Neutral Citation Number: [2024] EWCA Civ 900

Case No: CA-2022-002464

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
MR JUSTICE JAY, UTJ MACLEMAN & MR R GOLLAND
SC/159/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2024

Before :

LORD JUSTICE HOLROYDE

LORD JUSTICE PETER JACKSON
and
LORD JUSTICE SINGH

- -

Between :

B4	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Stephanie Harrison KC, Ali Bandegani and Julianne Kerr Morrison (instructed by **Birnberg Peirce**) for the **Appellant**
Jonathan Glasson KC and James Stansfeld (instructed by the **Treasury Solicitor**) for the **Respondent**
Angus McCullough KC and Rachel Toney (supported by **Special Advocates' Support Office**) appeared as **Special Advocates**

Hearing dates: 14 & 15 May 2024

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Approved OPEN Judgment

This judgment was handed down remotely at 2 p.m. on 31 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Singh:

Introduction

1. On 26 October 2018 the Secretary of State decided to deprive the Appellant of his British citizenship pursuant to section 40(2) of the British Nationality Act 1981 ("the 1981 Act") on the ground that it was conducive to the public good ("the deprivation decision"). The Appellant's appeal to the Special Immigration Appeals Commission ("SIAC") was dismissed on 1 November 2022. The judgment was given by Jay J, the Chair of SIAC. The Appellant now appeals to this Court with the permission of SIAC on certain grounds and with the permission of this Court on others.

2. The Appellant is the subject of an anonymity order dated 3 April 2023, as he was during the proceedings below. SIAC issued a PRIVATE judgment, which was confidential to the parties, as well as OPEN and CLOSED judgments. On this appeal, I do not consider it necessary to give a PRIVATE judgment, as the parties already know the relevant information, not least as they have SIAC's PRIVATE judgment. When referring to such confidential matters, I will use the same terminology that was used by SIAC in its OPEN judgment, e.g. to refer to certain countries without naming them. There is also a CLOSED judgment on this appeal, as there are matters which cannot be set out in this OPEN judgment without prejudicing national security.

3. At the OPEN hearing we heard submissions from Ms Stephanie Harrison KC, who appeared with Mr Ali Bandegani and Ms Julianne Kerr Morrison on behalf of the Appellant, and from Mr Jonathan Glasson KC and Mr James Stansfeld on behalf of the Respondent. At the CLOSED hearing, the interests of the Appellant were represented by Mr Angus McCullough KC and Ms Rachel Toney, who appeared as Special Advocates. I express the Court's gratitude to them all for their written and oral submissions.

Factual background

4. The Appellant was born on 21 December 1988 in a non-European country and became a national of that country at birth. He came to the United Kingdom ("UK") with his parents and was registered as a British citizen in 2004. He retains his first nationality.

5. In spring 2014 the Appellant left the UK and travelled to the non-European country. In winter 2014 he travelled onwards to Syria via Turkey. The Appellant disputes the amount of time that he spent in Syria. The Appellant also claims that, for a significant period while he was in Syria, he was there with a friend who has now returned to the UK. The evidence in OPEN is that in early autumn 2015 the Appellant left Turkey and returned to the non-European country, where he obtained employment and worked in the west of the country.

6. The Appellant's case is that in spring 2018 he and his friend went to European country A to meet someone known to the UK intelligence services in order to enquire about how they might return to the UK. On returning to the non-European country, the Appellant was denied entry to a second non-European country, which he believes was because the UK government had alerted that country's authorities. He also alleges that

he had several email exchanges and a series of meetings with a Foreign and Commonwealth Office ("FCO") official in European country A, who later claimed to be working for the Secret Intelligence Service (MI6). The Appellant alleges that MI6 were considering offering him the ability to return to the UK some time in the future in exchange for recruiting him as an agent or human source.

7. The Appellant alleges that his friend was similarly in contact with the FCO. However, the Appellant alleges that, in autumn 2018, his friend unexpectedly flew to the UK where, after being arrested on arrival, he was informed that the police did not intend to take further action against him. The Appellant's case is that this event triggered a rushed decision-making process that led to the deprivation decision in his case.

8. The Respondent has neither confirmed nor denied the Appellant's allegations relating to his and his friend's contact with UK intelligence services. This is in accordance with the long-standing policy of the British government known as "NCND".

9. On 26 October 2018 the Secretary of State, having considered the advice of the Security Service (MI5) contained in a ministerial submission, concluded that it would be conducive to the public good to deprive the Appellant of his British citizenship. The OPEN basis for the deprivation decision was that the Appellant had travelled to Syria, where he aligned himself with, and engaged in fighting with, an Al-Qaeda ("AQ") aligned group.

The ministerial submission to the Secretary of State

10. We have seen, as did SIAC, an OPEN summary of the ministerial submission which was provided to the Secretary of State before the decision was taken to deprive the Appellant of his British citizenship. The submission made the recommendation that he should be deprived of his citizenship in accordance with section 40(2) of the 1981 Act. In the alternative, should the Secretary of State disagree with that recommendation, it was recommended that a Temporary Exclusion Order ("TEO") should be imposed.

11. Attached to the ministerial submission were six annexes: Annex A was the 'Security Service recommendation to deprive and intelligence case'; Annex B was a 'Mistreatment risk statement'; Annex C was a 'Consideration of risk factors'; Annex D was a 'Consideration of ECHR [i.e. European Convention on Human Rights] issues'; Annex E was the 'Notice of intention to make a deprivation order' (for signature); and Annex F was a Security Service 'Statement on the threat to national security from individuals with UK links who have aligned with an AQ-aligned group in Syria', dated May 2017.

12. Paras 6-9 of the ministerial submission summarised the national security case for deprivation of citizenship. The submission agreed with the assessment of the Security Service that, should the Appellant return to the UK, he posed a threat to the UK's national security and would pose a risk to members of the public in the UK as a result of terrorism-related activity.

13. At paras 11-13, the submission carried out an Article 2/3 ECHR assessment. It noted that, notwithstanding the legal position that the ECHR does not have extra-territorial

effect in such cases, it has been the long-standing, publicly stated practice of the Home Office to consider the Article 2 and 3 risks associated with deprivation of citizenship, and only to recommend it if they consider that it would not give rise to a real risk of a breach of Article 2 or 3. This practice was confirmed publicly in an ECHR Memorandum during the passage of the Immigration Act 2014. The assessment in the Appellant's case was that there were no substantial grounds to believe that a real risk of mistreatment contrary to Article 2 or 3 arose as a direct result of his being deprived of his British citizenship while in the non-European country.

Other evidence before SIAC

14. The evidence before SIAC included the First Statement on behalf of the Secretary of State. Para 8 of the OPEN version of that Statement referred to the fact that there had been consideration of potentially exculpatory material. The content of that material can only be addressed in the CLOSED judgment.

15. There was also an Amended Security Service Note. Para 30 of that Note stated that the AQ statement (at Annex F to the ministerial submission) formed only part of the recommendation which was submitted to the Secretary of State. The statement accompanied a summary of the intelligence which concerned B4 specifically. It was therefore incorrect to say that the Secretary of State was provided with "no individualised information" about the risk to national security posed by B4.

Material legislation

16. Section 40(2) of the 1981 Act provides that the Secretary of State "may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good."

17. Section 40(3) provides that the Secretary of State may by order deprive a person of a citizenship status which results from registration or naturalisation if he is satisfied that the registration or naturalisation was obtained by means of (a) fraud, (b) false representation, or (c) concealment of a material fact.

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

19. Ordinarily, a person who is given notice under section 40(5) may appeal against that decision to the First-Tier Tribunal: see section 40A(1). But subsection (2) provides that subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public (a) in the interests of national security, (b) in the interests of the relationship between the UK and another country, or (c) otherwise in the public interest.

20. Section 2B of the 1997 Act provides that a person may appeal to SIAC against a decision to make an order under section 40 of the 1981 Act if he is not entitled to appeal under section 40A(1) of that Act because of a certificate issued under section 40A(2).

21. In *Begum v Secretary of State for the Home Department* [2024] EWCA Civ 152; [2024] HRLR 5 ("*Begum (No. 2)*"), at para 10, this Court has recently summarised the relevant principles governing SIAC's jurisdiction when considering an appeal against a deprivation decision under section 40(2) of the 1981 Act as follows:

> "…
>
> i) SIAC is not the primary decision-maker. The exercise of the power conferred by s 40(2) must depend heavily on a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety. The primary decision is entrusted to the Secretary of State who has the advantage of a wide range of advice, including from security specialists.
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> ii) SIAC's jurisdiction is appellate (and not supervisory). In general, SIAC's powers are restricted to considering whether the Secretary of State has acted in a way in which no reasonable decision-maker could have acted, or whether it has taken into account some irrelevant matter or has disregarded something to which it should have given weight, or has erred on a point of law (an issue which encompasses the consideration of factual questions). SIAC can consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or based on a view of the evidence which could not reasonably be held.
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> iii) SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. It will bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision.
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> iv) In questions involving an evaluation of risk, SIAC allows a considerable margin, and real respect, to the Secretary of State's assessment. Some aspects of that assessment may not be justiciable; others will depend on an evaluative judgment. In matters of high policy, SIAC's deference may be effectively simple acceptance; at more granular levels, it is the function of SIAC to scrutinise all the evidence, open and closed, assisted by the invaluable contribution of the Special Advocates. It will apply a critical and expert intelligence – a 'powerful microscope' - to test the approach and the evidence bearing on the assessment, both for and against the conclusions of the Secretary of State, and then, applying due deference, decide whether the conclusions of the Secretary of State are sustainable.

> v) SIAC can make its own findings of fact which may be relevant to the assessment of national security, as long as it does not use those findings of fact as a platform for substituting its view of the risk to national security for that of the Secretary of State. Subject to that important limitation, it may make whatever findings of fact it considers it is able to on the evidence and which, in its expert judgment, it considers that it is appropriate to make.
>
> vi) SIAC can determine whether the Secretary of State has complied with s 40(4) (concerning statelessness) and must also determine for itself the compatibility of the decision with the obligations of the Secretary of State under the Human Rights Act 1998, where such a question arises.
>
> (See *Secretary of State for the Home Department v Rehman* [2001] UKHL 47;[2003] 1 AC 753 at [57] and [58]; *Begum UKSC* at [66] to [71] and [119]; *P3 v Secretary of State for the Home Department* [2021] EWCA Civ 1642, [2022] 1 WLR 2869 at [126]; *U3 v Secretary of State for the Home Department* [2023] EWCA Civ 811, [2024] 2 WLR 319 at [101], [169] and [176].)"

22. Section 7(1) of the 1997 Act provides that, where SIAC has made a final determination of an appeal, any party to the appeal may bring a further appeal to the appropriate appeal court on any question of law "material to that determination." In the present case, the appropriate court is this Court.

23. As Lewis LJ observed in *R (E3) v Secretary of State for the Home Department* [2023] EWCA Civ 26; [2023] KB 149, at paras 33-34 and 48, there is no express provision governing the powers of SIAC on an appeal. SIAC will therefore simply allow the appeal if the ground for it is established. SIAC does not have the power to quash the decision to make the order, still less the order itself which is the legal measure bringing about the deprivation of citizenship. If SIAC allows an appeal, further steps will need to be taken by the Secretary of State, in particular to withdraw the decision and the order, thereby removing the legal measure that deprives the individual of his status as a British citizen.

SIAC's OPEN Judgment

24. Jay J's judgment started by setting out SIAC's role in a section 2B appeal. At para 12, he stated that "… although s 2B of the 1997 Act confers a right of appeal, as opposed to a right of review, the principles to be applied by SIAC in reviewing the SSHD's exercise of discretion are largely the same as those applicable to judicial review."

25. Applying those principles, Jay J rejected all six of B4's grounds of appeal before SIAC.

26. On B4's grounds 1 and 2, Jay J held that the national security assessment provided to the Secretary of State did not contain any of the six errors suggested on behalf of B4:

    i) The national security assessment was not simply a generic assessment based on the 'Security Service Statement on Al-Qaeda' created in 2017, but was based on B4's individual circumstances: see para 96 of the judgment.

    ii) The Secretary of State's finding that B4 was "aligned" with an AQ-aligned group was not simply "... constituted by the mere fact that B4 was co-located with such groups and nothing more": see para 99.

    iii) For reasons given in CLOSED, SIAC found that the material presented to the Secretary of State was not one-sided: see para 103.

    iv) The Secretary of State did not simply consider "merely 'numerical' information about returnees from Syria to the UK before 2017", but had material which addressed the individual risk constituted by B4: see para 104.

    v) As the Secretary of State neither confirmed nor denied that interactions between B4 and MI6/FCO official(s) had taken place, the contention that he had erred by not taking these alleged interactions into account when assessing B4's national security risk had to be addressed in CLOSED, as did the question of whether B4 aligned with AQ in an ideological sense: see paras 106-107. Further, the Respondent's national security assessment was kept under review throughout the litigation: see para 109.

    vi) The Secretary of State did not err in not assessing whether it was appropriate to make a TEO prior to making the deprivation decision, as a TEO was "not considered as being suitable on any free-standing basis": see para 119.

27. Jay J rejected B4's grounds 3 and 4, which related to the assessment of the risk posed by the deprivation decision to B4's Article 2/3 rights and application of the Respondent's "supplementary ECHR memorandum covering article 2/3 risks outwith the jurisdiction of the ECHR". At para 127, Jay J held that, in line with *Begum v Secretary of State for the Home Department* [2021] UKSC 7; [2022] AC 765 ("*Begum (No. 1)*"), "… the question of how the policy applies to the facts of a particular case is for the SSHD to determine, subject always to *Wednesbury*". For reasons set out in SIAC's CLOSED judgment, Jay J said that the Secretary of State's conclusion about the Article 2/3 risk and the application of the policy was not *Wednesbury* unreasonable: see paras 129-132.

28. Jay J noted that B4's ground 5, arguing that the deprivation decision was arbitrary and vitiated by an improper purpose, related to B4's alleged contact with MI6/FCO officials, and so it was addressed in the CLOSED judgment: see para 134.

29. Finally, Jay J said that B4's ground 6 was unsustainable as there is no duty on the Respondent to seek representations prior to making a deprivation order, and there was no reason why that general rule should not apply to B4's case: see paras 138-140.

Grounds of Appeal before this Court

30. The grounds of appeal for which the Appellant has permission to advance before this Court are now set out in the Re-amended Grounds of Appeal.

31. Ground 1 is that SIAC erred in law in:

(a) directing itself that the considerations which the Respondent was required to take into account when making the deprivation decision are limited to those which he was required by *Wednesbury* reasonableness to have regard, and

(b) failing to hold that not taking into account factors impliedly required by section 40 of the 1981 Act or factors "so obviously material to a decision" was a public law error.

32. Ground 2 is that, in considering the ministerial submission presented to the Secretary of State, SIAC erred in:

(a) directing itself that "it is not for the court to decide for itself whether the summary [presented to the decision-maker] was fair and balanced"; and

(b) failing to hold whether a fair process was followed.

33. Ground 3 can only be set out in OPEN in the following redacted form:

> CLOSED Ground 3A: The Commission [i.e. SIAC] erred in law (CLOSED Judgment paras [redacted]) in applying the *Wednesbury* test to the following three aspects of the CLOSED case:
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> i. [redacted];
>
> ii. [redacted];
>
> iii. [redacted];
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> CLOSED Ground 3B: If, (contrary to the Appellant's case on appeal), the Court of Appeal finds that the correct applicable test is *Wednesbury*, the Commission erred in law in applying that test in finding that a fair and balanced picture was presented to the SSHD in relation to the aspect of the CLOSED case referred to in paragraph 3A(i)) above: the Commission could not rationally have concluded, on a *Wednesbury* basis, that a fair and balanced picture was presented to the SSHD in relation to the aspect of the CLOSED case referred to in paragraph 3A(i)) above.

34. Ground 4 is that SIAC misdirected itself in:

a. [Ground 4A] directing itself that the decision pursuant to section 40 of BNA 1981 did not involve an "overarching proportionality assessment" (para. 81) and that the anxious scrutiny standard did not apply (para. 83(8)); and

b. [Ground 4B] failing to conduct such an assessment itself (as required by the Supreme Court's judgment in *Pham v SSHD* [2015] 1 WLR 1591) including weighing the implications of its finding that the Appellant would remain in the non-European country (para.131). This aspect of Ground 4 is no longer pursued at this stage in the light of *U3*.

35. At the OPEN hearing before us, it was made clear by Ms Harrison that the only aspect of Ground 4 that is pursued before this Court is whether SIAC was required to apply the "anxious scrutiny" standard.

Ground 1: relevant considerations

36. In support of Ground 1 Ms Harrison relies on the judgment of Simon Brown LJ in *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037, at 1049-1050. Although that was a dissenting judgment, it is common ground that the principles set out by Simon Brown LJ in that passage represent established law.

37. Simon Brown LJ said that there are three categories of consideration in the exercise of a statutory power. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard *must* be had. These are mandatory relevant considerations. Secondly, those clearly identified by the statute as considerations to which regard must *not* be had. These are prohibited and are therefore irrelevant considerations. Thirdly, those considerations to which the decision-maker *may* have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide what considerations should play a part in the reasoning process. This category therefore covers relevant considerations which it is permissible to take into account but which are not mandatory.

38. Simon Brown LJ also cited with approval the judgment of Cooke J in the New Zealand case of *CREEDNZ Inc. v Governor-General* [1981] 1 NZLR 172, at 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

39. That passage has been cited with approval on many occasions in this jurisdiction, including by the House of Lords and the Supreme Court: see e.g. *Findlay v Secretary of State for the Home Department* [1985] AC 318, at 333-334 (Lord Scarman).

40. It is well-established that, when it comes to the third category, the conventional test of *Wednesbury* unreasonableness has to be applied. In other words, the court may only interfere with the decision if a consideration has not been taken into account which no reasonable decision-maker could properly leave out of account. Another way in which this has been expressed is that the consideration is "obviously material".

41. These principles have recently been approved by the Supreme Court in *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52; [2021] 2 All ER 967, at paras 116-121 (Lord Hodge DPSC and Lord Sales JSC). As was emphasised in that judgment, in deciding whether a consideration falls into the third category ("obviously material"), the test is the familiar *Wednesbury* irrationality test. Further, it is possible to sub-divide the third category into two types of case. First, a decision-maker may not have adverted at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight: the question again is whether the decision-maker acts rationally in doing so. This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, at 780 (Lord Hoffmann).

42. The only type of information to which this debate is relevant in the present appeal is exculpatory material. On behalf of the Appellant Ms Harrison submits that exculpatory material falls into the first category mentioned in *Fewings*. It is a consideration which must be taken into account, although not expressly mentioned in the 1981 Act, because it is impliedly required in deciding whether deprivation of nationality is "conducive to the public good". Alternatively, she submits that it is, in any event, "obviously material" and so must be taken into account because it falls within the third category of considerations mentioned in *Fewings*.

43. In support of her first submission Ms Harrison relies in part on the provisions of the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003 No 1034), in particular rules 10 and 10A, which make express reference, on an appeal to SIAC, to the duty of the Secretary of State to file any exculpatory material of which he is aware, and also to make a reasonable search for exculpatory material. Ms Harrison submits that, in accordance with well-known authority, reference to the Rules is a permissible aid to the interpretation of the primary legislation in this context, with which it needs to be read.

44. For the Respondent Mr Glasson does not accept that submission, because he points out that section 40 of the 1981 Act can be used to deprive a person of citizenship in circumstances which go beyond cases where it is conducive to the public good (for example fraud).

45. I am not persuaded by the Appellant's submission that exculpatory material is a mandatory relevant consideration because it is impliedly required by the Act. But it seems to me that this debate is an academic one, since Mr Glasson accepts on behalf of the Respondent that any meaningful exculpatory material is obviously material and therefore must be taken into account by the Secretary of State before a lawful decision can be made under section 40(2) of the 1981 Act.

46. I do not read SIAC's judgment as having said that exculpatory material is not an obviously material consideration, which the Secretary of State was required to take into account before depriving the Appellant of his British citizenship. I would therefore reject Ground 1 on this appeal.

Ground 2: fairness

47. Under Ground 2, Ms Harrison complains that SIAC misdirected itself in law in particular in the following passages. First, at para 80 of the OPEN judgment, Jay J said:

> "… B4 submits that the Security Service was under an obligation to provide a fair and balanced assessment of the position in relation both to national security (error 3. Ground 1 and 2) and the article 2/3 risk. Given that this is a situation where *Carltona* does not apply and the decision must be taken by the Secretary of State personally, the principles set out by the Divisional Court (Elias LJ and Simon J) on *R (oao Khatib) v SSJ* [2015] EWHC 606 (Admin), paras 49 ff are apposite. These may be enumerated as follows:
>
> (1) The decision-maker must be given 'the salient facts which give shape and substance to the matter, the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.' (see *R (National Association of Health Stores) v DOH* [2005] EWCA Civ 154, paras 60-64).
>
> (2) Given that the statute does not itemise or indicate the factors relevant to the exercise of the discretion, it is for the decision-maker, and those briefing him, to decide what these are, subject to *Wednesbury*.
>
> (3) It is for the decision-maker, and those briefing and/or advising him, to decide what is relevant or not, subject to *Wednesbury*. But the decision-maker etc. must have regard to the nature of the decision at issue, and where individual rights and liberties are in play any exculpatory matters must be fairly summarised. Ultimately, though, it is not for the court to decide for itself whether the summary was fair and balanced: the role of the court is confined to satisfying itself that the decision-maker and those advising him have

> diligently assessed those matters and have not committed any *Wednesbury* error in performing that assessment."

Secondly, in the final bullet point of para 83 of that judgment, Jay J said:

> "… it was submitted that the failure to present a fair and balanced assessment to the SSHD was a public law error which could not be cured without reconsideration by the SSHD personally. The Commission agrees, subject to two important qualifications. The first is that the Commission does not accept that a public law approach enables it to decide for itself whether the SSHD was presented with a fair and balanced assessment. Ultimately, this is a *Wednesbury* question where the Security Service are the experts. The Special Advocates probably accepted this when the matter was pressed in oral argument, whereupon the submission was made that this was not a case of 'heightened' *Wednesbury*. Insofar as there is an inherent flexibility in the *Wednesbury* principle itself, the Commission's understanding of *Begum* is that some national security questions are not justiciable at all, and others are subject to review on a *Wednesbury* basis. The present case falls into the second category."

48. Ms Harrison's submissions under this ground can be summarised as follows. First, she submits that Jay J's summary of what the Divisional Court had said in *R (Khatib) v Secretary of State for Justice* [2015] EWHC 606 (Admin) was inaccurate. In *Khatib*, the main judgment was given by Elias LJ. At para 49, he said:

> "… in a case like this where the decision-maker relies upon a briefing prepared by others, the decision-maker need not be told everything which has some potential relevance, however marginal; it is enough that he be given 'the salient facts which give shape and substance to the matter, the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered': per Brennan J in the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*. (1986) 162 CLR 24,30-3 cited with approval by Sedley and Keene LJJ in *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154, paras. 60-64. The latter was a case where a minister was briefed by his civil servants. The purpose of the briefing is to enable the decision-maker to make an informed judgment."

49. At para 53, Elias LJ referred with approval to what had been said by the Divisional Court (Thomas LJ) in the earlier case of *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB) as follows:

> "… in applying these principles the decision-maker or those briefing him, when determining what is potentially relevant, has to have regard to the nature of the decision in issue; and where it adversely impinges on the rights and liberties of individuals he must have regard to the need to ensure that matters potentially favouring the individual are fairly summarised to the decision-maker or considered by him, as the case may be. As the Divisional Court held in *R (Hindawi) v Secretary of State for Justice* [2011] EWHC 830 (QB) para.73, in a case which concerned the decision by the Secretary of State to refuse a terrorist prisoner parole, contrary to the recommendation of the parole board:
>
> > '…fairness required that his officials put the issues to him in a balanced way so he could arrive at a decision that had a rational basis. … He could not rely, if he was to follow what a fair procedure dictated, upon a document which set out only the case for rejection of the panel's decision.' "

50. Secondly, Ms Harrison emphasises that it is clear from paras 56-60 in the judgment of Elias LJ that the question whether a report made to the decision-maker is lawful in this context depends on "what fairness requires".

51. Ms Harrison submits that this was also made very clear in the judgment of Thomas LJ in *Hindawi*, at paras 69-72, where he summarised the position as follows: "Fairness is the determining factor, but context is critical." Thomas LJ also referred to the leading authority on procedural fairness of *R v Secretary of State for the Home Department, ex parte Doody* [1994] AC 531, at 559-563 (Lord Mustill).

52. This leads to the third, and fundamental, submission which Ms Harrison makes under Ground 2, which is that it is well-established on the highest authority that procedural fairness is a question for the court itself to determine and is not governed by *Wednesbury* unreasonableness: see the decision of the Supreme Court in *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115, at paras 64-71 (Lord Reed JSC). In particular, at para 65, Lord Reed stated that it was not correct to say that the question whether procedural fairness requires an oral hearing is a matter of judgment for the Parole Board, reviewable by the court only on *Wednesbury* grounds but that:

> "The court must determine for itself whether a fair procedure was followed … Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required."

53. At the hearing before us Mr Glasson submitted that the usual principles in *Hindawi*, *Khatib* and *Osborn* are modified in the present context because of the demands of national security. He submitted that this was the consequence in particular of the

decision of the Supreme Court in *Begum (No. 1)*. I do not accept that submission for the following reasons.

54. First, this issue was not before the Supreme Court in *Begum (No. 1)*. The relevant issue in that case was what should happen in circumstances where, as things then stood, it was impossible for the appeal before SIAC to be heard fairly because Ms Begum was in a camp in Syria and was unable to give full instructions to her solicitors. The Court of Appeal (which had also sat as the Divisional Court) had taken the view that, in those circumstances, Ms Begum had to be allowed to return to the UK so as to have a fair and effective hearing before SIAC. The Supreme Court reversed that decision, because the interests of national security can sometimes mean that it is simply not possible to have a fair hearing and so, for example, an appeal may have to be stayed.

55. The Supreme Court emphasised what the House of Lords had said in *Rehman v Secretary of State for the Home Department* [2001] UKHL 47; [2003] 1 AC 153 about the separation of powers in the assessment of national security. The Court of Appeal/Divisional Court had not been referred to the case of *Rehman*: see para 72 in the judgment of Lord Reed PSC. As Lord Reed explained at para 70, *Rehman* makes it clear that some aspects of the Secretary of State's assessment of considerations of national security and public safety may not be justiciable. Other aspects will depend, in many if not most cases, on an evaluative judgement of matters, such as the level and nature of the risk posed by an appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are incapable of objectively verifiable assessment: see *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68, at para 29, where Lord Bingham of Cornhill reiterated the point which had been made by Lord Hoffmann in *Rehman*. As Lord Reed said at para 70 of his judgment in *Begum (No. 1)*, SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect, for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability.

56. None of that, it seems to me, has the consequence for which Mr Glasson contends in the present appeal. If the fairness ground of challenge succeeds, the consequence in the present case will not be that someone will be required to be admitted to this country contrary to the Secretary of State's assessment of national security or public safety. As this Court explained in *E3*, which I have cited above, the consequence would simply be the conventional public law one that the decision-maker has to take the decision again in the light of the judgment of SIAC.

57. Secondly, far from supporting Mr Glasson's submission, the judgment of Lord Reed in *Begum (No. 1)* in fact contradicts it. This is because the Supreme Court decided for itself what fairness required in the circumstances of that case, including the very weighty consideration of national security. Furthermore, as Lord Reed explained at para 71, even in the national security context which is raised in cases such as this under section 40(2) of the 1981 Act, SIAC has a number of important functions to perform on an appeal against such a decision. Those functions include whether the Secretary of State has disregarded something to which he should have given weight (something which Ms Harrison contends may have occurred here under Ground 1) or has been guilty of some procedural impropriety (which Ms Harrison submits may have occurred here under Grounds 2 and 3). In doing so, Lord Reed explained, SIAC has to bear in

mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision.

58. I should explain that the phrase "procedural impropriety" does not carry any connotation of bad faith or other such behaviour. It is simply the compendious phrase which has been used in public law to describe breaches of procedural requirements, in particular the duty to act fairly, or what used to be called the rules of natural justice, ever since the speech of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at 411, where Lord Diplock made it clear that he was using the phrase to include "… failure to act with procedural fairness towards the person who will be affected by the decision."

59. Thirdly, Lord Reed did not refer to his earlier judgment in *Osborn* at all in *Begum (No. 1)*. It would be very surprising if he had intended to modify the effects of *Osborn* in the radical way for which Mr Glasson contends without even making reference to that judgment.

60. It is well-established in this area of law that the draconian effect of the scheme for deprivation of citizenship in section 40 of the 1981 Act is such that there is no right to make representations in advance of that decision where it is made on grounds of national security: see *Begum (No. 2*), at paras 103-113, in particular para 112. But, if anything, the absence of such a right reinforces the need for there to be such procedural fairness as it is possible to give in this context before the Secretary of State reaches his decision. It is precisely because the person affected is not entitled to prior notice before the decision, or to make representations before the decision is taken, that it is incumbent on the advisers to the Secretary of State to ensure that their advice is fair and balanced. This must include exculpatory material which would tend to favour the person concerned rather than a decision to deprive them of citizenship.

61. In the present context, the fact that there is no prior right of notice or consultation does not mean that there is no right to any procedural fairness in advance of the decision at all. Mr Glasson did not contend otherwise. He accepts that the advice which is given to the Secretary of State must be fair and balanced but his contention is simply that the judge of whether it is fair and balanced is the author of the advice and not SIAC, subject only to review on grounds of *Wednesbury* irrationality. I do not accept that contention. As the Supreme Court held in *Osborn*, the question whether there has been procedural fairness is an objective one and is for the court (or in this context SIAC) to determine for itself.

62. That all said, I should emphasise that it does not follow that SIAC can simply substitute its own view as to what should have gone into the advice or report to the Secretary of State. Although the question is an objective one, there is still a margin of appreciation to be afforded to the authors of the advice to be given to the Secretary of State. This is in part because the input into that advice will have come from organisations with expertise, such as the FCDO and the UK Intelligence Community ("UKIC"). But, in any event, this follows from the approach which is in general taken by courts when they have to review matters of this kind. The mere fact that the question is ultimately an objective one for the court (or in this context SIAC) to decide does not mean that it can simply substitute its own view of what should go into an advisory report. The question is whether, taken in the round, the advice which is given to the Secretary of State is fair

and balanced. The fact that a detail here or a comment there might or might not have been left out does not mean that the overall effect of the report is unfair or unbalanced.

63. In this context, although analogies are not exact, some parallel can be drawn with other contexts, for example planning law.

64. In *R (Whitley Parish Council) v North Yorkshire County Council* [2023] EWCA Civ 92; [2023] JPL 1081, at para 37, Sir Keith Lindblom SPT confirmed that the test as to whether a planning committee's decision is vitiated by an error of law is if the effect of the planning officers' report is "significantly to mislead members on a material issue". The report must be read as a whole, with a reasonable degree of benevolence, and considering the audience to which it is addressed. In this he echoed his earlier judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, at para 42(2):

> "The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different, that the court will be able to conclude that the decision itself was rendered unlawful by that advice."

65. Returning to the present context, in my judgment, the correct approach is for SIAC itself to decide whether the advice given to the Secretary of State was fair and balanced but, in performing that task, SIAC must give appropriate respect to the judgments of the experts involved, for reasons both of institutional capacity and democratic accountability. The test is not, however, one of *Wednesbury* unreasonableness.

66. It is then necessary to consider whether any error by SIAC as to the approach it should take was material to the outcome of the case.

67. It is well-established in public law that an error in the decision-making process will not vitiate a decision if it is inevitable that the decision would have been the same in any event. The error of public law must be material: see *Simplex G.E. (Holdings) v Secretary of State for the Environment* (1988) 57 P & CR 306, at 325-326 (Purchas LJ) and 329 (Staughton LJ).

68. It is also clear that, in the context of proceedings in SIAC, an error of law must be material before it will vitiate its decision: see *U3 v Secretary of State for the Home Department* [2023] EWCA Civ 811; [2024] 2 WLR 319, at para 5(iii) (Elisabeth Laing LJ).

69. The *Simplex* test was also applied by SIAC itself in *S3 v Secretary of State for the Home Department* (SC/151/2018, judgment of 20 December 2023), at paras 171-172 (Lane J).

70. This Court has held that it is within SIAC's remit to conclude that a deprivation decision would inevitably have been the same even if a public law error had not occurred and that it does not err in law by applying *Simplex*: see *Begum (No. 2)*, at para 120. Furthermore, in that case, this Court in any event considered the matter for itself and concluded that on all of the evidence before it, including the closed evidence, the decision would inevitably have been the same: see para 121.

71. Finally, as I have mentioned in setting out the legislative framework above, an appeal to this Court from SIAC will only succeed if an error made by SIAC was "material". In the circumstances of the present appeal, I have reached the conclusion that, although SIAC did err in its approach, because it considered that its task was not to decide for itself whether the advice given to the Secretary of State was fair and balanced, but to review that question on *Wednesbury* grounds, that error was not material, as the outcome would inevitably have been the same.

72. Having considered the ministerial submission to the Secretary of State, and the Annexes to it, with care, I am satisfied that the advice that was given to the Secretary of State was fair and balanced. It made the salient points that needed to be brought to the decision-maker's attention. It did not set out all of the underlying intelligence but that was neither necessary nor desirable, since the experts in the field are the Security Service and others, not the Secretary of State. There is also the risk that the Secretary of State will be overwhelmed with material and so be unable to see "the wood for the trees". What is required is a summary of relevant matters, which are set out in a fair and balanced way. I am satisfied that is exactly what the Secretary of State was given here. This is also for reasons set out in the CLOSED judgment.

Ground 3

73. Grounds 3A and 3B are dealt with in the CLOSED judgment.

Ground 4: anxious scrutiny

74. As I have mentioned above, the only live issue that remains under Ground 4 in this Court is whether SIAC was required to apply "anxious scrutiny" in the appeal before it.

75. The phrase "anxious scrutiny" derives from the speech of Lord Bridge of Harwich in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, at 531, where he said:

> "The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

76. As was explained by Carnwath LJ in *R (YH) v Secretary of State for the Home Department* [2010] EWCA Civ 116; [2010] 4 All ER 448, at paras 22-24, the phrase has now become an accepted part of the canon, but there has been little discussion of its practical significance as a legal test. Carnwath LJ said that the expression in itself is uninformative. Read literally, the words are descriptive not of a legal principle but of a state of mind: indeed, one which might be thought to be an axiomatic part of any judicial process, whether or not involving asylum or human rights. However, as Carnwath LJ recognised, it has by usage acquired special significance as underlining the very special human context in which such cases are brought "and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account."

77. In this context Ms Harrison emphasises the particular importance of citizenship as the right which is often said to be the source of other rights. The importance of citizenship was emphasised by the Supreme Court in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, in particular at para 60 (Lord Carnwath JSC) and paras 97-98 (Lord Mance JSC). As Lord Mance put it at para 98 of *Pham*, removal of British citizenship under the power provided by section 40(2) of the 1981 Act is "a radical step" and a "correspondingly strict standard of judicial review must apply to any exercise of the power". Similarly, at para 108, Lord Sumption JSC said that a person's right in domestic law to British nationality is "manifestly at the weightiest end of the sliding scale". However, he went on to say that, equally, the security of this country against terrorist attack is on any view a countervailing public interest which is potentially at the weightiest end of the scale.

78. Ms Harrison also relies on the emphasis placed by this Court on the need, where anxious scrutiny is required, for a high quality of reasoning in *R (MN) v Secretary of State for the Home Department* [2020] EWCA Civ 1746; [2021] 1 WLR 1956, at para 242: that was a case concerning a conclusive grounds decision in the context of human trafficking.

79. Before us Mr Stansfeld, who made submissions on behalf of the Respondent in relation to Ground 4, submitted that a "powerful microscope" is applied by SIAC to cases of this type. When pressed at the hearing before us, Mr Stansfeld accepted that this is no different in substance from saying that the most "anxious scrutiny" must be applied in this context as it is in others to which I have referred earlier.

80. In those circumstances it seems to me that there is no material dispute between the parties in the appeal before us. As this Court said in *Begum (No. 2)*, at para 10(iv), SIAC must apply a "powerful microscope" and that is what SIAC in fact did in the present case.

81. Accordingly, I would reject Ground 4 in this appeal.

Conclusion

82. For the above reasons and for those set out in the CLOSED judgment, I would dismiss this appeal.

Lord Justice Peter Jackson:

83. I agree.

Lord Justice Holroyde:

84. I also agree.