively against that outcome. He submitted that the three decisions of the Court of Appeal in *G1, L1* and *S1* were correctly analysed by SIAC in its judgment, as was the decision of the Court of Appeal in *W2*. The only question in *W2* was whether SIAC had jurisdiction to grant a remedy, to deal with all eventualities, to which the answer was that it did have jurisdiction. [85] of the judgment upon which Mr Hickman QC placed so much reliance, contained no reasoning or consideration of points with which the Court was now dealing, that Ms Begum cannot have a fair and effective appeal now.

84. He submitted that the TPIM and control order cases such as *AN* provided no useful analogue. The geographical extent of the powers under the different statutory regimes was materially different which was significant because it affected the scope of protection that is available to deal with terrorist conduct that is contrary to the public interest. The cases relied upon by Mr Hickman QC all concerned disclosure and the failure of the Secretary of State to disclose information on which he relied in justifying the decision under challenge. Sir James submitted that that was a different issue from the question whether the unavailability of an effective appeal at a particular point in time means that an appeal against a deprivation decision must be allowed. If information cannot be disclosed without harming national security, then that was highly likely to remain an insuperable objection even if the individual's circumstances subsequently change. He also submitted that *AN* positively supported the idea that the Court would strive to avoid putting national security at risk.

85. In relation to the reliance on international law by Mr Hickman QC and the UN Rapporteur, Sir James submitted that, contrary to the view expressed by Lord Denning MR in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 at 533, customary international law was not automatically incorporated into the common law. The applicable principle was set out by Lord Mance JSC in *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355 at [150]:

> "Speaking generally, in my opinion, the presumption when considering any such policy issue is that CIL, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration."

86. In other words, he submitted, customary international law had to respect the decision making of the legislature, here section 40A of the BNA as amended. Contrary to the submissions by Mr Hickman QC and the intervenor, there was nothing arbitrary about the statutory scheme which allowed a deprivation decision to be made immediately effective on national security grounds with a right of appeal. There was nothing arbitrary in the deprivation decision by the Secretary of State as the inability of Ms Begum to exercise her right of appeal was not caused by any action on the part of the Secretary of State. There was no principle of international law that in a situation such as Ms Begum faces, there was only one answer, to allow the appeal.

87. In relation to the second issue, Sir James submitted that because the issue was the application of the extra-territorial policy or practice of the Secretary of State, on the basis of well-established public law principles, whilst the interpretation of the policy was for the courts, its application was for the Secretary of State as the primary decision-maker and was only susceptible to challenge in accordance with the principles of judicial review, for example on grounds of irrationality.

88. The Court was not dealing with a situation where the ECHR was in play, so as to impose on the Secretary of State the obligation not to act incompatibly with the appellant's Convention rights. Although Mr Hickman QC had relied upon *Evans* where the Divisional Court had said that it was for the Court to make its own assessment of risk, the court had given no reasons for taking that view. In any event, *Evans* did not assist Ms Begum's case because it concerned a different issue of the transfer of British-captured detainees in Afghanistan to the Afghan security service.

89. He submitted that there had been no error of law by SIAC in focusing on the risks in Syria, which it had dealt with entirely properly at [139] of its judgment. It was only required to consider immediate risks, not future risks at all the places to which Ms Begum might travel in the future. Risks anywhere outside Syria were wholly speculative because of the uncertainty as to what the SDF was going to do with detainees. Unlike the second example given by counsel for the Secretary of State in [50] of *X2*, she had been detained at all material times by a third party, the SDF, and that detention was unaffected by the loss of citizenship.

90. He argued that, contrary to the submission of Mr Hickman QC, SIAC had considered the evidence on risk for Ms Begum, as demonstrated by the fact that at [130] of the judgment, it paid tribute to the industry of her legal team in amassing the evidence they had.

91. In relation to the LTE appeal, Sir James made the perfectly valid point that the Secretary of State does not have the keys to the camp. He submitted that on any view, the Court should not make an order requiring the Secretary of State to engage with non-state actors over someone of serious national security concern. He reiterated that it was not necessary for Ms Begum to return to the UK to have a fair appeal given that her circumstances might change so that she could participate effectively even though she was abroad. To grant LTE would undermine the protection of the public in relation to national security.

Analysis and conclusions

92. The first sentence of [143] of the judgment of SIAC: "We accept that, 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" is in clear and categorical terms. What "in current circumstances" means is whilst Ms Begum is detained by the SDF in a camp, which as matters stand is for an indefinite period. Of course, when later in the judgment at [191], SIAC discussed the possibility of Ms Begum applying for a stay in the hope that at some point in the future she would be in a better position to take part in it, it was recognising that at some indeterminate point in the future she may no longer be detained by the SDF, but on the findings made by SIAC, that is entirely speculative.

93. I do not accept the submission on behalf of the Secretary of State that SIAC was only expressing some provisional or *pro tem* view about Ms Begum's prospects of playing any meaningful part in her appeal whilst she is still detained by the SDF in the camp. Although SIAC does not refer expressly at this point in its judgment to the evidence of Mr Furner as to the difficulties of communication and of obtaining instructions, its conclusion in the first sentence of [143] seems to me to show that it accepted that evidence which was unchallenged. I agree with Mr Hickman QC that, in circumstances where the Secretary of State has not cross-appealed the conclusion in the first sentence of [143] of the judgment or sought to challenge through cross-examination the evidence of Mr Furner, it is not open to the Secretary of State to run arguments such as that Ms Begum's situation in the camp might be susceptible to immediate change because she might gain access to a telephone or a videolink or that she can give instructions, albeit in an attenuated form. We have to proceed on the basis that whilst she remains detained in the camp she cannot give effective instructions or take any meaningful part in her appeal, so that, as SIAC found, the appeal cannot be fair and effective.

94. In his submissions, Sir James Eadie QC placed considerable emphasis on Ms Begum having left the UK of her own free will to go to Syria, aligned herself with ISIL and remained in Syria for four years until her detention by the SDF, so that the difficulties she faces in terms of presenting her appeal are to a large extent self-inflicted. However, as he recognised, the cases which have considered this question of absence from the jurisdiction being self-inflicted, specifically *G1* (*K2*) and *S1*, have done so in the context of the issue of whether the relevant appellant can have a fair and effective appeal, an issue which in the present case has been determined in Ms Begum's favour. None of them has considered the legal and procedural consequences of an appellant not being able to have a fair and effective appeal, the issue which arises in the present case. In my judgment, 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.

95. In terms of what legal and procedural consequences should follow from the conclusion of SIAC that Ms Begum cannot have a fair and effective appeal, I consider that, contrary

to Mr Hickman QC's submissions, it does not follow that the appeal must be allowed. It seems to me to be contrary to principles of fairness and justice simply to conclude that the appeal should be allowed and the deprivation decision set aside without any consideration of the merits of the case by the court. Fairness is not one-sided and requires proper consideration to be given not just to the position of Ms Begum but the position of the Secretary of State. The Court has also to keep in mind the public interest considerations, including the interests of national security which led to the deprivation decision, together with the important fact emphasised by Sir James Eadie QC that Ms Begum's predicament is in no sense the fault of the Secretary of State. It would be wrong to disregard those matters and allow the appeal without the Court assessing the national security case. If Mr Hickman QC were right, then in every other case where an appellant for whatever reason could not play any meaningful part in his or her appeal, the appeal would have to be allowed without any consideration of its merits by the Court. In particular, where, as in the present case, the deprivation decision is based on an expert assessment that it is in the interests of national security, simply allowing an appeal would set that assessment at nought, a point which was powerfully made by Sir James Eadie QC. That seems to me to be an extreme position which is wrong in principle and would potentially set a dangerous precedent.

96. I do not consider that any of the matters relied upon by Mr Hickman QC support his submission that the appeal has to be allowed. So far as direct authority on the statutory scheme for deprivation appeals under section 40A of the BNA is concerned, I agree with Sir James Eadie QC that SIAC was correct in its analysis (which I have summarised earlier in this judgment) that the three decisions of the Court of Appeal in *G1*, *L1* and *S1* support its analysis of the statutory scheme, in particular that the statute does not provide a right to an in-country appeal and that Parliament must have contemplated that a number of appellants would be required to conduct their appeals from abroad.

97. On the specific issue which we have to determine, whether, when an appellant cannot have a fair and effective appeal, SIAC should allow the appeal, the only one of the three cases which has anything to say of direct relevance is *S1*. The appellants there submitted that they could not have fair appeals unless they were permitted to return to the UK to pursue them. That submission was rejected on the facts by both SIAC and the Court of Appeal, but the Court of Appeal dealt with what SIAC could have done if it had accepted the appellants' contention that they could not have a fair appeal unless they were allowed to return to the UK. As recorded by Burnett LJ at [82] of his judgment, counsel on behalf of the appellants submitted that the appeal should have been allowed.

98. That submission was effectively rejected by the Court of Appeal. Its reasoning was contained in [83] to [86] of the judgment of Burnett LJ which is worth quoting in full:

> "83. Rule 4(3) of the 2003 Rules requires SIAC to satisfy itself "that the material available to it enables it properly to determine proceedings." But this general duty is not apt to provide a power to direct that someone (an appellant or witness) should be allowed to enter the United Kingdom for the purpose of giving evidence in person before SIAC. Rather it is concerned to ensure that in the event that SAIC considers it has inadequate material available to it to determine an appeal, it may use the other powers available to it under the rules to remedy the deficiency (in

> particular rules 10A and 39), which include powers to give directions to a party to serve further details of a case and evidence. A failure to comply with such directions may lead to the appeal being struck out, or the reply from the Home Secretary being struck out. This latter course would have the practical effect of the appeal going by default. Otherwise, the only circumstances envisaged by the 2003 Rules (rule 11B) for striking out the Home Secretary's reply, is if it discloses no reasonable grounds for defending the appeal.
>
> 84. Rule 45 of the 2003 Rules concerns witness summonses which may only be issued to persons in the United Kingdom. The appellants are not witnesses (although theoretically they might be in each other's appeals) but the rule tells against the proposition that SIAC has a disciplinary power to require the Home Secretary to facilitate entry into the United Kingdom for the purposes of participating in a SIAC appeal.
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> 85. I am unpersuaded that, even if the appellants had made good their concerns, there was anything within the power of SIAC to help them. The appropriate course was to ask the Home Secretary to allow the appellants to enter the United Kingdom outside the Immigration Rules to prosecute their appeals, and to challenge any refusal in judicial review proceedings. The appellants took the first step, at least in substance. In the course of the SIAC appeal they asked, through the Treasury Solicitor, whether the Home Office would facilitate their return to the United Kingdom for the purpose of prosecuting the appeals. The answer was no. In September 2012 the judicial review proceedings were issued which are before us sitting as a Divisional Court.
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> 86. In the *G1* case Laws LJ recognised that the High Court, exercising its supervisory jurisdiction, could review a decision of the Home Secretary to refuse to facilitate the entry into the United Kingdom of a SIAC appellant to prosecute his appeal. It is clear that those circumstances would be rare and require clear and compelling evidence to support the proposition that absent physical presence in the United Kingdom, the person concerned could take no meaningful part in the SIAC appeal. Even then, the decision would have to be reviewed in the light of public law principles including if they apply, EU and ECHR principles. The evidence adduced by the appellants to support their contention that it was impossible for them to engage meaningfully in their appeals to my minds falls a long way short of establishing the proposition for which they contend."

99. Thus, the Court of Appeal considered that if there were unfairness in the appeal, the remedy was not to allow the appeal but for an application for LTE to be made, which if it was refused by the Secretary of State could be the subject of judicial review. Burnett LJ recognised that albeit the circumstances would be rare, if there was clear and

compelling evidence that, unless the person concerned was in the UK, he or she could not take a meaningful part in the deprivation appeal, a claim for judicial review of the refusal of LTE might succeed.

100. It is against the background of that decision that one has to consider the later decision of this Court in *W2*. The context of that case was, in one sense, unusual in that the appellant was arguing that his application for permission to apply for judicial review should be allowed, because SIAC could not provide a suitable alternative remedy. I have set out in detail at [42] to [51] above SIAC's detailed analysis of the decision, with which I agree. The passage in the judgment of Beatson LJ upon which Mr Hickman QC particularly relied is at [85] where he said:

> "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". I do not consider that the circumstances of this case are analogous to the scenario considered by Lord Wilson at [65] (see [77] above) of *Kiarie* and *Byndloss*. This is because in this case there is no question of W2 seeking first an unenforceable direction and then to judicially review that. He would be pursuing an appeal against a decision by the Secretary of State. 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. And (see *R (Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787 at [52]) that decision will bind the Secretary of State"

101. In my judgment, contrary to Mr Hickman QC's submission, the statement that "[SIAC] will allow the appeal" does not support his case that *W2* is authority for the proposition that if the appeal cannot be fair and effective, it must be allowed. It is important to focus on the issue the Court was addressing. [85] is in a section of the judgment which runs from [69] to [88] and which is headed: *(ii) Does the unavailability of interim relief in a SIAC appeal mean that SIAC cannot deal adequately with the determination of whether, in order for W2's appeal to be "effective", he should be in the United Kingdom?* At [69] the question being addressed was framed thus:

> "The question is how to determine whether an out of country appeal would, in the circumstances of this case, be, in the language of Lord Wilson in *Kiarie* and *Byndloss,* "effective". Can this be determined practically and effectively as a preliminary issue in the section 2B appeal or by way of a section 2 appeal against a refusal to grant W2 LTE pending the appeal?"

102. Beatson LJ then recorded the submissions of the parties and dealt with the decision of the Supreme Court in *Kiarie*, which was relevant in *W2* because Article 8 issues arose, which they do not in the present case. At [171] of its judgment SIAC decided, correctly in my view, that *Kiarie* was not relevant in the present case.

103. At the beginning of [85], when Beatson LJ refers to the question being: "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"" it seems to me that he is referring back to the question framed in [69] set out above. He distinguishes what Lord Wilson JSC was considering in *Kiarie* because, under the present statutory scheme, it was not necessary for an appellant such as W2 to seek judicial review of a refusal of LTE because he had a right of appeal to SIAC against a refusal of LTE, that is one of the two types of appeal he was considering: either a preliminary issue in the deprivation appeal under section 2B of the 1997 Act as to whether the appellant's presence in the UK was necessary for his appeal to be effective or an appeal under section 2 of the 1997 Act against a refusal of LTE.

104. Accordingly, it seems to me that in the penultimate sentence particularly relied upon by Mr Hickman QC: "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", the appeal which Beatson LJ is saying that SIAC will allow is either a decision in the appellant's favour on the preliminary issue or an appeal against the refusal of LTE. He is not saying that SIAC would allow the appeal against the deprivation order without considering its merits. That would explain what SIAC described as the cryptic statement by Beatson LJ at [58] that Burnett LJ's statement in [85] that SIAC was powerless to help the appellants did not reflect the statutory scheme. Beatson LJ had in mind that the statutory scheme did permit one of the two forms of appeal which he later discusses. It is also more consistent with the reference to *R (Evans) v Attorney General* at the end of the paragraph. What he has in mind is that a decision that the appellant had to be in the jurisdiction for the appeal to be effective would bind the Secretary of State.

105. Even if I am wrong in that analysis and the "appeal" which Beatson LJ had in mind that SIAC would allow was the deprivation appeal itself, I consider SIAC was correct to conclude that this part of the judgment was *obiter*. The Court of Appeal was not purporting to determine that SIAC would have to take a particular course, as in allow the appeal, but whether it had jurisdiction to do so. As SIAC points out at [189 (iii)] of its judgment, in the last two sentences of [88] of his judgment, Beatson LJ said: "She [Ms Giovannetti QC counsel for the Secretary of State] argued that, by contrast, there is no statutory presumption that out of country appellants should be permitted to travel to the United Kingdom to conduct their appeals here and that article 8 does not create such a presumption. I express no views on these matters because, in this appeal, the role of this court is to consider whether SIAC is able to decide these matters and give a practical and effective remedy in respect of them." This seems to me a further indication that the Court of Appeal was only deciding issues of jurisdiction, not substantive issues.

106. Finally in relation to *W2*, if necessary I would conclude that, even if what Beatson LJ said at [85] were a definitive statement that, if W2 could not have an effective appeal, the deprivation appeal would be allowed, which was part of the *ratio* of the case, as Mr Hickman QC contends, it is distinguishable and not binding on us because it was an Article 8 case. That is what SIAC concluded at [188] on the basis of an "important" "concession" to that effect by Mr Hickman QC. Before this Court Mr Hickman QC was inclined to argue that this made no difference, but I consider that his original position was correct and *W2* is distinguishable on that basis.

107. Mr Hickman QC relied next upon the common law principles of natural justice. Of course, the principles are well-established and uncontroversial. However, the

entitlement to be heard and to fairness in decision-making to which Singh LJ referred in *Citizens UK* at [82] and [83] does not lead inevitably to the answer that if an appeal cannot be fair and effective it must be allowed, if there are other ways in which the unfairness and lack of effectiveness can be addressed, an issue to which I return below.

108. Similar considerations apply to the principles of international law relied upon by Mr Hickman QC and in relation to which we received the helpful submissions on behalf of the UN Rapporteur. The status of customary international law in interpreting and applying the common law is not a matter which requires resolution on this appeal as the principles of international law identified, safeguards to protect against the risk of arbitrariness and the minimum requirements of a right to an independent review of a deprivation decision by a judicial or administrative body, are themselves principles well-recognised in English public law.

109. In any event, the answer to the point about arbitrariness is that whether at the end of the day the deprivation decision is found to have been justified or not, neither it nor the statutory scheme under which it was made could be described as arbitrary. The deprivation decision was taken on the basis of a detailed ministerial submission as to the interests of national security. As to the right to an independent review, as Sir James Eadie QC pointed out, nothing in the principles of international law relied upon dictates as the only answer to Ms Begum's appeal not being fair and effective that her deprivation appeal should be allowed, if there are other ways in which the unfairness and lack of effectiveness can be addressed.

110. So far as Mr Hickman QC's reliance on the control order and TPIM cases and, specifically, *AN* is concerned, in my judgment that different statutory scheme does not support his submission that the appeal should be allowed, for the reasons given by SIAC as set out in [41] above.

111. Accordingly, for all those reasons, I would reject Mr Hickman QC's submission that on the basis of the conclusion of SIAC at [143] the deprivation appeal has to be allowed even though there has been no consideration of the merits of the deprivation decision. The critical question remains as to what steps can be taken to alleviate the unfairness and lack of effectiveness. At [191] of its judgment, SIAC identified three possible courses: (i) that Ms Begum could continue with her appeal; (ii) that "she could apply for a stay of the appeal in the hope that, at some point in the future, she will be in a better position to take part in it"; (iii) if she does not ask for a stay, she might fail to comply with a direction under Rule 40 of the 2003 Rules, leading SIAC to strike out the appeal, but that if her circumstances changed in the future, it might be open to her to apply to reinstate her appeal.

112. The first and third of these courses can be swiftly dismissed as failing to answer the issue of unfairness and lack of effectiveness of the appeal. 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. It is no answer to say, as was suggested on behalf of the Secretary of State, that she would have the benefit of the submissions of the Special Advocates in any CLOSED hearing and they have already been instructed and so are essentially

incommunicado without express agreement of the Secretary of State. As the OPEN disclosure in relation to the national security case makes clear in the footnote cited at [13] above, the same national security case is currently relied on in both OPEN and CLOSED. It follows that any unfairness and lack of effectiveness in OPEN cannot be cured by the Special Advocates in CLOSED.

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.

114. The third course equally does not alleviate, let alone remedy the unfairness. What is contemplated is that Ms Begum is required to continue with the appeal, directions are made at some point with which she cannot comply and so SIAC strikes out her appeal under Rule 40(1)(c) of the 2003 Rules, leaving her to apply to reinstate the appeal under Rule 40(3) if SIAC were satisfied that she could not comply with its directions due to circumstances beyond her control. That seems to me to be no more than a refinement of the first course, carrying on with the appeal even though SIAC has found that Ms Begum cannot have a fair and effective appeal. This merely compounds the unfairness.

115. That leaves the second course, that she applies for and is granted a stay of her appeal in the hope that at some indeterminate point in the future she is in a better position to take part in the appeal. This was the course urged upon us by Sir James Eadie QC, specifically to avoid what he described as the "ultimate conundrum" of allowing the appeal as contended for by Mr Hickman QC. I have already concluded that we should not simply allow the appeal, so one is looking for ways in which the unfairness and lack of effectiveness can be ameliorated.

116. I have thought long and hard about whether a stay is a satisfactory answer to the issue of unfairness and lack of effectiveness. In my judgment, it is not 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.

117. 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.

118. Once it is recognised that a stay of the appeal is not the answer, it seems to me that, despite the blandishments of Sir James Eadie QC, the Court does not have to grapple yet with the "ultimate conundrum", we should do so and should conclude that, since neither allowing the appeal as Mr Hickman QC submitted nor staying the appeal as Sir James submitted, is a legally satisfactory outcome, the only way in which there can be a fair and effective appeal is to allow the appeals in respect of the refusal of LTE.

119. I am acutely conscious of the national security issues which Sir James emphasised and of the points forcefully made by SIAC at [144] of its judgment in *U2* which I quoted at

[80] above. However, there are two important grounds of distinction between the present case and *U2*. First, as noted in [13] above the national security case against Ms Begum at this stage of the proceedings in both OPEN and CLOSED is that she travelled to Syria and aligned with ISIL. Annex A to the ministerial submission expands on that assessment again as set out in [13] above. Whilst there is no question of prejudging the national security issue in circumstances where the appeal has not been heard, that assessment would appear to be at a lower level of seriousness than in the case of U2. Second, the assessment made by SIAC in [144] of that case was made after a full appeal hearing in which U2 provided lengthy witness statements and was cross-examined on behalf of the Secretary of State. The national security case against him as set out in the OPEN judgment describes a dangerous and dedicated Islamic extremist, who has travelled to Syria many times and who has connections to equally dangerous terrorists and extremists.

120. It seems to me that given the difference in level of seriousness between U2 and Ms Begum, the national security concerns about her could be addressed and managed if she returns to the United Kingdom. If the Security Service and the Director of Public Prosecutions consider that the evidence and public interest tests for a prosecution for terrorist offences are met, she could be arrested and charged upon her arrival in the United Kingdom and remanded in custody pending trial. If that were not feasible, she could be made the subject of a TPIM.

121. Notwithstanding the national security concerns about Ms Begum, I have reached the firm conclusion that given that the only way in which she can have a fair and effective appeal is to be permitted to come into the United Kingdom to pursue her appeal, fairness and justice must, on the facts of this case, outweigh the national security concerns, so that the LTE appeals should be allowed. As noted above, Sir James contended that allowing the LTE appeal would not guarantee that Ms Begum would be released from the camp. However, as Mr Hickman QC pointed out, the uncontested evidence of Mr Furner was that, if Ms Begum were granted LTE and had access to UFF travel documents, he had no reason to believe she would be unable to return. As he said, the Kurdish authorities have repeatedly made clear, in public, their determination to facilitate such returns.

122. In all the circumstances, although I would refuse Ms Begum's challenge to SIAC's decision that, it did not follow that because she could not have a fair and effective appeal, her appeal should be allowed, I consider that fairness requires that we allow her LTE appeals against the decisions of SIAC and the Administrative Court.

123. Turning to the second issue, SIAC took the wrong approach when it said at [138] that it would apply the principles of judicial review to the issue of whether the deprivation decision breached the extra-territorial policy of the Secretary of State. The appeals to SIAC under sections 2 and 2B of the 1997 Act are full merits appeals and as such it is for SIAC to decide for itself whether the decision of the Secretary of State in question was justified on the basis of all the evidence before it, not simply determine whether the decision of the Secretary of State was a reasonable and rational one on the material before him as in a claim for judicial review.

124. The task of SIAC on a full merits appeal is put in various ways in the authorities. In the first SIAC judgment in *Al Jedda* [2009] SC/66/2008, Mitting J said at [7]: "An appeal

is a challenge to the merits of the decision itself, not to the exercise of a discretion to make it". In the Supreme Court in that case, Lord Wilson JSC put it as follows:

> "Parliament has provided a right of appeal against her conclusion that one or other of the grounds exist and/or against her refusal to conclude that the order would make the person stateless; and it has been held and is common ground that such is an appeal in which it is for the appellate body to determine for itself whether the ground exists and/or whether the order would make the person stateless (albeit that in those respects it may choose to give some weight to the views of the Secretary of State) and not simply to determine whether she had reason to be satisfied of those matters (*B2 v Secretary of State for the Home Department* [2013] EWCA Civ 616, Jackson LJ, para 96)."

125. As Mr Hickman QC put it, 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. 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 Articles 2 and/or 3 if it occurred in the jurisdiction (the issue under the extra-territorial policy) as it is of the issue of statelessness, which SIAC did decide for itself on the basis of expert evidence in detailed reasoning in its judgment. I can see no reason in principle for drawing a distinction between the nature of the task which SIAC had to undertake in relation to the two issues merely because one issue concerned a policy or practice of the Secretary of State.

126. Furthermore, 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. Contrary to the submission of Sir James Eadie QC, I consider that the approach of the Divisional Court in *R (Evans) v Secretary of State for Defence* as cited at [69] above informs what should have been the approach of SIAC here. Although the policy under consideration in *Evans* was a different one from the extra-territorial policy under consideration in the present case, the intention of both policies was the same, that Articles 2 and 3 would be given extra-territorial effect, so that there is every reason why the approach of the Court or SIAC should be the same, namely to make its own independent assessment of risk on all the evidence before it.

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.

128. It follows that I consider that Ms Begum's claim for judicial review of the decision of SIAC in relation to the Articles 2/3 issue succeeds. The question remains what the disposition of the matter should be. Mr Hickman QC submitted that the Court had sufficient evidence to conclude that the real risk threshold was met given the cumulative possibility of (a) transfer to Bangladesh; (b) transfer to Iraq; and (c) her not coming out of the camp so that the deprivation decision must have exposed Ms Begum to a real risk of Article 3 mistreatment to which she would not have been exposed if she had not been deprived of her British nationality. He submitted that on that basis, the Court should allow the deprivation appeal and quash the decision.

129. I see the force of those submissions, particularly in relation to prolonged detention in the camp as a consequence of the deprivation decision which neither the Secretary of State nor SIAC considered at all. However, on reflection, it seems to me the better course is to remit the second issue to SIAC so that it can consider the question of risk on the basis that it has to decide that issue *de novo* for itself on the totality of the evidence before it. This is for two reasons. First, the normal course when a claim for judicial review succeeds is to remit the matter to the relevant decision-making body to reconsider its decision in accordance with the judgment of the reviewing court. Secondly, SIAC is better placed than this Court to make findings of fact, particularly in the field of national security. It has well-developed procedures for dealing with such matters, including the availability of cross-examination of witnesses and the holding of CLOSED hearings.

Lord Justice Singh

130. I agree.

Lady Justice King

131. I also agree.