Case No: UKSC 2023/0145

IN THE SUPREME COURT

B E T W E E N:

U3

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

JUSTICE

Proposed Intervener

JUSTICE'S DRAFT WRITTEN SUBMISSIONS

References in the form CA § are to paragraph * of the Court of Appeal's judgment*

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SUMMARY

1. JUSTICE is a law reform and human rights charity and the UK section of the International Commission of Jurists. JUSTICE has substantial expertise in cases concerning issues of fair process in a national security context, having intervened in many cases involving closed material procedure.[1] It intervened before the Court of Appeal in these proceedings orally and in writing. JUSTICE also made Rule 15 submissions in support of U3's application for permission to appeal to this Court. For the reasons set out below, JUSTICE submits that the appeal itself should be allowed.

2. Permission to appeal has been granted on the ground that the Court of Appeal "*erred in law in treating SIAC's fact finding function as relevant only to the application of public law grounds to the decision making of the Secretary of State*". JUSTICE makes four core submissions in support of that ground:

    2.1. The Court of Appeal held that SIAC can allow an appeal if it found, on balance of probabilities, a "*pivotal*" fact against the Secretary of State, such as mistaken identity. However in respect of other, "*non-pivotal*", facts, SIAC can only allow an appeal if there is no rational basis on which the Secretary of State could have reached the determination of the facts that they did (CA §§174-175). This distinction is unprincipled. It is also illogical given that, on all factual questions, SIAC considers substantial volumes of factual and expert evidence that were not before the decision-maker and tests such evidence in a manner the decision-maker is not able to do.

    2.2. The Court of Appeal's approach is inconsistent with the approach articulated by Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, which this Court in *R (Begum) v SIAC* [2021] UKSC 7, [2021] AC 765 (**"*Begum*"**) held to be the most relevant articulation of SIAC's role.

[1] E.g. *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140, [2007] QB 415 and [2007] UKHL 46, [2008] 1 AC 440; *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269; *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12, [2010] 2 AC 1; *Al Rawi v Security Service* [2010] EWCA Civ 482, [2010] 3 WLR 1069 and [2011] UKSC 34, [2012] 1 AC 531.

2.3. The Court of Appeal's approach fails properly to respect the role of the Secretary of State as the primary decision-maker because it requires SIAC to second-guess the decision that would have been made by the Secretary of State on the basis of the facts that SIAC has found them to be, although the Secretary of State has not considered those facts. The separation of powers is properly respected by allowing an appeal if an error of fact has been made, thus enabling the Secretary of State to take a further decision on the facts found by SIAC if he or she considers it appropriate to do so.

2.4. The Court of Appeal's approach produces serious unfairness when considered in the light of *Al-Jedda v SSHD* (SC/66/2008, 18 July 2014) ("***Al-Jedda***"). It leads to the outcome that (i) an individual need not be given an opportunity to make representations to the Secretary of State before a decision is taken to deprive them of their British citizenship; and (ii) the individual is also not afforded a proper opportunity to make factual representations after the decision has been made, since SIAC is very limited in the use that it may make of any evidence that the individual subsequently adduces. This would represent a major derogation from the requirements of natural justice, and there is no proper basis in the statutory scheme from which to infer that Parliament intended such a derogation.

LEGAL FRAMEWORK

The deprivation power and right of appeal

3. Section 40(2) of the British Nationality Act 1981 ("**BNA 1981**") 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*".

4. An appeal against such a decision ordinarily lies to the First-tier Tribunal under s.40A(1) BNA 1981. However, that right of appeal does 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"* on certain specified grounds, one of which is *"in the interests of national security"*: s.40A(2) BNA 1981.

5. Where the Secretary of State issues such a certificate, there is a right of appeal to SIAC under s.2B of the Special Immigration Appeals Commission Act 1997 (**"SIACA 1997"**), which provides:

> "*A person may appeal to the Special Immigration Appeals Commission against a decision to make an order under section 40 of the British Nationality Act 1981… if he is not entitled to appeal under section 40A(1) of that Act because of a certificate under section 40A(2) (and section 40A(3)(a) shall have effect in relation to appeals under this section)*".

6. The right of appeal to SIAC is in turn governed by the detailed procedures set out in the Special Immigration Appeals Commission (Procedure) Rules 2003 ("**the SIAC Rules**"), which came into force on the same date as s.2B was inserted into SIACA 1997 (i.e. 1 April 2003). The SIAC Rules were made by the Lord Chancellor in exercise of the powers conferred by ss.5 and 8 of SIACA 1997 and received Parliamentary approval by way of positive resolution of each House of Parliament. The SIAC Rules include extensive provision for the Commission to hear live evidence (including factual and expert evidence) in both OPEN and CLOSED proceedings for the purposes of determining an appeal against a deprivation decision (see e.g. Rules 10 and 10A), which evidence will necessarily post-date the decision under appeal.

The Court of Appeal's judgment

7. The Court of Appeal rightly described the procedures regulating citizenship deprivation on national security grounds as "*inherently unfair*" (CA §171). Unfairness arises because an individual who is deprived of their citizenship on such grounds: (i) will usually not have received any prior notice of the decision, such that they could seek to influence it by submitting representations and/or evidence; and (ii) will need to pursue any appeal under s.2B without access to much of the material on which the decision was based.

8. The Court noted that, in order to mitigate such unfairness, an appeal under s.2B should provide a forum for deprivation decisions to be examined "*as meticulously as is possible […] within the constraints established by the authorities*" (CA §171). This appeal concerns the nature and scope of those constraints and, in particular, the degree to which they may limit SIAC's use of such factual findings as it makes.

9. JUSTICE submits that the Court of Appeal's reasoning was correct in the following essential respects:

9.1. An appeal under s.2B is *"not an application for judicial review"* (CA §169).

9.2. SIAC has *"power to decide questions of fact and of law"*, subject to such constraints as the authorities impose (CA §170).

9.3. There is no restriction on the evidence which SIAC may consider on an appeal under s.2B (CA §172).

9.4. Nor is there anything which prevents SIAC from *"making findings of fact on the balance of probabilities"* (CA §173).

9.5. SIAC may, at least in certain circumstances, allow an appeal under s.2B on the basis that the Secretary of State has made an error of fact (CA §174). The Court of Appeal gave the following example: *"if there were evidence, which SIAC accepted, which showed […] that on the balance of probabilities, U3 had never been to Syria, and that the Secretary of State had mistaken someone else for her, SIAC's duty would be to make that finding and to allow the appeal"* (CA §174).

9.6. The matters on which SIAC may make findings of fact include the fact that a person had a particular motivation (CA §175).

9.7. The description of SIAC's functions on an appeal under s.2B in Begum at §71 is not a binding or exhaustive account (CA §166).

10. However, JUSTICE submits that the Court of Appeal erred in its approach to other aspects of appeals based on error of fact.

11. The Court of Appeal drew a distinction between (i) "*pivotal*" findings of fact concerning such matters as a person's location at a particular point in time, and (ii) findings of other, non-pivotal, facts, such as a person's motivation or state of mind. The Court of Appeal held that, generally, it is only errors of fact of the former kind—pivotal findings of fact—in respect of which SIAC is entitled to allow an appeal. Where SIAC concludes that a deprivation decision is premised on an error as to a non-pivotal fact, this does not (so the Court of Appeal held) provide a basis on which to allow the appeal, unless there was no material on which the Secretary of State could rationally take the (*ex hypothesi* erroneous) view of the facts that he or she did. The relevant conclusion is expressed as follows in the last sentence of CA §175:

"Since a finding about motivation necessarily involves an assessment based on inferences from primary facts, SIAC must bear in mind that its finding about motivation cannot displace a contrary assessment by the Secretary of State, as long as there is material which would rationally support such a contrary assessment."

12. Thus, on the Court of Appeal's approach: (i) SIAC could allow an appeal on the basis that the Secretary of State had made an error as to whether, on the balance of probabilities, a person had been to a particular place (see §9.5 above); but (ii) SIAC could not allow an appeal simply because it concluded on balance of probabilities that a person had an innocent reason for having gone to that place. It could only allow an appeal in respect of a person's motivation or intention if there was no *"material"* capable of rationally supporting the Secretary of State's assessment. As the Court of Appeal put it at CA §186, once SIAC has found facts to be different from what they were thought to be by the Secretary of State, *"[o]n the authorities, the question [SIAC] had to ask"* was *"whether there was material which rationally supported the Secretary of State's assessment to the contrary."*

SUBMISSIONS

(1) The Court of Appeal's approach to the scope of SIAC's powers is unprincipled and illogical

13. Since *Begum*, there has been uncertainty about how to reconcile the *"public law"* approach articulated in that case with the fact that s.2B confers a right to an unrestricted *"appeal"* from a deprivation decision. The uncertainty arises in part because the issue in *Begum* was fundamentally different from the issue in this case:

    13.1. Section 40(2) BNA 1981 confers on the Secretary of State a discretion but it is one premised on the satisfaction of a statutory precondition: 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***" (emphasis added). The word *"may"* confers a discretion, while the words *"is satisfied that …"* involve a precondition to the exercise of the discretion (Lord Reed in *Begum* described it as a *"statutory condition"* to the exercise of the discretion (§67)).

    13.2. The appeal in *Begum* concerned only the discretion — the *"may"* element — and, specifically, whether the Secretary of State was precluded by his human rights policy from depriving the appellant of her citizenship notwithstanding that he considered it conducive to the public good to do so, i.e. that the

precondition had been met. The issue in Begum was thus the scope of an appeal to SIAC on the manner in which a policy constrains a discretionary decision. This public law question was taken as a preliminary issue.

13.3. Begum was not concerned with the scope of an appeal to SIAC on the national security case — the "*statutory condition*" element — which SIAC had not at that time considered. Whilst Lord Reed did make wider comments on the scope of the s.2B appeal (at Begum, §71), SIAC's jurisdiction was not articulated comprehensively or exhaustively. SIAC's role in making findings of fact in relation to the statutory precondition under s.40(2) was not in issue.

14. In this case, the Court of Appeal has (rightly) held that SIAC is not limited to a Wednesbury approach in considering questions of fact, noting the unrestricted nature of an appeal under s.2B (at CA §170). As Lord Kerr stated in GMC v Michalak [2017] UKSC 71, [2017] 1 WLR 4193 at §20 (with which Baroness Hale and Lords Mance, Wilson and Hughes agreed): "*In its conventional connotation, an "appeal" (if it is not qualified by any words of restriction) is a procedure which entails a review of an original decision in all its aspects. Thus, an appeal body or court may examine the basis on which the original decision was made, assess the merits of the conclusions of the body or court from which the appeal was taken and, if it disagrees with those conclusions, substitute its own*". Section 2B SIACA 1997 is not qualified by words of restriction. This can be contrasted not only with ss.2C-2F SIACA 1997, which confer a jurisdiction on SIAC to review decisions of the Secretary of State, but also s.7(1) which limits appeals from SIAC to any "*question of law*". There is no such limitation on an appeal to SIAC under s.2B.

15. In light of this, the Court of Appeal's approach to the scope of SIAC's jurisdiction in respect of the statutory precondition in s.40(2) BNA 1981 — satisfaction that deprivation is conducive to the public good — is unprincipled and illogical.

16. First, as noted above, the Court of Appeal held that SIAC can allow an appeal for error of fact, but drew a distinction based on whether or not a finding of fact is "*pivotal*". Laing LJ accepted that SIAC should allow an appeal if a pivotal finding of fact contradicts the facts on which the Secretary of State's decision is premised, even if the finding is based on evidence that was not before the Secretary of State and which the Secretary of State had no obligation to obtain. However, on the Court of Appeal's approach, other findings of fact are in practice irrelevant unless there is no "*material*" which would rationally support

the Secretary of State's assessment (CA §175). The same approach appears to have been subsequently adopted by the Court of Appeal in Begum v SSHD [2024] EWCA Civ 152, [2024] HRLR 5 ("***Begum (CA)***"), at §§97-99.

17. The proposed distinction between *"pivotal"* and non-pivotal facts is however unprincipled. Laing LJ implied that non-pivotal facts are those facts which are established by inference, such as a person's motivation (see the last sentence of CA §175). However, as Laing LJ acknowledged, the case against a person who has been deprived of their citizenship *"will often turn on questions of motivation"* (CA §175). It is very hard to see how a factual issue on which a case turns is not *"pivotal"*. Moreover, a finding that a person did not go to a particular place (i.e. Laing LJ's paradigm example of a *"pivotal"* fact) may be just as much based on inference as a finding about their state of mind: the fact that a person did not travel to location X may have to be inferred from a range of incomplete evidentiary sources and the Secretary of State may continue to maintain that, properly analysed, the sources prove the person did travel to location X. There is thus nothing distinctively inferential about facts concerning a person's state of mind, and no principled basis for treating factual findings about a person's state of mind differently from other factual findings. As Bowen LJ memorably observed, *"the state of a man's mind is as much a fact as the state of his digestion"*: Edgington v Fitzmaurice (1885) 29 Ch D 459, 483.

18. Secondly, it is unclear what facts beyond questions about *mens rea* are non-pivotal and how this distinction is to be drawn. Is the fact that a person did not engage in military training in location X, when alleged to have done so, a *"pivotal"* factual question, for example?

19. The more principled distinction is that between a finding as to the occurrence of past facts and an assessment as to future risk. The former is a conventional issue of pure fact, whilst the latter is necessarily a question of opinion. The distinction was noted by Lord Carnwath in R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs [2016] UKSC 3, [2016] AC 1457 at §50: *"The position of a decision-maker trying to assess risk in advance is very different from that of a decision-maker trying to determine whether someone has actually done something wrong"*.

20. The third respect in which the Court of Appeal's approach is unprincipled and illogical is its attempt to reconcile SIAC's evidential procedures with the public law principles to

which it is (on the Court of Appeal's approach) confined in relation to the Secretary of State's national security assessment:

20.1. There should be a principled relationship between the grounds on which a claim or appeal may be allowed and the evidence which may be adduced in support of it. That a claimant in judicial review proceedings can only rely on the material which was before the decision-maker at the time of the impugned decision (subject to certain narrow exceptions) is logical and principled because it reflects the fact that the court is exercising a supervisory jurisdiction. Its focus is on the process by which the decision under challenge was reached and the decision-maker is required to have had regard to all relevant considerations and to have afforded the affected person an opportunity to make representations. It is for this reason that, for example, an unlawful decision cannot be rescued by *ex post facto* reasons which were not relied upon at the time of the decision: see e.g. *Inclusion Housing Community Interest Company v Regulator of Social Housing* [2020] EWHC 346 (Admin) at §78. That stands in contrast with an appellate jurisdiction in which the court may be concerned with the underlying merits of the impugned decision, as opposed to its legality, and the much more varied types of appeal that exist (e.g. *de novo* appeals, appeals on questions of fact or restricted to questions of law, etc). Just as in the case of judicial review, there must be a principled correspondence between the grounds on which a person can appeal and the procedures before the appellate court or tribunal.

20.2. On the Court of Appeal's approach, however, there is no such principled correspondence. Under its rules, SIAC is able to examine the facts in much more detail than the Secretary of State, consider evidence that was not before the Secretary of State, and hear witnesses on both sides cross-examined, including in respect of closed evidence in closed sessions. Yet on the Court of Appeal's approach, there is no purpose in these extensive fact-finding capabilities other than in the rare case where a "*pivotal*" fact (if such a "*pivotal*" fact can be distinguished from "*non-pivotal*" facts) is in dispute. It is not sufficient to say, as Chamberlain J did at first instance, that SIAC has the benefit of a "*more powerful microscope*" than the Administrative Court (§§32-33), if there is no purpose in using it. The doctrine of material error of fact in public law is

narrow and will not be engaged simply because a person can show that a decision-maker got the facts wrong: it must be shown that this amounted to an error of law.[2] Nor could evidence not before the Secretary of State establish the *Wednesbury* unreasonableness of a decision to deprive an appellant of their citizenship, since such evidence would (*ex hypothesi*) not have formed part of the Secretary of State's decision-making process.

20.3. If SIAC's ability to make use of factual findings were as limited as the Court of Appeal suggests, it would be anomalous that SIAC's procedures were designed in such a way as to make fact-finding central to its process in considering appeals. The necessary implication would be that Parliament approved an institutional and procedural framework for SIAC appeals the central provisions of which are largely otiose.

(2) The Court of Appeal's approach is inconsistent with *Rehman*

21. In *Rehman*, the Appellate Committee of the House of Lords considered the approach that SIAC should take on an appeal concerning whether a person's deportation was in the interests of national security. Lord Reed in *Begum* held that Lord Hoffmann's speech is the most relevant of the speeches in that case to SIAC's functions in this context (*Begum*, §59). Lord Hoffmann's speech does not however support the distinction drawn by the Court of Appeal in this case between pivotal facts and other facts. On the contrary, the distinction drawn by Lord Hoffmann was entirely different: His Lordship drew a distinction between (i) matters of policy as to what the Government considers to be contrary to the interests of UK national security, on which a court must defer to the executive on constitutional grounds; and (ii) all other factual matters, such as whether or not an individual has engaged in such conduct and their motivation in doing so, in relation to which SIAC is subject only to ordinary principles of restraint arising from inherent limitations on the appellate function. Within this second category, Lord Hoffmann also noted that if SIAC is assessing an evaluation of future risk — such as whether a person would engage in conduct in the future — then this might call for "*a considerable margin*" of deference, akin to a *Wednesbury* review, particularly where the evaluation is based on specialist advice and

[2] *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14; *E v SSHD* [2004] EWCA Civ 49, [2004] QB 1044. See also SIAC's observations in *B4 v SSHD* (SC/159/2018, 1 November 2022) to the effect that the public law doctrine of material error of fact "*would be unlikely to be applicable to any SIAC appeal*" (at §77).

expertise (*Rehman* at §57-§58). However, as Lord Hoffmann noted at §57, "*[s]uch restraint may not be necessary in relation to every issue which the Commission has to decide*".

22. Lord Hoffmann stated that the "*decision as to whether support for a particular movement in a foreign country would be prejudicial to national security*" is a question of policy which the courts can only review on *Wednesbury* grounds (§53, read with the second point in §54). On the facts of this appeal, that equates to the question of whether it is contrary to the interests of UK national security for a person to align with ISIL, and it has never been disputed in this case that the Secretary of State was entitled to answer that question in the affirmative.

23. The question of whether a person has in fact aligned with ISIL is a question of past fact of precisely the sort that Lord Hoffmann considered had to be established with evidence before SIAC, and which SIAC would address by way of appeal subject only to limitations in the appellate function, not limitations arising from the separation of powers. This reflects the fact that Parliament has chosen to confer an appeal on such issues to SIAC. In the key passage at §54, after referring to the need for SIAC to defer to the executive on the policy question, Lord Hoffmann stated:

> *"This does not mean that the whole decision on whether deportation would be in the interests of national security is surrendered to the Home Secretary, so as to "defeat the purpose for which the Commission was set up": see the Commission's decision. It is important neither to blur nor to exaggerate the area of responsibility entrusted to the executive. The precise boundaries were analysed by Lord Scarman, by reference to Chandler v Director of Public Prosecutions [1964] AC 763 in his speech in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, 406. His analysis shows that the Commission serves at least three important functions which were shown to be necessary by the decision in Chahal. First, the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. It is therefore open to the Commission to say that there was no factual basis for the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir. In this respect the Commission's ability to differ from the Home Secretary's evaluation may be limited, as I shall explain, by considerations inherent in an appellate process but not by the principle of the separation of powers. The effect of the latter principle is only, subject to the next point, to prevent the Commission from saying that although the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir had a proper factual basis, it does not accept that this was contrary to the interests of national security."*

24. Several important points are to be drawn from this passage:

    24.1. Lord Hoffmann distinguished between two issues, namely: (i) whether Mr Rehman had been actively supporting terrorism in Kashmir, and (ii) whether

actively supporting terrorism in Kashmir was contrary to the interests of national security. SIAC's consideration of the former is, he held, only constrained by limitations inherent in the appellate process, not by the separation of powers. That issue equates, in this appeal, to whether the appellant aligned with ISIL. Separation of powers considerations apply to the second issue: in the present context, whether aligning with ISIL is contrary to national security.

24.2. Lord Hoffmann distinguished between finding that there is no factual basis for a decision and a finding that the decision is *Wednesbury* unreasonable. He did not suggest that the *Wednesbury* test is applicable to deciding whether a decision has a proper factual basis; indeed, he clearly distinguished the two inquiries. Connectedly, His Lordship carefully distinguished between *"fact"* and *"evidence"*: one of SIAC's functions is to determine whether the *"factual basis"* for the SSHD's opinion is *"established by evidence"*. He did not state that, in order for an appeal to be allowed, there must be no evidential basis for a conclusion of fact. Accordingly, references to *"no factual basis"* (or as he later put it, ensuring a decision has a *"proper factual basis"*) are not to be equated to the judicial review principle that a decision is vitiated if it has no evidential basis at all. Lord Hoffmann anticipated an appeal being allowed on a question of fact and not just for error of law or *Wednesbury* unreasonableness.

24.3. Lord Hoffmann did not suggest that any distinction should be drawn between different subsets of facts—i.e. *"pivotal facts"* and other facts. When Lord Hoffmann stated that, *"[i]t is … open to the Commission to say that there was no factual basis for the Home Secretary's opinion that Mr Rehman was actively supporting terrorism in Kashmir"*, he was not suggesting that SIAC could only reach this conclusion if the case had been one of mistaken identity. He was clearly anticipating that SIAC could say that there was no factual basis for the Secretary of State's position that Mr Rehman had been actively supporting terrorism in Kashmir because, upon analysis, either his activities had not occurred or they had another explanation (just as there could be an explanation other than alignment with ISIL for U3's presence in Syria).

24.4. The limitations in the appellate process which Lord Hoffmann recognised do constrain SIAC in allowing an appeal for error of fact are context-specific (a point to which Lord Hoffmann returned at §57). They will depend on the degree to which SIAC has been able to consider factual issues more thoroughly than the Secretary of State was able to do, and the extent to which judgements made by the Secretary of State depended upon advice and expertise that SIAC does not possess and which its more detailed scrutiny has not brought into question. However, there are no hard-edged limits imposed by this principle of restraint (such as that a particular approach must be adopted to all facts established by inference or all facts relating to questions of national security).

24.5. Lord Hoffmann's reference to *Chandler v DPP* [1964] AC 763 (and Lord Scarman's treatment of it in his speech in the *GCHQ* case) is also salient. In *Chandler*, the question whether the protesters had entered Wethersfield Air Force Station with the purpose of disrupting its operation was a matter of fact that had to be determined on the evidence by the jury. On that question, which was an issue of motivation, the opinion of the Crown was considered to be entirely irrelevant and not afforded any special weight. By contrast, the question whether disrupting the base was prejudicial to the interests of the State was a matter that the judge had been entitled not to leave to the jury. This also supports the view that the Court of Appeal's distinction between pivotal and non-pivotal facts, associating the latter with questions of motivation, is unsound.

25. For these reasons, the approach taken by the Court of Appeal in this case is inconsistent with that set out by Lord Hoffmann in *Rehman*.

(3) The Court of Appeal's approach does not respect the Secretary of State's role as the primary decision-maker

26. Laing LJ stated that after establishing the facts, "*SIAC's task is then to see whether the Secretary of State's assessment can withstand its view of the evidence*" (CA §175). By this, Laing LJ appears to have meant that, even if SIAC concludes that the Secretary of State has made an error of fact, SIAC cannot allow the appeal if the Secretary of State could rationally have reached the same overall decision by reference to the facts as found by SIAC (see especially CA §186).

27. In conducting this exercise, there would be two possibilities open to SIAC.

    27.1. The first possibility is that SIAC should put out of its mind the factual conclusions it has reached and the evidence that it has heard and simply ask itself whether there was a rational basis for the Secretary of State's assessment on the material that the Secretary of State had before him or her.

    27.2. The second possibility is that SIAC asks whether the Secretary of State's decision was rational on the basis of the new factual picture found by SIAC. This involves testing the Secretary of State's decision against evidence that the Secretary of State did not have before them, such as the representations made by the affected individual, evidence (including any expert evidence) adduced for the appeal, and answers given in cross-examination before SIAC.

28. Both of these possibilities are unprincipled, for different reasons.

29. If the first was adopted, there would be no purpose at all in SIAC considering the evidence before it and in reaching factual conclusions in relation to non-pivotal facts. This may explain why the Court of Appeal disapproved of this option, Laing LJ holding that it is open to SIAC to reach factual conclusions even in relation to non-pivotal facts and that these must be taken into account in asking if the Secretary of State's decision is *Wednesbury* unreasonable. Laing LJ stated that such factual findings become, *"part of the factual picture to which [SIAC] must apply the tests in Rehman and Begum"* (CA §175).

30. This leaves the second possibility. However, that approach is inconsistent with the separation of powers. It is well established that, where an appellate body finds that a decision-maker has made an error of fact, the appeal must be allowed unless the decision-maker would necessarily have made the same decision in the absence of the error: *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [2017] PTSR 1041 (CA), 1060B-E, 1061H-1062C. This reflects the primacy accorded to the designated decision-maker. Where, on the true facts, the decision-maker might have made a different decision, the proper course is for the appeal to be allowed and the matter remitted to them, so that they may decide what decision to make.

31. A fundamental difficulty with the approach taken by the Court of Appeal is that it requires SIAC to step across the Rubicon of the separation of powers and assume that the Secretary

of State would have made the same decision if he or she had seen the evidence that was before SIAC and on which SIAC has reached different factual conclusions. However, the Secretary of State will never have considered the factual position established by SIAC, nor much of the evidence on which it is based. This approach therefore requires SIAC effectively to stand in the shoes of the Secretary of State and assume the role of primary decision-maker. SIAC must assume that, had the Secretary of State known the true facts, he or she would have taken the same decision that was initially taken, provided there was a rational basis for doing so. There is however no proper basis for such an assumption, the effect of which is to undermine the separation of powers (other than in the exceptional situation in which SIAC could be satisfied that the decision would inevitably have been the same).

32. Instead, when SIAC finds that the Secretary of State has made an error of fact, the separation of powers is respected by allowing the appeal. It will then be open to the Secretary of State to take a further decision if he or she considers it appropriate to do so.

33. Subsequent to the Court of Appeal's judgment in these proceedings, both SIAC and the Court of Appeal have affirmed that the *Simplex* test continues to apply when it is considering whether to allow an appeal under s.2B SIACA 1997 on the basis that the Secretary of State has made an error of law: *S3 v SSHD* (SC/151/2018, 20 December 2023), §171; *Begum (CA)*, §120; *B4 v SSHD* [2024] EWCA Civ 900, §§67-70. There is no basis for adopting a different approach in the context of errors of fact. Indeed, in *Begum (CA)* the Court of Appeal said at §120 that the *Simplex* test applies to errors of both law and fact; JUSTICE agrees with that position, but notes its inconsistency with what was said in this case.

(4) The Court of Appeal's approach produces serious unfairness

34. In *Al-Jedda*, 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 Secretary of State before a deprivation decision is taken, even if there are no national security reasons why the decision has to be taken urgently. The Secretary of State in that case positively submitted that s.2B SIACA 1997 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).

35. In circumstances where a person need not be given an opportunity to make representations to the Secretary of State before a decision is taken to deprive them of their citizenship, an appeal under s.2B SIACA 1997 is the 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 the appellant 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.

36. The Court of Appeal's interpretation of the statutory scheme fails to do this. On the Court of Appeal's approach: (i) SIAC is entitled to consider evidence from the appellant which was not before the Secretary of State; but (ii) there is in practice very little point in its doing so, since SIAC can make no real use of its factual findings beyond establishing that a (narrowly circumscribed) *"pivotal"* fact is wrong or that the Secretary of State could not reach a rational decision to maintain the deprivation on the facts as SIAC found them.

37. In *Begum (CA)*, the Court of Appeal expressed the view (at §§112-113) that *Al-Jedda* remained good law in relation to the absence of any right of prior consultation in the context of deprivation decisions. The Court reasoned that the "*existence and distinctive nature of this right of appeal* [under s.2B SIACA 1997], *and the risk of pre-emptive action by the appellant if prior notice is given, remain in our view compelling reasons to construe s.40(5) as excluding the right of prior consultation before a deprivation decision is made on the grounds of national security, as was held in Al-Jedda"* (§112). But this fails meaningfully to grapple with the Court's own conclusion as to the limited grounds on which an appeal can be allowed (i.e. on the basis of public law errors). The inevitable consequence is that the right to adduce post-decision evidence does not remedy the original unfairness (because post-decision evidence is of very limited relevance to such grounds).

38. It means that the subject of a deprivation decision has no meaningful opportunity to respond to the factual case against them and to have their evidence properly considered on its merits by either the primary decision-maker or SIAC. There is no basis in the statutory scheme from which to infer that Parliament intended to derogate so substantially from the requirements of natural justice.

39. The net outcome of the Court of Appeal's approach is that the right of appeal to SIAC under s.2B SIACA 1997 is very considerably less protective than ordinary judicial review proceedings, in respect of which individuals are challenging a decision that has been taken after they have had an opportunity to give their version of events.

40. Indeed, if the Court of Appeal were correct, the introduction of the right of appeal to SIAC would represent a weakening of the protections afforded to individuals subject to deprivation decisions when compared with the "*committee of inquiry*" procedure which existed prior to SIAC's establishment. That procedure existed pursuant to s.40 BNA 1981, as originally enacted and in force until the insertion of s.2B into SIACA 1997. Section 40 BNA 1981: (i) required the Secretary of State to give prior written notice to a person whom the Secretary of State 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 was chaired by "*a person possessing judicial experience*" (s.40(7)-(8)) and its 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*". Any decision by the Secretary of State to deprive an individual of citizenship, whether with the endorsement of a committee of inquiry or otherwise, would have been amenable to judicial review.

41. Thus, prior to the enactment of s.2B SIACA 1997, 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 (ii) to challenge any deprivation decision by way of judicial review. By contrast, on the Court of Appeal's approach, s.2B confines an individual deprived of their citizenship to an appeal that is in practice far less protective than an ordinary judicial review, with no meaningful opportunity to have their version of events taken into account. The statutory context does not suggest that Parliament in 2002 intended to effect such a dramatic reduction – or indeed any reduction – in 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.

42. If, as SIAC held in *Al-Jedda* and the Court of Appeal affirmed in *Begum (CA)*, there is no right of prior consultation in respect of deprivation decisions, fairness demands that the right of appeal under s.2B SIACA 1997 enable proper and meaningful consideration of any post-decision evidence submitted by the appellant. This in turn requires (i) that SIAC be entitled to make its own findings of fact in respect of matters such as motivation or alignment (which are distinct from assessments of future risk), and (ii) that SIAC allow an appeal where the Secretary of State might have made a different decision on the facts as found by SIAC, in order to enable the Secretary of State to consider for themselves whether to exercise the discretion to deprive the appellant of their citizenship in the light of those facts.

CONCLUSION

43. JUSTICE submits that the correct position is as follows:

    43.1. The question of whether, on the premise that a person is aligned with ISIL, it is in the interests of national security to deprive them of their citizenship is a matter of policy judgement entrusted to the executive. SIAC could only interfere with such a policy judgement on *Wednesbury* grounds. This point is not in issue in these proceedings.

    43.2. The question of whether a person such as U3 aligned with ISIL is a question of fact, not policy. In considering the Secretary of State's factual assessment of whether U3 was aligned with ISIL, SIAC would — as an appellate body — be required to exercise the degree of constraint determined by the relative institutional capabilities and knowledge of SIAC and the Secretary of State on that issue.

    43.3. SIAC should allow an appeal if the Secretary of State fails to establish there is a proper factual basis for his or her conclusions. This is not a *Wednesbury* review and nor is it limited to "*pivotal*" facts.

    43.4. This would not involve SIAC taking the Secretary of State's place as decision-maker. On the contrary, it would respect the principle that it is for the Secretary

of State (not SIAC) to decide whether to deprive a person of citizenship. Where SIAC allows an appeal, it is then open to the Secretary of State to consider (i) whether, in light of the facts found by SIAC, it would be conducive to the public good for the relevant individual to be deprived of their citizenship; and, if so (ii) whether the Secretary of State should exercise their discretion to make a deprivation order.

44. JUSTICE accordingly supports the appeal.