Appeal Nos. CA-2022-000838 & CA-2022-000839

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
SC/153/2018 & SC/153/2021

B E T W E E N:

U3

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

JUSTICE

Intervener

WRITTEN SUBMISSIONS OF THE INTERVENER

SUMMARY

1. JUSTICE is a law reform and human rights charity and the UK section of the International Commission of Jurists, which has substantial experience of cases concerning the principle of natural justice in the national security context.

2. This appeal concerns the approach which should be taken by the Special Immigration Appeals Commission ("**SIAC**") in appeals against decisions of the Respondent ("**SSHD**") (i) to refuse entry clearance; and (ii) to deprive a person of citizenship. Such appeals are governed, respectively, by s.2 and s.2B of the Special Immigration Appeals Commission Act 1997 ("**SIACA**"). These submissions address the nature of an appeal under s.2B in cases to which the Human Rights Act 1998 does not apply.

3. A key issue identified at §17 of SIAC's open judgment and arising also from the observations of Elisabeth Laing LJ in *P3 v SSHD* [2021] EWCA Civ 1642, [2022] 1 WLR 2869 at §115 and Sir Stephen Irwin at §120 and §124, is whether SIAC's role in relation to questions of fact goes beyond a strict *Wednesbury* test. More specifically, the issue is how SIAC's procedures and institutional competence in relation to facts and evidence are to be reconciled with the description of SIAC's functions at §71 of Lord Reed JSC's judgment in *R (Begum) v SIAC* [2021] UKSC 7, [2021] AC 765, which articulated SIAC's functions in terms of classic public law principles including, in relation to facts, determining only whether the SSHD had made "*findings of facts which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held*".

4. If §71 of *Begum* represents a comprehensive and definitive statement of SIAC's role in relation to questions of fact, there would be three consequences:

   (1) First, an appeal from a deprivation decision under s.2B SIACA would in effect be equivalent to an appeal on a question of law, since public law grounds of review are indistinguishable from an appeal on grounds of error of law.

   (2) Second, SIAC's unique institutional capacity to consider and test national security sensitive evidence, including its expert membership and its ability to consider closed evidence and allow cross-examination on such evidence by special advocates, would be rendered substantially otiose and the protections for individuals lesser than those available under the *"inquiry"* procedure prior to the right of appeal to SIAC being introduced.

   (3) Thirdly, and most importantly, the function of the appeal to SIAC in ensuring that natural justice is observed, and in particular the fundamental principle of *audi alteram partem*, would be rendered little more than window dressing. Evidence presented by a person deprived of their citizenship to rebut the case against them would have very little legal relevance and the

individual would not have a meaningful opportunity to rebut the national security case against them.

5. JUSTICE submits that:

(1) SIAC was right to conclude that Lord Reed in *Begum* was not setting out an *"exhaustive list of the grounds"* for challenging a deprivation decision (§27). However, SIAC was wrong to consider that only public law grounds could be relied upon (§27(a)), and that SIAC's special constitution and expertise simply allow it to apply public law principles "*with a more powerful microscope*" (§§32-33); an approach reminiscent of an "*anxious scrutiny"* judicial review (on which see *E v SSHD* [2004] EWCA Civ 49, [2004] QB 1044, §4).

(2) Whilst the Supreme Court's decision in *Begum* is highly persuasive for the proposition that SIAC should only interfere with the SSHD's decision if there was no evidence to support it or it was irrational (a classic judicial review/error of law approach), (i) the Supreme Court's judgment in *Begum* was concerned with whether the SSHD had exercised her discretion to deprive a person of citizenship contrary to her policy (a classic public law issue) and not with an appeal from whether deprivation was conducive to the public good (the issue on this appeal); and (ii) Lord Reed's judgment left open the possibility that other grounds of appeal might be available beyond classic public law grounds on a s.2B appeal.

(3) On an appeal from a decision by the SSHD that deprivation of British citizenship would be conducive to the public good, SIAC should allow an individual to advance evidence that is relevant to their situation at the date of the deprivation decision, even though this was not before the SSHD. SIAC should examine and weigh that evidence, allowing it to be tested by submission and cross-examination, and SIAC should reach findings of fact as to whether the factual case advanced by the individual is established or not. That is fundamentally different from the approach of a court in judicial review and from a tribunal on an appeal on a question of law.

(4) The factual conclusions of SIAC are then relevant in at least two ways. First, if SIAC concludes that the SSHD's decision was itself materially premised on an error of fact—to take a clear example, that an individual had left the UK of their own free will when in fact this was wrong—it should allow the appeal, because SIAC is not limited to allowing an appeal on grounds of *"mistake of fact giving rise to unfairness"* amounting to an error of law (*E v SSHD*). Second, even if an appeal is not allowed on that basis, SIAC should allow an appeal if the SSHD's conclusion that the individual is a risk to national security was not reasonably open to her on the facts as SIAC has found them. Whilst that standard is reminiscent of a judicial review standard, it is not a *review* of the decision of the SSHD or an exercise of *supervisory* jurisdiction, because the evaluative benchmark is not limited to the material that

was before the SSHD. It is therefore also an approach that differs fundamentally from a public law, judicial review approach and from an appeal on a point of law.

6. It is submitted that, in this way, the appellate function of SIAC is reconciled with respect for institutional competences; any other approach would become *"indistinguishable from a review under sections 2C to 2E"* (Sir Stephen Irwin, P3 §118); and unless SIAC is recognised as having a meaningful fact-finding role, there would be a grave departure from the basic principle of natural justice.

SUBMISSIONS

7. Section 40(2) of the British Nationality Act 1981 (**"BNA"**) provides that the SSHD "*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"*. Section 2B SIACA stipulates that a person *"may appeal"* to SIAC if an appeal is not available to the First Tier Tribunal. The statute is silent as to the grounds on which a person may *"appeal"* or the nature of the appeal to SIAC.

8. JUSTICE advances seven reasons why the appeal is not limited to challenging the deprivation decision on the basis that it was based on no evidence or was *Wednesbury* unreasonable.

(1) Natural justice requires the scope of *"appeal"* to permit individuals to make a meaningful challenge to the national security case against them

9. In determining the scope of the right of appeal under s.2B the foremost consideration should be the principle of natural justice and, in particular, the right of a person to have their side of the story heard *and taken into account* (*audi alteram partem*).

10. Requirements of procedural fairness "*will readily be implied into a statutory framework even when the legislation is silent and does not expressly require any particular procedure to be followed*": *Citizens UK v SSHD*, [2018] EWCA Civ 1812, [2018] 4 WLR 123, §68; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700, §35.

11. This principle does not always require that a person be given an opportunity to make representations before a decision is taken, but they must be provided with a meaningful opportunity to have their case heard and considered: "*[f]airness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken …* ***or after it is taken, with a view to procuring its modification***": *R v SSHD ex parte Doody* [1994] 1 AC 531, 560F-G (Lord Mustill).

12. In *Al-Jedda v SSHD* (SC/66/2008, 18 July 2014) SIAC (Flaux J, Judge Warr and Sir Stewart Eldon) held that procedural fairness does not require that a person be given an opportunity to make representations to the SSHD before a deprivation decision is taken, even if there are no

national security reasons why the decision has to be taken urgently. The SSHD positively submitted that s.2B SIACA confers *"a full merits right of appeal"*, such that any failure to consult *"would be overtaken by the decision of* [SIAC]*"* (§§155, 159). SIAC accepted this submission, stating that, *"the procedural rights and obligations which the common law has recognised in the case of judicial review such as the obligation to consult before a decision is made arise precisely because judicial review is not a merits right of appeal"* (§159).

13. Therefore, given that natural justice does not require that a person be given an opportunity to make representations to the SSHD before a decision is taken to deprive them of their British citizenship, an *"appeal"* under s.2B SIACA is a person's first and only opportunity to be heard. In order to accord with natural justice, the right of appeal must be interpreted in such a way as to allow a person a meaningful opportunity to challenge the national security case on the basis of which they have been deprived of their citizenship, as SIAC in *Al-Jedda* held that it did. There is no difficulty in interpreting s.2B in a manner that affords natural justice: the reference to an "*appeal*" is open-ended and the principle of natural justice will "*supply the omission of the legislature*": *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 (Byles J).

(2) An appeal from the national security case is not an appeal from a discretionary decision

14. In his judgment in *Begum* (which is considered in detail below), Lord Reed gave particular emphasis to the case law concerning appeals from an exercise of discretion by a public official. It is therefore necessary to consider the nature of an appeal under s.2B in relation to the national security case and in particular whether it concerns an appeal from the exercise of a discretionary decision.

15. Section 40(2) of the BNA has two elements: (i) it confers on the SSHD a discretion, and (ii) the discretion is subject to a condition precedent or pre-condition. The section 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"*. The first part of this clause confers on the SSHD a discretion, as is clear from the use of the word *"may"*. However, the second part of the clause sets out a condition for the exercise of that discretion. Before the Secretary of State can exercise her discretion she must first be satisfied that deprivation would be conducive to the public good. This is not a context in which *"may"* means *"shall"*: the SSHD is entitled not to deprive a person of their citizenship even if she considers that the condition that it would be conducive to the public good to do so is satisfied (and as will be explained below, that is the context in which the question of SIAC's appellate function arose in the *Begum* case).

16. The condition precedent involves a mixed question of fact and evaluation. It requires the Secretary of State to reach findings of fact about an individual's conduct and to make an

assessment of future risk. It is therefore not a purely backward-looking exercise or one solely concerned with finding past facts. Nonetheless, the exercise is equally clearly not a question of discretion. It follows that an appeal from a determination that the condition precedent is satisfied is not itself an appeal from the exercise of a discretion (cf. *Customs and Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1981] AC 22). Rather, it is an appeal from an essentially factual judgement or assessment made by the Secretary of State as a precondition to the exercise of her discretion. This distinction is recognised at §68 of *Begum*, which refers to the second part of s.40(2) as setting out a *"statutory condition"*.

(3) The decision of the Supreme Court in Begum does not determine that an appeal from a determination that deprivation would be conducive to the public good is confined to public law grounds

17. The key points from *Begum* are as follows:

(1) At §46 Lord Reed noted that modern authorities concerning appeals to tribunals from administrative decision-makers "*have adopted varying approaches"*. He referred to *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941, in which the Court of Appeal limited an undefined appellate jurisdiction to public law principles. This was, however, a case in which it was held the Commissioners failed to consider whether to give the appellant an opportunity to adduce evidence before they took their decision. This is quite different from the present context where no such opportunity needs to be given (*Al-Jedda*, above). Lord Reed also referred to *Corbitt*, supra, in which public law principles had been applied to a statutory appeal: this was an appeal from the exercise of a pure discretion, to recognise records as sufficient for tax purposes, again different from the question that arises on this appeal.

(2) At §§51-62 Lord Reed considered the differences between the judgments of Lord Slynn and Lord Hoffmann in *SSHD v Rehman* [2001] UKHL 47, [2003] 1 AC 153, noting that at that time SIAC's jurisdiction under s.4 SIACA in relation to immigration appeals expressly included a power for SIAC to allow an appeal if it considered that a discretion should have been exercised differently. Lord Slynn stated that where specific facts had already occurred, fairness required that they be proved to the civil standard, but that the overall question was whether the SSHD could *"proportionately and reasonably'* form the view that there was a real risk to national security (§53). By contrast, Lord Hoffmann considered that SIAC's role in relation to the facts was limited to determining that there was *"no factual basis"* for the SSHD's

opinion (§57). Lord Reed concluded that given that s.2B has no similar provision to that which was contained in s.4, "*it is Lord Hoffmann's approach which is now the more relevant"*.[1]

(3) At §65, Lord Reed noted that (i) s.2B SIACA "*confers a right of appeal, in distinction to sections 2C to 2E, which provide for "review"*"; (ii) unlike ss.2C-2E, there is nothing in s.2B which limits SIAC to judicial review principles when considering an appeal under that section; and (iii) the rule-making power under s.5(1) contemplates appeals involving questions of fact as well as points of law.

(4) At §§66-67, Lord Reed underlined that, by s.40(2) BNA, Parliament conferred a discretion on the SSHD, not SIAC, but also noted that it was a *"condition"* to the exercise of that discretion that the SSHD was satisfied that deprivation would be conducive to the public good. Lord Reed explained that a right of an appeal from that condition did *"not convert a statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied"*.

(5) In light of this, Lord Reed said at §68 that appellate tribunals are "***in general restricted*** *to considering whether the decision-maker has acted in a way which no reasonable decision-maker could have acted"* (etc) and at §69 that in appeals under s.2B SIACA, *"the principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are* ***largely*** *the same as those applicable in administrative law"* (emphasis added).

(6) At §70, Lord Reed emphasised the need to have regard to the primary role which s.40(2) BNA allocates to the SSHD, and to accord appropriate respect (for reasons of both institutional capacity and democratic accountability) to the SSHD's evaluative judgement on national security issues.

(7) At §71, Lord Reed underlined that SIAC has *"important functions"* to perform on an appeal against a deprivation decision, and that it must "*bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from that decision*".

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[1] The power contained in s.4 SIACA was repealed by the Nationality, Immigration and Asylum Act 2002 (**"NIAA 2002"**). However, in parallel with deleting s.4, NIAA 2002 recast s.2 (which has since been further amended) to provide that a person could appeal to SIAC against a decision if they would have been able to appeal against it under s.82(1) NIAA 2002, and applied the grounds of appeal contained in ss.84 and 86 with necessary amendments. Those grounds included "*the person taking the decision should have exercised differently a discretion conferred by immigration rules*". Thus, the repeal of s.4 by the NIAA 2002 did not make any substantive change to the basis on which an appeal under s.2 SIACA could be allowed and lends no support to any contention that Parliament intended to constrain the grounds on which an appeal under the new s.2B SIACA could be allowed.

18. In analysing the consequences of Lord Reed's judgment, it is important that the Supreme Court in *Begum* was not concerned with an appeal from an assessment by the SSHD that deprivation of Ms Begum's citizenship would be conducive to the public good. The proceedings in *Begum* had not reached the stage of considering the SSHD's determination that deprivation of Ms Begum's citizenship was conducive to the public good on grounds of national security. The appeal to the Supreme Court was (insofar as material) a judicial review of SIAC's determination of a preliminary issue by which it was claimed that, irrespective of the lawfulness of the SSHD's determination that deprivation was conducive to the public good, the exercise of the SSHD's discretion to make a deprivation order contravened the SSHD's policy that she would not do so if it would expose a person to a real risk of inhumane or degrading treatment or death (§§118-131). That policy therefore structured the exercise of the SSHD's discretion under s.40(2) and set out circumstances in which the SSHD would not deprive a person of citizenship *even though he was satisfied it would be conducive to the public good to do so*. Ms Begum's appeal was thus directly and squarely related to a purely discretionary element of the deprivation decision, viz, "*may …deprive*", not the condition precedent *("if the Secretary of State is satisfied that…")*. It is for this reason that Lord Reed characterised the challenge as a challenge to the exercise of discretion and held that in absence of an express power allowing the tribunal to exercise the discretion itself, an appeal could only be challenged on conventional public law grounds (see especially §§121-122).

19. In other words, because the appeal in that case related to the *"may"* element of s.40(2), the Supreme Court concluded that it could only be challenged on public law grounds, applying a public law approach (following *Corbitt*, supra). The Court did not determine the scope of an appeal from the determination of the SSHD that deprivation would be conducive to the public good. Whilst the breadth of that condition coupled with the national security context no doubt requires great deference to judgements of the SSHD, that does not mean that SIAC's approach should be limited to public law grounds in the same way.

(4) An appeal under s.2B is not limited to an appeal on a point of law

20. If SIAC's role in relation to the assessment of facts is limited to public law grounds of challenge then there is no significant difference between SIAC's appellate role and its role in a judicial review. This creates a tension within the terms of SIACA itself given that Parliament has expressly distinguished between SIAC's judicial review jurisdiction (ss.2C-2F) and its appellate jurisdiction. The manner in which SIAC has sought to square this circle in this case is to (i) point to the fact that SIAC can cast a wider factual net and consider more evidence in exercising its appellate jurisdiction than its judicial review jurisdiction; and (ii) say that the evidence can be examined through a "*more powerful microscope"*. However, SIAC held that in light of *Begum*, the

legal *grounds* on which it will find a decision under challenge to be vitiated are the same as in judicial review (e.g. §31).

21. The various more detailed proposals made by SIAC as to how the standard public law grounds might flex in the context of the wider factual picture that can be considered in an appeal are addressed at §§34-45 below. The most fundamental point however in answer to this attempt to reconcile SIAC's appellate and judicial review jurisdictions is that it runs afoul of a further distinction: that between appeals which are limited to questions of law and those that are not. Even if SIAC is able to consider a wider variety of evidence in an appeal under s.2B, if it is limited to allowing an appeal only where there is no evidence or the factual premise of the decision is irrational, this effectively limits the appeal to an appeal on a point of law. This is because the grounds of judicial review are essentially indistinguishable from an appeal on questions of law. In *E v SSHD* this Court addressed that question and, after considering the history of the development of judicial review, concluded that, "*it has become a generally safe working rule that the substantive grounds for intervention are identical*" (§42).

22. Whatever the scope of an appeal under s.2B of SIACA, it is not an appeal limited to a question of law. If there was any doubt about that, it is dispelled by the fact that SIACA expressly limits appeals to this Court from SIAC to *"any question of law"* (s.7(1)). In the absence of any such limitation under s.2B, an appeal under that section is not so limited. An appeal to SIAC from a deprivation decision must therefore be capable of challenging *the facts* taken into account by the SSHD beyond what is permissible in a judicial review. The appeal is one of both fact and law.

(5) Hansard statements

23. That an appeal is not limited to error of law grounds, including *Wednesbury* review, is also apparent from statements made by Lord Filkin, Minister of State, on behalf of the then Government during the passage of NIAA 2002, which introduced the right of appeal (emphasis added):

> "*After careful consideration the Government have decided that they are justified in conceding a full right of appeal against deprivation of citizenship because the burden of that is so much more painful than the non-award of citizenship."* (HL Deb vol 637, col 471, 8 July 2002).
>
> *"The person against whom it was proposed to make* [a deprivation of citizenship] *order would be free on appeal to raise any issue bearing* ***on the legality or merits of the decision****"* (HL Deb vol 637, vol 504, 8 July 2002).[2]
>
> *"I have explained the Government's view of the fact that it is the exclusive province of the Secretary of State to make the first decision that deprivation is justified. However,* ***the question on appeal for, for example, obtaining citizenship by fraud, would be whether the citizenship was obtained by fraud***

[2] Lord Filkin referred to *Rehman* immediately before this passage.

***rather than whether the Secretary of State was satisfied that it was**. In that respect, we come to the same point."* (HL Deb vol 637, col 506, 8 July 2002).

24. Lord Filkin also stated:

> *"The noble Earl, Lord Russell, suggested that the only appeal is a judicial review. We do not believe that that is the case. The appeal against deprivation is a full appeal on the merits. We believe that perhaps the JCHR does not have that clearly in sight or perhaps we have not been as clear as we could have done. The appellate body will be able not only to remove [sic] the legality of the Secretary of State's decision, but also to hear arguments at his discretion on whether or not the right to deprive should have been exercised differently. The Bill proposes no restrictions on the issues which might be raised in any appeal either to an adjudicator or, where that body has jurisdiction, to the Special Immigration Appeals Commission."* (HL Deb 637, col 508, 8 July 2002).

25. In addition, Lord Filkin stated explicitly stated that an appeal is not limited to *Wednesbury* review:

> *"The **fundamental point is** that **the appeal is not limited to judicial review, nor is it limited to the Wednesbury test; it is broader. The statutory appeal is a full appeal on the merits as well as on the law** […] The appeals provided for in Clause 4 are full appeals, as I have signalled, where the appellate body could review both the legality and the merits of the decision."* (HL Deb vol 637, cols 532-533, 8 July 2002).

26. These statements are admissible aids to the interpretation of s.2B SIACA because (i) the legislation is ambiguous as to the nature of the right of appeal that is conferred; (ii) the statements were made by the responsible Minister; and (iii) the statements are clear: indeed, Lord Filkin expressly states that he is clarifying the position for the JCHR and Parliament. See *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, 640C; *R v Secretary of State for Transport, the Environment and the Regions, ex parte Spath Holme Ltd* [2001] 2 AC 349, 391-392 (Lord Bingham).

27. The second of the extracts quoted above was cited by Lane J in *Deliallisi v SSHD* [2013] UKUT 439 (IAC), §34. In *Begum*, Lord Reed referred to §34 of *Deliallisi* and stated that Lane J had used the statement in a manner disproved in *Wilson v First Country Trust Ltd (No 2)* [2004] 1 AC 816 at §§56-60 (Lord Nicholls). This appears to have been a reference to Lord Nicholls' statement that Ministerial statements, however explicit, "*cannot control the meaning of an Act of Parliament*". However, *Wilson* did not overrule *Pepper v Hart*, which approved the use of such statements as a means of identifying the meaning and effect of ambiguous provisions in legislation (see also *Spath Holme* at p.399 (Lord Nicholls)). Lord Reed did not state that s.2 was not ambiguous, and in any event *P3* and the present case have revealed that there is ambiguity at least as to SIAC's role in relation to the condition precedent under s.40(2) (which, as explained above, was not in issue in *Begum*).

28. It is submitted that in relation to the issues arising on this appeal, the statements of Lord Filkin are admissible aids to construing s.2B SIACA. In particular, the reference to SIAC's review being broader than *Wednesbury* review, which was not a passage quoted in *Deliallisi,* speaks directly to the nature of SIAC's appellate role in relation to questions of fact.

(6) Historical statutory context

29. Like all statutory provisions, s.2B "*should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment*": R *(Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, §8. The historical context reinforces the argument that Parliament intended SIAC's role to allow individuals a meaningful ability to challenge the national security case against them on the facts.

30. Section 40 BNA, as originally enacted and in force until the insertion of s.2B into SIACA: (i) required the SSHD to give prior written notice to a person whom the SSHD proposed to deprive of their citizenship; and (ii) conferred on such a person a right to have the proposed deprivation referred to a committee of inquiry before any decision was taken. The committee of inquiry was chaired by "*a person possessing judicial experience*" (s.40(7), (8)). The committee's procedure was regulated by the British Citizenship (Deprivation) Rules 1982. Rule 4 provided that the committee "*shall give to each party at the inquiry an opportunity to address the committee, to give evidence, to call witnesses and to make representations on the evidence (if any) and on the subject matter of the inquiry generally"*, and that the committee could "*receive oral, documentary or other evidence of any fact which appears to the committee to be relevant to the inquiry, notwithstanding that such evidence would be inadmissible in a court of law"*.

31. Prior to the enactment of BNA, analogous provision for committees of inquiry in respect of proposed deprivation decisions had been made by s.20 of the British Nationality Act 1948 (and, before that, s.7 of the Status of Aliens Act 1914, as amended).

32. The practical operation of committees of inquiry is examined in Weil & Handler, 'Revocation of Citizenship and the Rule of Law: How Judicial Review Defeated Britain's First Denaturalization Regime', (2018) 36 *Law and History Review* 295, who show that, (i) committees of inquiry took a robust approach to scrutinising proposals for deprivation of citizenship and reached conclusions of fact; and (ii) the SSHD generally would not deprive a person of citizenship without the endorsement of a committee of inquiry, notwithstanding that the committee's conclusions were not binding on the SSHD.

33. Any decision by the SSHD to deprive an individual of citizenship, whether with the endorsement of a committee of inquiry or otherwise, would have been amenable to judicial review.[3] Thus, prior to 1 April 2003, a person who was proposed to be the subject of a deprivation decision was entitled (i) to have their case examined by a quasi-judicial body, with wide powers to receive evidence and examine issues of fact, before any deprivation decision was made; and also (ii) to

[3] Although the deprivation power was not in fact used between 1973 and 2000: Weil & Handler, 296.

challenge any deprivation decision by way of judicial review. There is nothing in the statutory context to suggest that Parliament in 2002 intended to reduce the protections available to individuals from deprivation of their citizenship. On the contrary, SIAC's unique jurisdiction and procedures were created following *Chahal v UK* (1997) 23 EHRR 413 to *enhance* the protections for individuals.

(7) SIAC's identification of ways that the evidence of an affected person could be relevant to its appellate jurisdiction do not provide any meaningful ability to challenge the national security case

34. In the judgment under appeal, SIAC correctly recognised that if a pure public law approach is adopted, the consequence would be *"extreme"* as nothing that the individual could say could be taken into account by SIAC since it was not before the SSHD when the decision was taken (§§34-35). SIAC's efforts to explain how such evidence could be relevant to public law grounds of challenge (§§36-40) are, with respect, not convincing and demonstrate that SIAC cannot be confined to a public law straitjacket of grounds of review.

35. First, SIAC stated that the evidence of an affected individual might identify something that the SSHD ought to have considered, which could be the basis for finding the decision unlawful on the grounds that the SSHD (i) failed to take into account a relevant consideration, (ii) failed to make sufficient inquiries (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014), or (iii) made an error of established fact (*E v SSHD*).

36. Secondly, SIAC stated that an individual's evidence on a deprivation appeal can be relevant because SIAC can consider *"updated"* national security assessments on a *"rolling"* basis (§38).

37. Thirdly, SIAC stated that an individual's evidence would be relevant to a subsequent further decision, such as refusing entry clearance (§39).

38. Each of these bases on which SIAC considered that the evidence of a person deprived of their citizenship could be taken into account is considered in turn. It is submitted that none of them provide a basis for any significant or meaningful relevance or weight to be attributed to the evidence of an affected person on an appeal against deprivation of citizenship.

(i) The doctrine of relevant considerations

39. The Supreme Court has recently confirmed that, unless a statute expressly or impliedly identifies specific considerations as ones that must be taken into account, which is not the case in this

context,[4] there are limited circumstances in which not taking evidence or information into account would vitiate a decision:

(1) Considerations that the decision-maker has not considered at all need to be considered only if they are *"so obviously material"* to the decision that they must be taken into account. In deciding whether a consideration is obviously material, *"the test is … the familiar Wednesbury irrationality test"* (R (Friends of the Earth Ltd) v Heathrow Airport Ltd [2020] UKSC 52, [2021] PTSR 190, §§119-120).

(2) In relation to considerations to which the decision-maker has turned his or her mind but dismissed as irrelevant to their decision, the question is whether *"the decision-maker acts rationally in doing so"* (Friends of the Earth, §121)

40. The second of these sub-categories is unlikely to have relevance to the evidence provided by an individual in the course of a s.2B appeal. It is possible that an individual's evidence might be relevant to the first sub-category. However, given that there is no requirement on the SSHD to notify the affected person in advance and elicit their response to the national security case, it is difficult to see how material which is unknown to the SSHD and could only be elicited by obtaining the representations of the affected individual could be regarded as *"obviously material"*. In other words, if natural justice does not require the SSHD to canvass the views of an affected person before taking a decision to deprive them of British citizenship, it would be inconsistent if such representations had to be canvassed under the doctrine of relevant considerations.

41. Furthermore, as the Supreme Court held, the issue is tested by reference to the familiar Wednesbury irrationality test. Therefore, in reality this ground of review, in this particular context, dissolves into the irrationality test and does not provide any separate or meaningful platform for the evidence of an affected individual to be considered.

(ii) The doctrine of sufficient inquiry

42. The second potential way that the evidence of an affected individual could be relevant that was identified by SIAC is the Tameside duty on public officials to make sufficient inquiry. However, again, the fact that the SSHD is not required to give prior notice to an individual before taking the decision to deprive them of their citizenship militates against a failure to consult the individual giving rise to any breach of this duty. Moreover, the incorporation into this duty of a Wednesbury standard denudes this possible basis for public law challenge of any meaningful scope of application. In the leading authority on this principle, the Court of Appeal held that:

[4] Other than perhaps in relation to the most general of considerations.

"the court … should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries, they had made were sufficient." (R (Balajigari) v SSHD [2019] EWCA Civ 673, [2019] 1 WLR 4647, §70, drawing on R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (Admin); [2015] 3 All ER 261, §§99-100).

(iii) The doctrine of error of fact giving rise to unfairness

43. The doctrine of error of established fact likewise does not provide any meaningful ability for affected persons to challenge the national security case. That doctrine is limited to circumstances in which: (i) there has been a mistake as to an existing fact or the availability of evidence on a particular matter; (ii) the fact or evidence is uncontentious and objectively verifiable; (iii) the appellant is not responsible for the mistake; and (iv) the fact played a material part in the reasoning (*E v SSHD*, §66).

44. Given these conditions, in particular the need for facts or evidence to be established and objectively verifiable, the scope of this doctrine in a SIAC appeal is severely limited. The jurisdictional premise for this ground of appeal/judicial review is that there is *"unfairness"* in evidence or a fact, which exists at the time of the decision (or before a tribunal becomes *functus officio*), not being taken into account (*E v SSHD*, §§63, 66). It is difficult to see how that jurisdictional premise can justify the taking into account of evidence of an affected person in circumstances where it has been held *not to be unfair* for the SSHD to take the deprivation decision without giving the affected person an opportunity to make representations (*Al-Jedda*, as cited above).

45. In short, each of the doctrines identified by SIAC (i.e. relevant considerations, sufficient inquiry and error of fact) are doctrines that are intrinsically related to contexts in which the primary decision must give affected persons opportunities to provide evidence and representations before a decision is taken; they are unsuited and of limited application in a context where representations and evidence are adduced after a decision has been taken. Moreover, closer factual scrutiny by SIAC ("*more powerful microscope*") does not alter the nature and conditions of these doctrines; it is reminiscent of *"anxious scrutiny"* judicial review.

(iv) Updated national security assessments and rolling review

46. SIAC's further suggestion was that the evidence of an individual would be relevant because it would generate updated national security assessments. This however suffers from two difficulties:

    (1) First, as a matter of principle, the position as it is generally understood is the opposite of that described by the Judge, in that it is the procedural flexibility of judicial review that

allows it to be *"expanded by amendment to include review of subsequent decisions"* but this is not permissible in the context of statutory appeals (*E v SSHD* §§43, 91).

(2) Second, it does not address the problem because as SIAC recognised, the question is still whether the assessment is *"flawed in the public law sense"*, i.e. on grounds that a relevant consideration has not been considered or it is irrational. Therefore, the rolling procedure does not provide any additional basis on which an individual is able to challenge the deprivation decision. On the contrary, the only effect of a rolling approach is that it enables the SSHD to reinforce her evidence and make it more difficult for an individual to prevail on public law grounds. A rolling approach enables the SSHD to address any new facts presented and maintain that they do not affect her assessment, making it extremely challenging to show that the decision was irrational, and almost impossible to show that it was made in ignorance of an obviously material consideration. As such, a rolling approach does not in fact address the *"extreme"* implications for an individual being unable to affectively challenge the deprivation decision by leading evidence contrary to the national security case. Rather, it compounds it.

(v) Relevance to another decision

47. The fact that the evidence of an affected individual might be considered by the SSHD in the context of a different and subsequent decision which may also have an appeal to SIAC, and which might be considered at the same time as the deprivation appeal, does not address the issue of principle, which is how such evidence should be addressed in the appeal from a decision to deprive them of their citizenship.

48. On the contrary, the lack of principle in SIAC's approach is underlined by the possibility that SIAC might decide (i) on such an appeal from a subsequent decision, such as denying entry clearance, that there was no proper basis for the SSHD's decision, based on evidence provided to the SSHD, but (ii) that the deprivation decision itself was not unlawful as the SSHD had not been appraised of that critical material when that decision had been taken (as the individual had had no opportunity to advance it before the decision nor was it of any meaningful relevance on appeal). It is unlikely that Parliament can have intended such a consequence.

(vi) Conclusion on possible relevance of an individual's evidence

49. Therefore, whilst SIAC was right in stating that under a public law approach SIAC is *"not debarred"* from considering the evidence of an affected individual on a deprivation appeal, the public law straitjacket is inescapable, despite SIAC's efforts to articulate ways in which such evidence would be relevant. None of the options suggested by SIAC provides a truly meaningful opportunity for an individual to challenge the national security case against them.

CONCLUSION

50. It is submitted that in the light of the seven factors considered above, the issue identified at §17 of SIAC's open judgment regarding the observations in *P3* at §115 (Elisabeth Laing LJ) and §120 and §124 (Sir Stephen Irwin) is to be answered by recognising that SIAC's approach to an appeal from a national security assessment is not limited to a *Wednesbury* approach:

(1) Consistently with *Begum*, an appeal from a deprivation decision is not a full *de novo* determination, or a merits appeal in that sense, and SIAC is not permitted to substitute its view of whether a deprivation would be conducive to the public good for reasons of national security.

(2) Nonetheless, the appeal is not limited to questions of law (i.e. public law grounds). The appropriate approach is not to seek to flex public law grounds, or apply them with greater intensity, but to recognise that an individual can appeal on the basis that the decision is premised on a material error of fact. This is not restricted to *"mistake[s] of fact giving rise to unfairness"* in the limited sense referred to in *E v SSHD*. SIAC can consider new evidence presented by an affected individual and reach findings as to whether those facts are established. This respects the statutory framework and context and ensures that natural justice is respected.

(3) In considering an appeal on grounds of error of fact, SIAC must give due weight to the assessments of fact made by the security services where these are matters within their expertise, but an appeal should be allowed where, having done so, SIAC concludes that (a) the deprivation decision is materially premised on an error of fact; or (b) the SSHD's conclusion that the person is a risk to national security was not reasonably open to the SSHD on the facts as SIAC has found them.

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