Neutral Citation Number: [2021] EWCA Civ 1642

Case No: T2/2021/0741

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Special Immigration Appeals Commission

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2021

Before :

LORD JUSTICE BEAN
LADY JUSTICE ELISABETH LAING
and
SIR STEPHEN IRWIN

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
P3	**Respondent**

- -
- -

David Blundell QC and James Stansfeld (instructed by **Government Legal Department**) for the **Appellant**
Stephanie Harrison QC, Edward Grieves and Stephen Clark (instructed by **Wilsons**) for the **Respondent**
Ashley Underwood QC and Dominic Lewis (as Special Advocates supported by **the Special Advocates' Support Office**) for the **Respondent**

Hearing dates : 13 and 14 July 2021

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Approved Open Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am on Monday 8 November 2021.

Lady Justice Elisabeth Laing DBE :

Introduction

1. This is an appeal by the Secretary of State from a decision of the Special Immigration Appeals Commission ('SIAC'). SIAC allowed P3's appeal pursuant to section 2(1)(a) of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act') against the Secretary of State's decision to refuse his application for entry clearance ('Decision 2'). I will refer to the parties to this appeal as 'the Secretary of State' and 'P3' respectively.

2. The background is that the Secretary of State had already decided to deprive P3 of his British citizenship when he was outside the United Kingdom ('Decision 1'). P3 appealed to SIAC against Decision 1 ('Appeal 1'). He then applied to the Secretary of State for entry clearance to the United Kingdom in order to be able to take part in Appeal 1 in person. His appeal against Decision 2 was heard by SIAC on 7 and 8 December 2020. In an OPEN judgment handed down on 11 February 2021, SIAC allowed Appeal 2.

3. On this appeal P3 was represented by Miss Harrison QC, Mr Grieves and Mr Clark. The Secretary of State was represented by Mr Blundell QC and Mr Stansfeld. I thank counsel for their comprehensive written and oral submissions. I also thank the teams instructing them, who have evidently all worked hard to prepare this appeal.

The issues

4. As the case was argued, the main issue on this appeal is whether SIAC adopted the correct approach to its role as a specialist appellate tribunal. The second main issue is whether SIAC's approach to the application for entry clearance was wrong in law. To be fair to SIAC, its role has been somewhat clarified a result of the decision of the Supreme Court in *Begum v Secretary of State for the Home Department* [2021] UKSC 7; [2021] 2 WLR 556, which was handed down after the hearings in SIAC and after it had handed down its OPEN and CLOSED judgments. There is a question, however, about the extent to which *Begum* is binding on those issues, as I will explain.

5. This appeal has been expedited. Producing an OPEN judgment in a case in which the Court has seen CLOSED material is complicated and time consuming. I need not describe them, but I apologise for the fact that these complexities have led to inevitable delay in the circulation of the draft OPEN judgment. As a consequence of the order for expedition, of the imminence of the end of the legal term and of those complexities, which increased the length of time between the hearing and the date when the draft OPEN judgment could be handed down, this judgment is as short as possible. I have limited full citations of authority. I have also referred to counsel's main arguments only rather than to their detailed submissions.

6. The constitution which heard this appeal includes two former Chairmen of SIAC. I have found it necessary to make one or two observations at the very end of this judgment, which were prompted by the points raised by counsel in their oral submissions and by the Court's discussion of the issues after the hearings. The OPEN representatives were invited to make further written submissions on this issue after the hearing, and did so.

The facts

7. References in this and in the next section of the judgment to paragraphs are to the paragraph numbers in SIAC's OPEN judgment, unless I say otherwise. P3 is a national of Iraq. He was born there on 29 March 1968. His wife ('Witness A') and three minor children are all British citizens. The children were born between June 2002 and July 2012. The eldest child is now, therefore, an adult. P3 has lived in the United Kingdom since 1997. Witness A joined him in the United Kingdom in 2001. P3 was naturalised as a British citizen in February 2003, and Witness A, in October 2007.

8. P3 was outside the United Kingdom between 1 October 2017 and 5 November 2017. The Secretary of State decided on 2 November 2017 to deprive him of his nationality on the grounds that it would be conducive to the public good. Decision 1 was served on 28 December 2017, and the order depriving him of his nationality was made two days later. P3 had left the United Kingdom again on 21 November for Iraq. He was planning to return on 31 December 2017. He has been in Iraq since then. P3 was told that Decision 1 was made because he was assessed 'to have links with Iranian intelligence services'. He was later told that it was also assessed that he 'was prepared to accept tasking'.

9. P3 applied for entry clearance on 28 November 2019 on the grounds that it is 'essential' for him to be present in the United Kingdom for Appeal 1 to be effective, relying on a statement in *W2 v Secretary of State for the Home Department* [2017] EWCA (Civ) 2146; [2018] 1 WLR 2380. He claimed that a refusal of entry clearance would be unlawful under section 6 of the Human Rights Act 1998 ('the HRA') as it would breach articles 2, 3, 8 and 13 of the European Convention on Human Rights ('the ECHR'). As SIAC recorded (paragraph 3) 'the focus throughout the hearing was on article 8'. P3 'set out in very clear detail' the adverse effect which the Decision 1 was said to be having on him and on his family (paragraph 13). I note that it was Decision 1, not Decision 2, which was said to be having this effect. That seems to be a correct interpretation of the contentions in the entry clearance application (see, in particular, paragraph 16 of that application). That approach was echoed in Miss Harrison QC's oral submissions about the effect of Decision 1.

10. SIAC also recorded that the Secretary of State 'interpreted P3's application, in our view correctly, as being both (i) an application for entry clearance outside the Rules [sc the Immigration Rules ('the Rules')], and (ii) a human rights claim'. The Secretary of State refused both applications on 7 February 2020, and a request for reconsideration on 8 June 2020. P3 submitted much material to the Secretary of State in support of the initial application, and a little more in support of the application for reconsideration (a further report from Professor Katona). Miss Harrison handed up the index of the documents which supported the entry clearance application. It had 149 items in it, and was 671 pages long. As she pointed out, all of this material post-dated Decision 1. As she also pointed out in her oral submissions on this appeal, SIAC had even more material than that. I summarise that material in paragraphs 21-23, below.

11. In Decision 2, the Secretary of State said that she had no information to contradict the assertion that P3's separation from his family was 'likely to have a negative impact on your family'. However, P3 had often been in Iraq before Decision 1 was made. Prolonging the separation 'may be considered harsh', but was not unjustifiably harsh because of the 'serious threat' which P3 posed to national security. SIAC said

(paragraph 14) that the Secretary of State 'well understood that the article 8 case was being advanced' on the basis of P3's deteriorating mental health and the impact of his separation from Witness A 'who was struggling to cope', and the impact on his children.

12. The Secretary of State said, in paragraph 11.a of Decision 2, that as P3 was outside 'the UK's jurisdiction for article 8 purposes, it is assessed that for jurisdictional reasons your Article 8 ECHR rights are not engaged. However the Article 8 ECHR rights of your family are engaged as they are living in the UK and these rights will be considered below'. The Secretary of State said that there was still 'a degree of physical contact and communication between P3 and his family. The evidence with the entry clearance application showed that his family visited P3 every 6 months in Iraq. Before the protests in Iraq, they had WhatsApp calls every night. From early 2017 until Decision 1, P3 had worked in Iraq for four to six weeks at a time before returning to the United Kingdom for two to three weeks. During P3's absences, his nephew provided support in person and P3 provided support on the telephone.

13. The Secretary of State said that article 8 was a qualified right. Interference with article 8 rights in the interests of national security was expressly permitted. The Secretary of State acknowledged that the refusal of entry clearance would have an impact on P3's family. The Secretary of State's assessment was that if P3 were admitted to the United Kingdom, there would be a 'serious risk to the UK'. Any interference with the article 8 rights of his family was 'necessary and proportionate to mitigate that threat'. The Secretary of State considered the application outside the Rules and refused it on the grounds that the consequences of the refusal would not be unjustifiably harsh. The Secretary of State also considered section 55 of the Borders Citizenship and Immigration Act 2009. Decision 1 had no adverse impact on the status of Witness A or of the three children. The Secretary of State accepted that P3's absence had a negative effect on his children. But their best interests were not the only consideration and were outweighed by the serious threat posed by P3.

14. The Secretary of State rejected P3's submission based on article 13 as he was outside the jurisdiction of the United Kingdom for ECHR purposes. In any event, a human rights claim could not be based on article 13 [presumably because article 13 is not a 'Convention right' listed in Schedule 1 to the HRA]. The Secretary of State nevertheless considered P3's submissions based on article 13. Despite claimed difficulties, P3 had been able to instruct his representatives to date. The Secretary of State did not accept that P3's presence was essential for an effective appeal. P3 was not in detention. He was free to contact his representatives by telephone, and had met them in person on several occasions. He had given them sufficient instructions to instigate an appeal and to make a detailed application for entry clearance. This strongly suggested that his appeal could be prepared and conducted fairly while he was outside the United Kingdom, although the Secretary of State recognised that his presence would 'simplify the appeal proceedings'. The Secretary of State added that SIAC had had a number of deprivation appeals in which there had been an effective hearing when the appellant was outside the United Kingdom.

15. The Secretary of State also rejected the argument that P3 would not pose a risk if he were admitted for a short period. P3's challenge to the risk assessment was based solely on the OPEN material. The Secretary of State acknowledged that P3's mental health issues were not known when Decision 1 was made, but the current assessment was that 'you continue to pose a nationality security risk, despite your mental health

issues' (Decision 2, paragraph 17). The Secretary of State's conclusion was that the application should be refused on grounds of national security, as P3 was assessed to have links with Iranian intelligence services, and the Secretary of State did not accept that it was essential for him to be in the United Kingdom in order for his deprivation appeal to be effective. The ECHR rights which P3 relied on were either not engaged, or, if they were engaged, did not justify the grant of entry clearance. P3 was notified that the refusal of entry clearance was subject to judicial review and that there was a right of appeal to SIAC against the refusal of P3's human rights claim (as the Secretary of State had certified the claim under 97(3) of the 1997 Act).

16. In paragraph 15 SIAC referred to the ministerial submission in response to the application for entry clearance ('the Submission'). Officials advised the Secretary of State that P3's presence in the United Kingdom was not essential: he had been in contact with his legal representatives by telephone. He had had several meetings with them. They had been given sufficient instructions to instigate Appeal 1 and to make a detailed application for entry clearance (as SIAC acknowledged in paragraph 13: see paragraph 9, above). SIAC quoted the Submission, to the effect that this material 'strongly suggests that is possible for P3's appeal to be prepared and conducted effectively while he is outside the United Kingdom'.

17. In the reconsideration decision dated 8 June 2020, the Secretary of State made various points. They included the contention that P3 was not living in the United Kingdom when the deprivation decision was made (by reference to the evidence about P3's movements in 2017). 'As the UK's jurisdiction for ECHR purposes is primarily limited to the UK's territory, from which you were [sic] repeatedly and voluntarily departed and outside which you remained at the time of [Decision 2], your article 2,3 and 8 ECHR rights were not engaged.'

18. SIAC also considered the ministerial submission in support of the reconsideration decision. It noted that Professor Katona mainly attributed the deterioration in P3's mental health and his 'escalating suicide risk' to the prolonged separation from his family. That submission, as SIAC noted, was that P3's mental health issues did not outweigh the risk he posed to national security. That submission also accepted the suicide risk, and that, the longer P3 was away from his family, the worse that risk would become. P3 was in regular contact with his family and they had visited him in Iraq in December 2019.

SIAC's judgment

19. In para 6, SIAC described P3's grounds of appeal.

> *'(1) The Respondent's refusal to grant entry clearance for the duration of the appeal period is incompatible with P3's rights under articles 8 and 13 of the Convention, in relation to:*
>
> *(i) Substantive article 8 rights due to ongoing familial separation;*
>
> *(ii) Procedural article 8 rights in the linked deprivation appeal.*
>
> *(2) The entry clearance refusal engages the jurisdiction of the ECHR and there is a breach of articles 2 and/or 3.'*

Somewhat confusingly, SIAC referred, in the body of the judgment, to grounds (1)(i) and (1)(ii) as grounds '1(a)' and '1(b)'.

20. SIAC recorded (paragraph 7) that it had stayed 'P3's common law challenge (as an alternative to the article 8 procedural challenge)' pending the decision of the Supreme Court in the *Begum* case. It also recorded that P3 had not pressed ground 2 and that 'the principal focus of the hearing was on the article 8 procedural grounds, although the substantive article 8 issue remains very much live' (paragraph 8).

21. Paragraphs 19-85 are headed 'Synopsis of the Evidence Relevant to the Article 8 Claim in its Two Iterations'. P3 gave evidence (remotely). Witness A also gave evidence, as did Professor Katona. SIAC said (paragraph 38) that there was a 'mass of evidence' from him. It seems that SIAC considered four opinions formed during 2020, one of which was based on a video assessment of P3. Some of that was material which had not been before the Secretary of State when the Secretary of State made Decision 2 and when the Secretary of State reconsidered Decision 2. It is clear from paragraphs 19-75 that SIAC also considered an unchallenged report from an independent social worker.

22. P3's solicitor also gave evidence. That showed that she had been taking instructions from P3 remotely and in person (at three conferences in Lebanon and one in Turkey). She had assembled all the material she needed in order to deal with the entry clearance application and with the article 8 case, but had not yet been able to take full enough instructions on the national security case, as, in her view, 'this was a highly complex case which required examination of 30 years of her client's personal history' (paragraph 55). There was still a lot of work to do. P3 'has had family links to Iran and links to Iranians through anti-Saddam groups over very many years. Any of these could, potentially at least, constitute a link with Iranian intelligence' (paragraph 58). P3's draft statement was 150 pages and 800 paragraphs long. To complete it, she would need three to four more conferences, each lasting four days. If P3 were in the United Kingdom, that would take 4-6 weeks. By 24 August 2020, she was no longer able to make progress by taking instructions remotely.

23. SIAC also heard evidence from a caseworker from P3's solicitors, and from a Mr Khadim. Realistically, conferences were only possible in Turkey and in Lebanon. There were complications in travel because of Covid.

24. SIAC described its impressions of the witnesses in paragraphs 64-75.

25. In paragraphs 76-107 SIAC considered ground '1(a)' (or, by reference to paragraph 6, ground 1(i)), which SIAC labelled 'Article 8 – Substantive'. SIAC summarised the submissions. P3's submission was that the effect of 'the elongated separation', in the light of all the evidence, was 'an extremely serious' interference with family life 'such that the national security case would need to be powerful indeed to outweigh it'. If the suicide risk materialised, it would be 'the ultimate interference with family life'.

26. SIAC commented that ground '1(a)' did not feature in P3's oral argument. SIAC inferred that there might have been three reasons for that. P3's advocate, Mr Grieves, had been short of time and ground '1(b)' was more complex legally; there were full written submissions about ground '1(a)'; and as the Secretary of State had said that the national security risk was serious, Mr Grieves might have thought that that was the premise of the article 8 balance.

27. The Secretary of State submitted that since P3 was outside the United Kingdom, he could not rely on article 8, though his family could. The issue was whether the temporary interference with family life (up until a decision on Appeal 1) was

disproportionate. The national security case had not been challenged by P3 and the Secretary of State's assessment should be respected. If P3 returned, he would claim asylum, creating a further delay and increasing the risk to national security. It was relevant that P3 was living in Iraq for most of the time before Decision 1, and his family could go and live there with him. Witness A was able to manage when P3 was in Iraq before December 2017, and the extent of her reliance on P3 had been exaggerated. P3 could exercise a conscious choice about whether to commit suicide, and was able to resist the impulse.

28. In paragraphs 83-90, SIAC considered *L1 v Secretary of State for the Home Department* [2015] EWCA (Civ) 1410, paragraphs 20 and 27, *S1 v Secretary of State for the Home Department* [2016] CMLR 37, paragraph 102, *Abbas v Secretary of State for the Home Department* [2018] 1 WLR 533, paragraphs 19 and 25, *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115, paragraphs 4 and 20, paragraph 41 of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, and paragraphs 44 and 49 of *Turner v USA* [2012] EWHC 2426 (Admin).

29. The statutory scheme did not prevent the Secretary of State from deliberately deciding to wait until a person had left the United Kingdom before depriving him of his nationality. The Secretary of State did not, by depriving P3 of his nationality, exercise control over him. P3 was therefore outside the jurisdiction for the purposes of article 1 of the ECHR when the Secretary of State made Decision 1. But that did not matter. Family life is indivisible. P3's family were present and settled in the United Kingdom. 'It is sufficient for P3's purposes that [the Secretary of State's] deprivation action has had an obvious impact on those members of the family who are undoubtedly within the jurisdiction of the Convention, even if some of the article 8 factors (eg his mental health) are peculiar to him. This much was made clear by the Court of Appeal in *Abbas*, paragraph 19, where a distinction is made between family life and private life for the purposes of article 8. In a family life case, the presence of family member in the UK supplies the "jurisdictional peg": see paragraph 25 of the judgment …'

30. In paragraph 89, SIAC referred to an 'allied consideration', the British citizenship of the three children, citing paragraph 41 of the judgment of Lord Hope in *ZH (Tanzania)*. It is a 'very significant and weighty factor' against moving British citizen children to another country, especially if it would mean them losing the advantages of citizenship for the rest of their childhood. SIAC referred to *Turner*, an extradition case, in paragraph 90. SIAC did not interpret the judgment in that case as saying that suicide risk was irrelevant, even if (as the appellant in that case was rational), suicide would flow from a choice, 'rather in the light of the exercise being undertaken under the extradition statute, on the particular facts of the case and on the available psychiatric evidence, the risk did not weigh heavily'.

31. Paragraphs 91-107 are headed 'Discussion'. SIAC acknowledged that the entry clearance application did not raise the same article 8 issues as might arise in Appeal 1. That was because the outcomes of Appeal 1 were 'binary and permanent'. Appeal 2 concerned an application for entry clearance 'for a particular purpose and for a limited period'. At this stage, SIAC was ignoring the arguments on ground '1(b)'. Ground 1(a) was to be considered 'on a self-contained basis' and on the premise that P3 might be required to leave the United Kingdom after Appeal 1. That would 'ordinarily' militate against the grant of entry clearance, because as Mr Tam pointed out, the interference might well be temporary. Whether P3's case was an ordinary or

exceptional case was 'a matter we will address at the appropriate time'. Another consideration was that while P3's stay in the United Kingdom might be temporary, its length was not certain. Appeal 1 might be delayed for some reason, and there might be a further appeal. P3 might apply for asylum, and there might be a long appeal process. The premise of the article 8 balance, therefore, had to be that P3 might be irremovable 'for a considerable period of time'. That was a factor against P3 in the article 8 balance. An asylum claim might be made 'regardless of its prospects of success'. A factor which militated in P3's favour was that if he were not permitted to return to the United Kingdom, his deprivation appeal would not be heard 'for a considerable period of time'. By that, SIAC meant a period of about 15 months (see paragraph 34, below).

32. It was 'axiomatic' that 'the strength of P3's article 8 rights must be balanced against the strength of the national security case against him (paragraph 96). It was all very difficult. In paragraph 97, SIAC said that 'Usually, if the risk to national security were serious, it would require an extremely strong article 8 case to outweigh it'. SIAC had not been referred to any authority in support of that proposition, but 'it ought to be uncontroversial'. On the other hand, 'If the risk to national security is not serious … [ranging from] slightly less serious to very weak, the counterbalancing article 8 case need not be as strong. It is unnecessary in these circumstances to be any more precise than that'.

33. In paragraphs 98-105, SIAC 'evaluated' P3's article 8 case. SIAC described it, variously, as 'particularly compelling' (paragraph 98), 'very powerful' (paragraph 104') and 'powerful' (paragraphs 107 and 162). The reader is left not knowing precisely what SIAC thought. SIAC added that the effects of the 'deprivation action' had been 'very harsh' and were continuing. The article 8 case was 'fortified' by the consideration that if the entry clearance appeal were allowed, 'the restoration of family life would be likely to improve, if not reverse, the damage already done to this family unit, in particular the children, as well as P3's mental health'.

34. Professor Katona's evidence was 'deeply troubling'. P3's suicide risk was high. His mental health fluctuated but the trend was 'downwards', if he could not return. It would 'be likely significantly to improve' if he were admitted to the United Kingdom. Even if Appeal 1 were held remotely, a lot more work needed to be done on it (paragraph 100). In paragraph 150 SIAC agreed with P3 that it would be very unlikely that Appeal 2 could be held before the spring of 2022 (that is, some 15 months after the SIAC hearing). Witness A was 'struggling with the administrative chores' which P3 had done when he was in the United Kingdom. SIAC acknowledged that this factor should not be overstated. P3's absence was having an 'important, deleterious effect' on P3's children, especially the eldest and the youngest. The continued separation was 'strongly contrary to their best interests'. Their welfare 'carries very significant weight in this case' even though P3 was not seeking entry clearance 'on a permanent basis'. SIAC rejected the Secretary of State's submission that the family should move to Iraq. The children 'railed against the idea in 2017'. It would not be in their best interests. The education of the two younger children would be seriously disrupted.

35. In paragraph 106 SIAC said that the Secretary of State's 'national security case must now be evaluated. We have covered this in some detail in our CLOSED judgment. For the reasons explained there, it should be understood that our assessment is preliminary. We have concluded, contrary to the assessment of [the Secretary of

State], that P3 does not represent a serious threat to the national security of the United Kingdom. We have gone into this more fully in CLOSED, and nothing further can be said in OPEN as to our reasoning and conclusions'.

36. In paragraph 107, SIAC said the balance was between a 'powerful article 8 case' and 'a case which does not indicate that P3 represents a serious threat to national security of the United Kingdom. Had we concluded, as did [the Secretary of State] that the national security threat was serious, we would have thought long and hard before allowing the entry clearance appeal on this basis'. SIAC 'conclude[d] by some margin that it would be disproportionate to treat the national security risk as outweighing article 8 case' [sic]. SIAC allowed the entry clearance appeal on ground '1(a)'.

37. SIAC returned to this topic in observations which the Chairman made when granting the Secretary of State permission to appeal. He said that the appeal hinged on SIAC's approach to 'the issue of national security'. He added that if the appeal succeeded on ground 1 it must also succeed on ground 2, because SIAC had 'made clear in its OPEN judgment that if the risk to national security were as it had been assessed by [the Secretary of State], P3's A8 rights, whether substantive or procedural, would have been overridden. The Commission undertook its own evaluation of P3's threat to national security, paying due regard to the assessment of the Security Service'. In my judgment, if and to the extent that there is any material difference between those observations and the terms of the OPEN judgment, the latter, which was agreed by the Panel, and contains SIAC's OPEN reasons for allowing the appeal, must prevail.

38. In paragraphs 108-161, SIAC considered P3's procedural case. P3 submitted that article 8 entitled him to a fair and effective appeal, and that he could not have one within a reasonable time unless he was given entry clearance to prepare for it. The medical evidence showed that anything less than that would mean that he could not answer the national security case. P3 had a 'bold submission', that if SIAC decided he could not have a fair and effective appeal without returning to the United Kingdom, his section 2 appeal should succeed, regardless of the national security case. His alternative argument was that a strong national security case was needed to outweigh P3's procedural rights

39. SIAC summarised the submissions in paragraphs 110-116. It considered eight authorities in paragraphs 117-136: *G1 v Secretary of State for the Home Department* [2013] QB 1008, paragraph 55, *S1*, paragraph 42 and 83-86, *R (Johnson v Secretary of State for the Home Department* [2016] 1 WLR 1267, *K2 v United Kingdom* [2017] 64 EHRR SE18, paragraphs 49 and 57, *Kairie and Byndloss v Secretary of State for the Home Department* [2017] 1 WLR 2380, paragraphs 49, 76, 78, 88, and 103, paragraphs 197 and 198 of *R (FB Afghanistan) v Secretary of State for the Home Department* [2020] EWCA (Civ) 1338, *R (W2) v Secretary of State for the Home Department*, and paragraphs 100-106 of *R (Begum) v Secretary of State for the Home Department* [2020] 1 WLR 4267.

40. *G1* showed that there was no right at common law to enter the United Kingdom in order to take part in an appeal. *G1* was not relevant as G1 did not rely on article 8 (*G1*, judgment, paragraph 55). The proceedings were an application for judicial review and 'the bar was much higher'. Moreover, G1 could travel to a safe third country to give instructions and evidence by video link (paragraphs 117 and 118).

41. There was an article 8 argument in the deprivation appeal in *S1*. Mrs S and the child were both in Pakistan. The national security case was 'real'. In paragraph 108, Burnett

LJ (as he then was) said that the position would have been no different if Mrs S and the child had been in the United Kingdom: 'There can be little doubt that …article 8 would not have provided a basis for contending that S1 should be admitted in the face of a finding that his presence here constituted a threat to national security'. SIAC said in paragraph 121 that there was no argument that there were any particular features of S1's case which meant that he had to return to take part in his appeal in the United Kingdom. SIAC referred to 'obiter' passages in paragraphs 83-86 of *S1* in which the Court considered whether, if the appeals would be unfair unless S1 was admitted to the United Kingdom, his appeal should succeed. SIAC could only come to that conclusion in rare circumstances on clear and compelling evidence. The remedy would not be to allow the appeal, but for an application for entry clearance to be made.

42. SIAC said that Mr Tam's heavy reliance on those cases was misplaced, for the reasons it had given. In any event Beatson LJ had said, in paragraph 74 of *W2*, that those authorities 'fall to be "reassessed"'. I should explain that Mr Tam QC was leading counsel for the Secretary of State at the SIAC hearing.

43. *Johnson* decided that the ECHR does not guarantee a right to become a citizen, but that a deprivation decision 'was sufficiently within the ambit of article 8 as to trigger the application of article 14'. Mr Tam QC pointed out that the appellant in that case was in the United Kingdom when that decision was made. 'In our view, his physical presence here might have had some bearing on the article 8 balancing exercise, but it should have no relevance to the prior question of whether the article has any potential application to this factual structure…the jurisdictional peg for article 8 in the present case is P3's family in the United Kingdom' (paragraph 124).

44. In paragraphs 125-126, SIAC considered the decision of the European Court of Human Rights ('the ECtHR') on G1's application (he was referred to in that application as 'K2'). The ECtHR had accepted that article 8 can apply to a revocation of citizenship. In deciding whether such a decision breaches article 8, the ECtHR considers two questions: whether the decision was arbitrary, and the consequences of revocation for the applicant. The ECtHR does not accept that an out-of-country appeal necessarily makes such a decision 'arbitrary'. It would not 'exclude the possibility that an article 8 issue might arise where there exists clear and objective evidence that the person was unable to instruct lawyers or give evidence while outside the jurisdiction: however article 8 cannot be interpreted so as to impose a positive obligation on Contracting States to facilitate the return of every person deprived of citizenship while outside the jurisdiction in order to pursue an appeal against that decision'.

45. SIAC said that 'the importance of these passages is somewhat diluted by the recognition that *K2* was a decision on admissibility'. SIAC took three points from *K2*.

    i. Article 8's procedural guarantees 'were generated by the concept of arbitrariness', because an interference with article 8 rights must be in accordance with the law. An arbitrary decision or 'subsequent judicial process would be contrary to the rule of law and incapable of justification'.

    ii. Out-of-country appeals do not, without more 'engage the procedural limb of article 8'. What was needed was 'convincing evidence that the appeal could not be pursued from abroad'. There was no such evidence in K2's case.

iii. K2 had 'voluntarily left the UK before the decision was made', his family could move to Sudan, and the consequences of deprivation were not significant. 'The facts of P3's case are somewhat different'.

46. The issue in *Kiarie* was whether certificates under section 94B of the 2002 Act interfered disproportionately with the appellants' article 8 rights. The effect of those certificates was to enable the Secretary of State to remove the appellants from the United Kingdom before their appeals against decisions to deport them had been heard (thus reversing the normal statutory position, which is that such appeals are in-country). SIAC said that the evidence in that case was that out-of-country appeals were difficult because of problems with legal aid and video facilities. There was no 'Convention-compliant system for the conduct of such appeals'. Lord Wilson concluded that for the appeals to be effective, the appellants should have the chance to give live evidence (judgment of Lord Wilson, paragraph 76). Deportation pursuant to the certificates under section 94B would breach the procedural requirements of article 8. Deportation pursuant to the certificates would interfere with the private and family lives of the appellants, and, 'in particular with the aspect of their rights which requires that their challenge to a threatened breach of them should be effective'. The Secretary of State had failed to show that the measure struck a fair balance (ibid, paragraph 78). I note that Lord Wilson emphasised that the Secretary of State could have, but had not, certified the appeals as 'manifestly unfounded'; it followed that the appeals were, at least, arguable.

47. SIAC said that the premise of the conclusion that the balance was not fair was Lord Wilson's assessment that the appellants would not have an effective appeal from abroad. SIAC added (paragraph 128) that 'It is implicit in Lord Wilson's reasoning that it could also make no difference for article 8 purposes whether or not the appellant was physically present here when the issue was being considered'.

48. SIAC referred to the judgment of Lord Carnwath. He accepted that article 8 did not require access to the best possible procedure. He did not consider that an appeal by video link would breach 'essential requirements of effectiveness and fairness' (*Kiarie*, judgment, paragraph 88). SIAC noted, by reference to *FB (Afghanistan)* that the position has moved on because of the advances in technology since 2017. My impression from her oral submissions was that Miss Harrison QC did not endorse the extreme position taken about video evidence taken by Lord Wilson in *Kairie*.

49. In paragraphs 131-134, SIAC considered *W2*. Beatson LJ could not reconcile *K2* and *Kiarie*. I remind myself that Beatson LJ said (judgment, paragraph 79) that it appeared that *G1*, *S1*, *L1* and *K2* were not cited to the Supreme Court in *Kiairie*. SIAC did not consider it necessary to 'explore these conflicts. Had the ECtHR been confronted by P3's rather better facts, it seems unlikely that it would have expressed itself so robustly'. SIAC considered that paragraphs 85-87 of *W2* made 'it clear that the issue for the Commission on a case such as this is whether an out-of-country appeal would be effective'. If SIAC 'were to conclude that an appellant's presence in this country is necessary in order for his appeal to be effective, it will allow the appeal (paragraph 85)'. SIAC was referring here to Appeal 2, and recognised that *W2* was obiter on this point (see paragraph 135). SIAC seems also to have accepted (paragraph 161) that it had to weigh P3's article 8 procedural rights against the national security case. SIAC said that paragraph 87 of *W2* was 'particularly germane'. This described what material SIAC might take into account in deciding whether a refusal of entry

clearance was unlawful. SIAC could consider whether there was 'a Convention-compliant system for the conduct of a SIAC appeal from abroad'.

50. SIAC noted that the submission that article 8 was not in play in a deprivation appeal was made in the Court of Appeal in *W2* and that the Court had not expressed a view on it (paragraph 134).

51. The parties had not referred to the decision of the Court of Appeal in *Begum*. SIAC said that the Court of Appeal had clarified that paragraphs 85-87 of *W2* were obiter. The reference to allowing an appeal in paragraph 85 was to allowing an entry clearance appeal, not the deprivation appeal. *Begum* was not an article 8 case.

52. SIAC said that it had to decide three issues. I think it in fact described four issues.

    i. Does article 8 apply at all to deprivation cases?

    ii. If it does, had it been shown that P3 would not have a fair and effective appeal from Iraq?

    iii. If not, should the entry clearance appeal be allowed regardless of the Secretary of State's national security concerns?

    iv. If not, should the appeal be allowed because P3's procedural rights outweighed the national security concerns?

53. SIAC held that article 8 did apply. Article 8 does not confer a right to nationality. But P3 had a right to appeal against the deprivation decision on the merits. His entire history could not be 'expunged'. Article 8 can be relied on to show that deprivation would not be conducive to the public good (see *Johnson* and *K2*). An appellant may rely on article 8 in a deprivation appeal. '…national security may well outweigh article 8 in the majority of cases, perhaps the vast majority of cases, it does not follow that article 8 is not engaged in all cases. Furthermore the fact that P3 is currently outside the jurisdiction of the ECHR does not matter: the jurisdictional peg exists, and the reasoning in *Kiarie and Byndloss* does not turn on their physical presence in the United Kingdom'.

54. 'It follows' said SIAC, that 'the full panoply of the procedural guarantees vouched by article 8 are applicable'. P3 was able to put forward 'a compelling case' on family life, but had difficulty dealing with national security case. 'The better able P3 is to assail the …national security case the lesser weight this Commission would accord to it on the deprivation appeal when performing the article 8 balance' (paragraph 143).

55. SIAC then considered whether P3 had shown he would not have a fair and effective appeal from Iraq. SIAC accepted that Professor Katona had overstated P3's difficulties to an extent. SIAC also had some concerns about P3's reliability as a witness. The fact that Professor Katona did not share those concerns also affected the reliability of his views. In paragraph 146, SIAC expressed its view that psychiatric disorders 'fluctuate over time' and considerably so. Nevertheless, there was a risk of suicide and while P3 was in Iraq, his mental health was getting worse. The position was 'somewhat bleak' and the 'prognosis [was] poor'. SIAC's view was that P3's solicitors could not finish P3's witness statement by telephone. That would be the case 'for the foreseeable future' (paragraph 148). P3's delusions were 'potentially relevant' to this issue. It is not clear from paragraph 149 how relevant SIAC thought they were, but it seems, not very relevant.

56. In paragraph 150 SIAC recorded Mr Grieves' concession that it would not be impossible for P3 to give 'proper instructions' in a safe third country such as Turkey. His submission, rather, was that it would be 'very difficult' and would take 'far too long'. SIAC agreed with him that P3's witness statement could not be finished before autumn 2021, and that it would be 'very unlikely' that the appeal could be heard before spring 2022. SIAC agreed with Mr Tam QC that P3's evidence could be taken remotely, provided that P3's illness did not get worse. SIAC would make reasonable adjustments for P3. He might have difficulties establishing his credibility.

57. It was likely that P3's illness would get worse. He might not be able to give any evidence to rebut the Secretary of State's case. That risk could become acute at some stage in 2021 if P3 stayed in Iraq (paragraph 152). The question for SIAC was whether 'the procedural guarantees vouched by article 8 to P3 would be effectively denied to him' if his appeal were not heard until spring 2022, and he stayed in Iraq. 'We must add to this factual substratum the important further ingredient that P3's family life, including the wellbeing of his family here, would be likely to deteriorate' over time. SIAC accepted Mr Grieves' submission that 'the decision…must accommodate the practical realities of this case and also reflect the fact that P3's inability to have his appeal heard within a reasonable time could frustrate the procedural rights granted by article 8' (paragraph 153).

58. Even if P3's family life in the United Kingdom were put on one side, SIAC decided that the risk that 'the procedural guarantees afforded by article 8 would be denied to P3 on the assumption that he remain in Iraq is now unacceptably high. Factoring into the equation the disruption to P3's family life between now and the notional spring 2022 date, including the real possibility that it is irremediably harmed by suicide or family breakdown, compels the conclusion on all the available evidence, making evaluative judgments as the future where appropriate, that P3 would not enjoy a fair and effective appeal were he to remain overseas' (paragraph 154).

59. In paragraph 155 SIAC described the third issue as whether the Secretary of State's security concerns 'are irrelevant…or if not are overcome by the strength of the article 8 procedural case, whether examined in isolation or in combination with the article 8 substantive case'.

60. SIAC recorded that the Secretary of State's submission was simply that P3 had 'fallen a long way short of establishing that he will be unable to fairly and effectively participate in the deprivation appeal'. The Secretary of State did not make any submission about the weight to be given to concerns about national security (paragraph 156). I infer that that might have been because the Secretary of State did not accept that article 8 was engaged at all, because P3 was outside the jurisdiction for article 8 purposes when Decision 1 was made (see the Secretary of State's skeleton argument for the SIAC appeal, paragraphs 37-40).

61. SIAC said, in paragraph 157, that if 'a balancing exercise must be conducted' it was similar to what SIAC had done for the purposes of ground '1(a)'. SIAC added 'Given the relative weakness of the national security case, we must conclude that the interference with the procedural guarantees conferred by article 8 cannot be justified…Once the article 8 substantive case is factored in…the scales come down even more firmly in P3's favour'.

62. In paragraph 159 SIAC said that the question whether the appeal could be fair and effective was binary one. It was not enough to show that the exercise of the appeal

would be more difficult; 'it must be shown that the rights under article 8 have to all intents and purposes been stifled because the appeal… is unfair and ineffective'.

63. SIAC rejected Mr Grieves' bold submission in paragraph 161, relying, by analogy, on the reasoning of the Court of Appeal in *Begum* to the effect that common law procedural rights should be weighed against the national security case.

64. SIAC summarised its conclusion in paragraph 162: this was a 'powerful article 8 case (on both its limbs) pitted against a national security risk that is – on a preliminary assessment made on the material provided to us – not serious'. That meant that 'P3's article 8 rights win out'. SIAC allowed the appeal.

Permission to appeal

65. The Secretary of State submitted to SIAC a seven-page document in support of an application for permission to appeal. The Secretary of State made submissions under three headings, two of which were informed by the decision of the Supreme Court in *Begum*.

    i. SIAC did not apply the correct approach to national security issues. The Secretary of State relied on *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153, and *R (Lord Carlile) v Home Secretary* [2014] UKSC 60; [2015] AC 945 as explained in *Begum*.

    ii. P3's national security risks outweighed his substantive and procedural article 8 rights. The Secretary of State argued that SIAC was not deciding P3's deprivation appeal. It was considering the prior question whether it was necessary to order the Secretary of State to admit P3 to pursue that appeal. The question was what impediments there were to a fair and effective hearing. Any connection with article 8 rights was tenuous at best. The question was how the right to a fair and effective appeal interacted with the question of national security. The position was similar to that in *Begum*. The correct outcome was to stay the appeal until any impediments to a fair hearing had been resolved, but if the interests of national security made it impossible for the appeal to be heard, the appeal could not be heard. The impact on P3's family is irrelevant.

    iii. Decision 1 did not arguably interfere with article 8 rights. P3 is outside the jurisdiction and Decision 1 did not arguably interfere with the article 8 rights of his family (by contrast with Decision 2).

66. The Secretary of State summarised those arguments in four grounds of appeal.

    i. The Commission erred in its approach to national security for the reasons given in paragraphs 2-13 of the submissions.

    ii. The Commission's conclusion on article 8 (substantive) was wrong for the reasons given in paragraph 14 of the submissions.

    iii. The Commission's conclusion on article 8 (procedural) was wrong for the reasons given in paragraphs 15-23 of the submissions.

    iv. The Commission should have concluded that there was no interference with article 8 rights in any event for the reasons given in paragraphs 24-26 of the submissions.

67. SIAC gave permission to appeal on all four grounds.

The decision of the Supreme Court in Begum

68. The decision of the Supreme Court in *Begum* is central to the Secretary of State's appeal. The Supreme Court considered, in detail, the scope of an appeal under section 2 of the 1997 Act against a refusal of entry clearance, and the scope of an appeal under section 2B against a deprivation decision. The principal difference between *Begum* and this case is that while the appellant in that case, like P3, was deprived of her nationality when she was outside the United Kingdom, SIAC recorded, in paragraph 168 of its OPEN judgment in *Begum* [2020] HRLR 7, that her counsel had conceded that she could not rely on article 8 as she was 'outside the territorial scope of the Human Rights Act 1998'. The case therefore did not concern article 8 procedural rights, but common law rights to an effective appeal.

69. Ms Begum, like P3, appealed against the deprivation decision to SIAC under section 2B of the 1997 Act. She had also applied for entry clearance in accordance with the suggestion in *W2*, and both appealed against, and applied for judicial review of, the Secretary of State's refusal of that application. A further difference between this case and *Begum* is that in *Begum* SIAC had held no CLOSED hearing in which it had assessed the Secretary of State's CLOSED case in support of the deprivation decision or in support of the refusal of entry clearance. In this case, by contrast, SIAC has considered CLOSED material, albeit on a 'preliminary' basis.

70. In *Begum* SIAC decided three preliminary issues against the appellant. On the third issue, SIAC decided that she could not have a fair and effective appeal from Syria, but that that did not mean that her deprivation appeal should succeed on that ground alone. In the light of the concession to which I have referred, although the appellant's application for entry clearance was a 'human rights claim' as defined in section 113 of the 2002 Act, she did not have a right of appeal against that refusal under section 2 of the 1997 Act (see the last sentence of paragraph 104, paragraph 107 and paragraph 133 of the judgment of the Supreme Court). SIAC dismissed her appeal against the refusal and the Administrative Court dismissed her application for judicial review of the refusal.

71. The Court of Appeal allowed appeals against the LTE decisions, and the Divisional Court granted an application for judicial review of SIAC's decision on the third preliminary issue. The Secretary of State was ordered to give the appellant entry clearance. Both sides appealed to the Supreme Court.

72. The Supreme Court considered the scope of SIAC's appellate jurisdiction under sections 2 and 2B of the 1997 Act (in a non-human rights case) in paragraphs 28-81 of the judgment.

73. An appeal under section 2 lies to SIAC in the circumstances in which an appeal would otherwise lie to the First-tier Tribunal (Immigration and Asylum) Chamber under section 82(1) of the 2002 Act. Three provisions of the 2002 Act, sections 84 (grounds of appeal), 85 (matters to be considered) and 86 (determination of the appeal) originally applied to such an appeal. Each was repealed or amended by the Immigration Act 2014 (judgment, paragraph 36). An appeal against the refusal of a human rights claim must be brought on the ground that the decision is unlawful under section 6 of the HRA. In considering such an appeal, SIAC's task '…is not a secondary, reviewing function dependent on establishing that the Secretary of State

has misdirected himself or acted irrationally, but SIAC must decide for itself whether the impugned decision is lawful' (judgment, paragraph 37). This is significant in the light of a point I make at the end of this judgment.

74. In paragraph 52, the Supreme Court referred to *Rehman*. That was an appeal under section 2 of the 1997 Act, decided before section 2 was amended. The right of appeal was not confined to human rights issues, and if SIAC allowed an appeal, it had power, under the original version of section 4(1) of the 1997 Act, to exercise differently any administrative discretion involved in the impugned decision (judgment, paragraphs 34 and 52). SIAC, differing from the Secretary of State, had decided that it was entitled to form its own view about what could be seen as a threat to national security and of whether the allegations against the appellant had been proved. The Court of Appeal reversed that decision. The House of Lords upheld the decision of the Court of Appeal.

75. In paragraphs 55 and 56, the Supreme Court quoted paragraph 49 of Lord Hoffmann's speech. He said that SIAC was right that it had full jurisdiction to decide questions of fact and law, but that its approach 'did not make sufficient allowance for certain inherent limitations, first in the powers of the judicial branch of government and secondly, within the judicial function, in the appellate process'. However broad a court's jurisdiction, whether at first instance or on appeal, 'it is exercising a judicial function and the exercise of that function must recognise the constitutional boundaries between judicial, executive and legislative power'.

76. In paragraphs 56-7, the Supreme Court quoted further from Lord Hoffmann's speech in *Rehman*. What was meant by national security was a question of law; but the question whether something is in the interests of national security is not a question of law, but rather a question of judgment and policy. Such questions are not for judicial decision but for the executive.

77. SIAC nonetheless had 'at least three important functions'.

    i. The factual basis of the executive's opinion that deportation would be in the interests of national security must be established by evidence, although SIAC's ability to differ from the Secretary of State's evaluation was limited by considerations inherent in the appellate process.

    ii. SIAC could reject the Secretary of State's opinion on the ground that it was one which no reasonable minister could reasonably have held.

    iii. An appeal might turn on issues which were not the exclusive province of the executive, such as compliance with article 3 of the ECHR.

78. Lord Hoffmann said, in relation to the first point, that the question was not standard of proof, but future risk: 'It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security, but also the importance of the security interest at stake and the serious consequences of deportation for the deportee'. In paragraph 59, the Supreme Court described a difference of view between the members of the Appellate Committee on this point, and preferred the approach of Lord Hoffmann. The questions were whether there was no factual basis for the evaluation of the Secretary of State and whether the Secretary of State's opinion was one which no reasonable minister could have held. Proper deference should be shown to the primary decision-

maker. SIAC is not the primary decision-maker, and is institutionally less well qualified than the Secretary of State. The Secretary of State has 'the advantage of a wide range of advice from people with day-to-day involvement in security matters which [SIAC], despite its specialist membership, cannot match' (paragraph 60). The Supreme Court returned to the evaluation of risk in paragraph 61. An appellate body should allow a 'considerable margin to the primary decision-maker'. Even if the appellate body prefers a different view, 'it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could be reasonably entertained'. That limited approach might not apply to all the issues which SIAC had to decide, such as article 3 issues (paragraph 61).

79. A final reason for SIAC to respect the decision of the Secretary of State was that she, and not SIAC, was democratically accountable for decisions on national security. Decisions about national security should be made by people who can be elected and removed. The Supreme Court noted that this approach had been taken in later cases (*A v Secretary of State for the Home Department* [2005] AC 68 and *R (Lord Carlile) v Secretary of State for the Home Department* [2015] AC 945 (paragraph 62).

80. The Supreme Court added in paragraph 64 that it was necessary to bear in mind that the appellate process must enable the requirements of the ECHR to be met, since many appeals raise such issues. Those would vary from case to case. An appellant must be able to challenge the proportionality of any interference with qualified rights, such as those protected by article 8. 'SIAC must also be able to allow an appeal in cases where the Secretary of State's assessment of the requirements of national security has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or arbitrary: see for example, *IR v United Kingdom* (Application No 14876/12 (2014) EHRR SE14, paragraphs 57-58 and 63-65 (concerning an appeal under section 2… [before] the amendments made by the 2014 Act)'.

81. The Supreme Court said that the ECtHR had taken a more limited approach in deprivation cases. It has accepted that a denial or deprivation of citizenship 'may, in certain circumstances, raise an issue under article 8'. It has considered, however, not whether the deprivation is proportionate, but whether it is arbitrary, and what its consequences were for the applicant. In deciding whether deprivation is arbitrary, it has considered whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person concerned has had the procedural safeguards required by article 8, for example, *K2 v United Kingdom* (Application No 42387/13 (2017) 64 EHRR SE 18, paragraphs 49-50 and 54-61 (paragraph 64).

82. In paragraph 65, the Supreme Court contrasted the right of appeal conferred by section 2B with the rights to a review conferred by sections 2C to 2E. It observed that the limitations imposed by those sections did not apply to a section 2B appeal. The terms of the rule-making power conferred by section 5(1)(b) referred to 'the mode and burden of proof and admissibility of evidence. Clearly, appeals involving questions of fact as well as points of law are contemplated. That is also reflected in the rules made under section 5'. This paragraph of the judgment of the Supreme Court and the provisions to which it refers are significant for a point which I make at the end of this judgment.

83. In paragraphs 66-71, the Supreme Court made some further points about SIAC's role on a section 2B appeal. Section 2B does not authorise SIAC to exercise the Secretary of State's discretion afresh. The Supreme Court explained SIAC's role in relation to the Secretary of State's discretion to deprive a person of his nationality in paragraph 68. SIAC's jurisdiction was nevertheless appellate, not supervisory. But the characterisation of that jurisdiction as appellate did not decide what principles of law SIAC should apply. 'Different principles may even apply to the same decision, where it has a number of different aspects giving rise to different considerations, or where different statutory provisions are applicable… The principles which apply to SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law…But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights…SIAC has to determine that matter objectively on the basis of its own assessment (paragraph 69).' This passage, also, is significant for a point which I make at the end of this judgment.

84. The Supreme Court returned to the review of the Secretary of State's discretion in paragraph 70. Some aspects of the exercise of the discretion might not be justiciable. Others will depend on 'an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it and the acceptability or otherwise of the consequent danger, which are incapable of verifiable assessment…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…'.

85. In paragraph 71, the Supreme Court described a number of SIAC's 'important functions' in a deprivation appeal. Those are restricted, consistently with the approach in *Rehman,* but also include obligations imposed, in appropriate cases, by section 6 of the HRA. 'In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to findings, evaluations and policies of the Secretary of State…In reviewing compliance with [the HRA] it has to make its own independent assessment.' A similar point was made in the fourth, fifth and sixth sentences of paragraph 120 ('SIAC must reach its own view of the compatibility of decision with Convention rights, as an independent tribunal, rather than reviewing the decision of the Secretary of State'). In paragraph 129, the Supreme Court mentioned that it was common ground that the question whether the Secretary of State had complied with his policy had to be decided at the date of the Secretary of State's decision, 'whereas a question whether an administrative decision was compatible with article 2 or 3, as given effect by [the HRA] would normally be determined by the court or tribunal as at the date of its decision'. This last point is also significant for a point which I make at the end of this judgment.

86. The Supreme Court expressly disapproved the decisions of SIAC in *Al-Jedda v Secretary of State for the Home Department* (Appeal No SC/66/2008) and in *Zatuliveter v Secretary of State for the Home Department* (Appeal No SC/103/2010). *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 was not consistent with an approach which would put SIAC 'in the shoes' of the decision-maker, or to enable it to reconsider the matter de novo, or re-take the decision itself (paragraph 81).

87. In paragraph 110, the Supreme Court criticised the Court of Appeal's statement that '…given that the only way in which she can have a fair and effective appeal is to be permitted to come into the United Kingdom, fairness and justice must…outweigh the nationality security concerns'. The view that the right to an effective appeal was a 'trump card' was 'mistaken'. If the Court of Appeal was making an evaluative judgment, balancing the appellant's rights against national security, that was wrong for several reasons, including that 'even if the issue had been properly before it, it would have been confined to reviewing the reasonableness of the Secretary of State's assessment, bearing in mind the limitations of the judicial role which were explained in *Rehman* and other cases'. The Supreme Court added, 'If a vital public interest – in this case, the safety of the public, makes it impossible for a case to be fairly heard, then the courts cannot ordinarily hear it'. The appropriate response was to stay the appeal until the appellant was able to play an effective part in it (paragraph 135).

Lord Carlile

88. Mr Blundell QC also relied on the decision of the Supreme Court in the *Lord Carlile* case. It is not directly relevant, because although the Court referred to the principles which apply to challenges to high level political and foreign policy decisions in the context of Convention rights, the Court was considering an appeal from an application for judicial review, rather than an appeal from a specialist statutory court, with a different jurisdiction (in this context) from that of the Administrative Court. The approach of the Supreme Court in that case was consistent with *Rehman* and with *Begum*.

The submissions

89. Mr Blundell QC submitted that the approach which SIAC should take to the Secretary of State's assessment of national security is no different in a human rights case than in a case, such as *Begum*, in which the appellant does not rely on her Convention rights. SIAC had not followed that approach and had erred in law. Miss Harrison QC, on the other hand, submitted that *Begum* should be distinguished, and that, in any event, Lord Hoffmann's formulation in *Rehman* was not and could not have been an exhaustive statement of SIAC's role, since *Rehman* was not a human rights case, and it was recognised in *Rehman* that SIAC would have to consider human rights issues in other cases. The Secretary of State merely disagreed with SIAC's approach, which was not wrong in law.

90. Mr Blundell QC submitted, further, that as SIAC recognised in its grant of permission to appeal, if it did err in its approach to the assessment of the Secretary of State, its reasoning about the article 8 balance was 'undermined', whether that related to what SIAC described as P3's substantive article 8 rights (which in truth have been his family's article 8 rights) or to P3's procedural rights. The core of the reasoning in *Begum* applied with equal force in this case; in fact a fortiori, because, unlike P3, she was completely unable to take part in her appeal. That complete inability was not 'a trump card'. The correct outcome was to stay the appeal until any impediments to its fairness had been overcome.

91. Miss Harrison QC submitted that *Begum* could be distinguished on several grounds, not least because SIAC had considered the national security case, and P3 could rely on the procedural protections of article 8. SIAC did not treat the right to fair and

effective appeal as a trump card, but balanced that right against the national security case. SIAC specifically rejected Mr Grieves' 'bold submission'.

92. Mr Blundell QC also submitted that Decision 1 did not interfere with P3's article 8 rights. He was outside the United Kingdom when it was made, and therefore outside the jurisdiction of the ECHR, even if his family were inside the jurisdiction. SIAC's reliance on their presence in the United Kingdom as a 'jurisdictional hook' was flawed. The rights of those inside, and outside, the jurisdiction should be considered separately. *Johnson* does not decide this issue, as it is an article 14 case; and *K2* was an admissibility decision. K2's article 8 arguments were rejected on their merits. The ECtHR did not consider whether he was inside the jurisdiction when the decision was made.

93. Miss Harrison QC made some forensic complaints about the way in which the Secretary of State's case on this point changed during the proceedings. She submitted that *Johnson* and *K2* showed that a deprivation decision could engage article 8. She noted that the Secretary of State had apparently accepted that article 8 was engaged by a deprivation decision but was now arguing that article 8 was not engaged.

Issues

94. Having heard and reflected on counsel's submissions, I consider that this appeal potentially raises four main issues.

    i. What approach should SIAC take when it is considering the Secretary of State's assessment of the interests of national security in a human rights case?

    ii. Did SIAC take that approach?

    iii. Are substantive article 8 rights relevant in an appeal against a refusal of an application for entry clearance made on *W2* grounds?

    iv. Did SIAC err in law in its approach to P3's procedural rights?

What approach should SIAC take, in a human rights case, to the Secretary of State's assessment of the interests of national security?

95. The decision in *Begum* is clear about the approach which SIAC should take to this issue in a case which does not involve Convention rights. The question is whether SIAC may take a different approach in a human rights case, and in particular, whether SIAC may make its own assessment of the interests of national security. The key point is that when the House of Lords considered the appeal in *Rehman* SIAC had full jurisdiction to decide questions of fact and law (see paragraph 74, above), and could exercise differently any administrative discretion conferred on the Secretary of State (see paragraph 73, above). Despite that full jurisdiction, SIAC's role on an appeal was limited in the way that Lord Hoffmann described.

96. The Supreme Court considered obiter, in passages which are, nonetheless, strongly persuasive, what approach SIAC should take to Convention rights. In the passages which I have quoted or summarised in paragraphs 72, 83, and 85 the Supreme Court said that when SIAC has to decide whether the Secretary of State has acted incompatibly with an appellant's Convention rights, SIAC's function is not a secondary reviewing function. It has to decide for itself whether the impugned decision is lawful. It has to decide the matter 'objectively on the basis of its own

assessment'; it 'must reach its own view…as an independent tribunal, rather than reviewing the decision of the Secretary of State'.

97. The parties' submissions might suggest that there is a tension between those passages. I do not consider that there is. Even when SIAC had full jurisdiction in fact and law, and had power to exercise the Secretary of State's discretion afresh, there were narrow limits on its institutional capacity to review the Secretary of State's assessment of the interests of national security. SIAC has full power to review the compatibility of the Secretary of State's decisions with Convention rights. That means that SIAC must assess the risk of any breach of article 3, and the proportionality of any interference with qualified rights for itself. It does not entail, in my judgment, however, that SIAC can, in assessing proportionality, substitute its evaluation of the interests of national security for that of the Secretary of State. The starting point for an assessment of proportionality is that the Secretary of State's assessment goes into one side of the balance, unless it is susceptible to criticism in one of the ways described in *Rehman*.

98. This is not in any way surprising. In most contexts, when it is considering whether a fair balance has been struck, the ECtHR recognises that a degree of deference must be shown to the decisions of democratically accountable institutions. Domestic courts have followed that lead, and also recognised that, depending on the context, the assessment of the executive may be entitled to great weight, particularly where issues of public or social policy, or macro-economic policy are at issue. The Supreme Court has recently considered this issue again, in the context of the two-child policy in tax credits, in *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26.

99. The two decisions of the ECtHR which are referred to in *Begum*, and in which SIAC's role has been considered, that is, *K2* and *IR*, do not suggest that the ECtHR considered that SIAC should be entitled to second-guess the Secretary of State's assessment of national security in order to comply with Convention rights. On the contrary, in paragraph 57 of *IR*, the ECtHR referred to a series of cases from Bulgaria which established the need for procedural safeguards in expulsion cases involving national security. Even in such cases, 'measures affecting fundamental human rights must be subject to "some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information"…In the context of such proceedings, the executive's assertion that national security is at stake must be open to challenge. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where the assessment has no reasonable basis in the facts, or reveals an interpretation of "national security" that is unlawful or contrary to common sense and arbitrary…'.

100. The requirement of an effective remedy in article 13 was for a remedy which was as '"effective as can be" having regard to the restricted scope for recourse inherent in the particular context'. The remedy need not have an automatic suspensive effect. The appeal authority had to be able to 'reject the executive's assertion that there was a threat to national security where it found it arbitrary or unreasonable'. There had to be some form of adversarial process, 'if need be through a special representative after a security clearance'. The question whether the measure would interfere with article 8 rights and whether it struck a fair balance 'had to be examined' (paragraph 62). In

paragraph 63, the ECtHR explained why it considered that the procedures in SIAC complied with article 8's procedural guarantees.

101. The approach in *K2* (a deprivation case) is less intrusive: the questions are whether the deprivation was 'arbitrary'; that is, not in accordance with the law, whether the authorities acted diligently and swiftly, and whether the applicant was given the procedural safeguards required by article 8. In paragraph 61 the ECtHR said that the 'standard of 'arbitrariness"…is a stricter standard than that of proportionality'. In paragraph 57 the ECtHR did not accept that an out-of-country appeal necessarily made a decision to deprive a person of his nationality arbitrarily. It added that 'It would not exclude that possibility that an art. 8 issue might arise where there exists clear and objective evidence that the person is unable to instruct lawyers or give evidence while outside the jurisdiction; however art. 8 cannot be interpreted so as to impose a positive obligation on Contracting States to facilitate the return of every person deprived of citizenship while out the jurisdiction in order to pursue an appeal against that decision'. The ECtHR held that K2's complaint was inadmissible.

102. In my judgment, SIAC must apply the approach which is described in *Begum* to the Secretary of State's assessment of the interests of national security in an article 8 case, just as much as it should in a case in which Convention rights are not at issue. That was the approach of the Supreme Court in *Lord Carlile*'s case. I accept that there are significant procedural differences between an appeal to SIAC and the application for judicial review in that case. Nonetheless, there is a common principle, which is that in both contexts, what is balanced against the Convention rights of the appellant or claimant is the assessment of the executive, tested in the limited ways which are described in *Rehman* and endorsed in *Begum*. Despite its expert membership, SIAC does not have the institutional competence to assess the risk for itself as a primary decision-maker. Nor is it democratically accountable. If SIAC were to call the risk incorrectly, the executive, not SIAC, would suffer the political fallout. The executive can be removed at a general election; SIAC cannot. I have had the advantage of reading Sir Stephen Irwin's judgment in draft. I do not understand him to be differing in any way from my statement of the test which SIAC should apply in an appeal, such as this, in which article 8 rights may be engaged.

What approach did SIAC take to the Secretary of State's assessment of the interests of national security?

103. There are hints at SIAC's approach in paragraphs 97, 106, 107 and 157. In paragraph 97, it referred to a spectrum of risks to national security which were not 'serious', which might suggest that SIAC thought it could distinguish between a 'very weak' and a 'slightly less serious' risk. In paragraph 157, it referred to the 'relative weakness' of the national security case, which might imply that SIAC thought it had as wide a knowledge of risks to national security as the Secretary of State. In paragraph 106, SIAC said that it was 'evaluating' and 'assessing' the national security case. It had 'concluded, contrary to the assessment of' the Secretary of State that 'P3 does not represent a serious threat to national security of the United Kingdom'. In paragraph 107, it referred to a case 'which does not indicate that P3 represents a serious threat to national security of the United Kingdom'.

104. This language does not suggest that SIAC recognised that it was reviewing the Secretary of State's assessment, or that it should pay any deference to the assessment of the Secretary of State, still less that it actually did so. It suggests, rather, that SIAC

was making an assessment for itself. This impression is reinforced by paragraph 2 of SIAC's grant of permission to appeal: 'The Commission undertook its own evaluation of P3's threat to national security, paying due regard to the assessment of the Security Service.' The reference to 'due regard' is uninformative, as its meaning depends on what regard SIAC thought was due, and SIAC does not expressly explain in the judgment was regard it did think was due to the assessment of the Secretary of State.

105. That this was SIAC's approach is, if possible, even clearer from the terms of its CLOSED judgment, for the reasons I have given in the CLOSED judgment. In adopting that approach, SIAC erred in law.

106. I have considered whether the appeal should be remitted to SIAC on grounds 1, 2 and 3. I have not found this an easy question. In his observations when giving permission to appeal, SIAC's Chairman accepted unequivocally that if ground 1 succeeded, 'P3's article 8 rights, whether substantive or procedural, would have been overridden' (reasons for giving permission to appeal, paragraph 2). He added that 'If the appeal succeeds on ground 1 it must also succeed on ground 2'. As SIAC referred in paragraph 2 both to P3's substantive and procedural rights, the logic of the Chairman's position is that the appeal to this Court must also succeed on ground 3. I consider, nevertheless, by a small margin, that the formulation in paragraph 107 of SIAC's OPEN judgment, which is the judgment of the whole court, is, or might be, inconsistent with the dogmatic formulation in the grant of permission to appeal (and see paragraph 37, above). On that basis, it is SIAC, rather than this Court, which should think long and hard about whether the Secretary of State's assessment of the risk P3 poses to national security outweighs his procedural article 8 rights, taking into account, also, the points which I make in paragraphs 107-113, below.

The other issues on this appeal

Are substantive article 8 rights relevant in an appeal against a refusal of entry clearance made on W2 grounds?

107. In my judgment, despite the structure of its decision, SIAC did not distinguish accurately in its reasons between the article 8 rights which were potentially in play in the entry clearance and in the deprivation appeal. It is potentially confusing simply to say that family rights are an indivisible whole, and the presence of family in the United Kingdom provides a 'jurisdictional hook' for article 8 purposes (and for both appeals). It is uncontroversial that an application for entry clearance by a person whose family are settled in the United Kingdom may engage a state's positive obligations under article 8. That is recognised in the definition of 'human rights claim' in section 113 of the 2002 Act, and by the fact that Parliament has created a right of appeal against a refusal of entry clearance on human rights grounds. But SIAC was not considering an appeal against a refusal of entry clearance for the purposes of family reunion. Nor was SIAC considering Appeal 1. SIAC was considering an appeal against a refusal of entry clearance for a temporary and specific purpose (to take part effectively in Appeal 1), as it expressly recognised in paragraph 91.

108. That has at least four consequences. First, any procedural rights were conferred on P3, and not on his family, so that the substantive article 8 rights of P3 and of his family, and P3's mental health were irrelevant. A second, linked point is that the effects of the deprivation decision were also irrelevant. SIAC should have should concentrated on

whether or not P3 could have an effective appeal, and not on the effects of Decision 1. At times that focus is blurred by SIAC's separate consideration of P3's 'substantive' and 'procedural' case, and at times by its elision of the two (for example in paragraph 154). Much, if not all, of SIAC's consideration of P3's 'substantive' article 8 case belonged, if anywhere, in Appeal 1, and not in Appeal 2.

109. Third, on analysis, Appeal 2 had considerable potential implications for the jurisdictional aspect of the Appeal 1. The jurisdictional question in relation to Appeal 2 depends not on whether P3's family were in the United Kingdom, but on whether P3 was in the jurisdiction for the purposes of article 8, as, on the entry clearance appeal, he was seeking to vindicate procedural rights said to be conferred on him by article 8 for the purposes of Appeal 1. While the presence of an appellant's family in the United Kingdom may impose a positive obligation to admit him for the purposes of family reunion, it by no means follows that it imposes a positive obligation to admit him for the purpose of taking part in his deprivation appeal, if he is not otherwise in the jurisdiction. The procedural rights, if any, which are in issue are the procedural rights, if any, which are conferred by the deprivation decision. P3 left the United Kingdom of his own accord and was outside the jurisdiction when the deprivation decision was made. In such a case, article 8 may well not apply. SIAC's observation that the reasoning in *Kiarie* 'does not turn on [the appellants'] physical presence in the UK' (paragraph 142; see also paragraph 128) is wrong. The certificates in that case enabled the Secretary of State, who would otherwise have been prevented by statute from doing so, to remove the appellants from the United Kingdom, where they would have been able to give evidence live, to a place where they could not do so. The certificates in that case were unlawful because they deprived the appellants, who had arguable appeals, of their statutory rights to an in-country appeal in circumstances where they could not fairly exercise those rights from abroad. Moreover, in paragraph 7 of his judgment, Lord Wilson distinguished the situation of the appellants in that case from those who bring appeals, such as against refusals of entry clearance, from abroad.

110. Further, the question is not simply, as SIAC appears to have thought, whether a deprivation decision in the abstract engages, or interferes with, article 8 rights, but whether a deprivation decision on particular facts does so. *Johnson* does not help, and not only because it was an article 14 case. No deprivation decision was made in Mr Johnson's case. Rather, because of quirks in nationality law, he was denied British citizenship in circumstances where if his parents had been married when he was born, or had married later, he would have been a British citizen. Moreover, he was in the jurisdiction at all relevant times. That was significant, because it meant that there could be no issue about whether he was in the jurisdiction for the purposes of article 8. *Johnson* simply cannot found an inference that if a person is deprived of his nationality when he is outside the United Kingdom, he is somehow within the jurisdiction for article 8 purposes, contrary to SIAC's approach in paragraph 124. *K2* is an admissibility decision, and SIAC itself recognised in paragraph 126 that that fact 'somewhat' reduced the weight which it could give to *K2*. *K2* was in Sudan when the deprivation decision was made. There is no reasoning in *K2* which explains why (or even whether) the ECtHR considered that article 8 was engaged or interfered with. The ECtHR seems to have assumed as much, without explaining why.

111. The best forum for considering and definitively deciding, in a case like this, whether the deprivation decision engages, or interferes with, an appellant's article 8 rights, and

whether that interference is justified, is the deprivation appeal. However, when, as here, an appellant has applied for entry clearance to pursue his deprivation appeal, SIAC will inevitably have to decide the jurisdiction issue raised by the deprivation appeal in the entry clearance appeal (unless an appellant confines his argument to common law fairness). I will not express a concluded view on the jurisdiction issue. I do not consider that it would be right for me to express such a view. I consider, rather, that, given the errors of law in SIAC's approach which I have described, that issue should be remitted to SIAC, which is also seised of Appeal 1, for SIAC to reconsider it in the light of this Court's judgment. It is desirable that SIAC, the specialist court, should reconsider this issue with a full understanding of its implications.

112. It is as well that, in future cases, the parties are alive to this. The result of the entry clearance appeal may well have significant implications for the deprivation appeal, which are potentially wider than simply a decision on whether or not the entry clearance appeal succeeds.

Did SIAC err in law in its approach to P3's procedural rights?

113. I also consider that SIAC erred in law in its approach to the question whether P3 could have a fair and effective appeal. For this purpose I assume that P3 was able to rely on article 8, despite the fact that he was and is outside the jurisdiction. SIAC recognised that the question was a 'binary' question. It was not whether or not P3's appeal would be more difficult, but whether the right to a fair and effective appeal would be 'to all intents and purposes…stifled' (paragraph 159). Yet SIAC did not hold that P3 could not have a fair and effective appeal. It held, rather, that a properly prepared appeal could be held remotely in spring 2022, but that 'the risk that the procedural guarantees afforded by article 8 would be denied to P3 on the assumption that he remain in Iraq is now unacceptably high'. It had, after all, recorded the concession of Mr Grieves that P3 could give proper instructions from a safe third country, but that it would be 'very difficult' and would 'take far too long'. SIAC then took into account the disruption to P3's family life between the hearing date and spring 2022, including the 'real possibility' that P3 would commit suicide or his family would break down. Those led it to the conclusion that 'P3 would not enjoy a fair and effective appeal were he to remain overseas' (paragraph 154). In other words, SIAC was not able to answer the 'binary' procedural question without taking into account irrelevant factors. SIAC recorded, but did not confront, the submission of Mr Tam QC that, as P3 could exercise a rational choice about whether to commit suicide, the risk of suicide was not relevant. Moreover, P3's mental health difficulties were longstanding, and to a significant extent the result of his experiences in Iraq. They were not the responsibility of the Secretary of State. On these facts, P3 clearly could enjoy a fair and effective appeal in spring 2022, if he chose to. That meant that his procedural rights (if he had any) would not be stifled. There is a real question whether a reasonable decision-maker could have concluded otherwise. Finally, although SIAC recognised in paragraph 93 that if P3 were admitted to the United Kingdom it might not be possible to remove him for a long time, and that that should weigh in the balance against the grant of entry clearance, the only factor which SIAC in fact placed in the balance was its assessment of the national security case. By a narrow margin, I consider that this issue, too, should be remitted to SIAC.

Postscript

114. Finally, in the course of his oral submissions, Mr Blundell QC indicated that SIAC might now be taking an approach to its role on appeals such as section 2B appeals which caused this Court some concern, and as I have mentioned in paragraph 6, above, led to further written submissions after the hearing. This approach seems to have been prompted by the decision in *Begum*. I consider that this approach may be unduly narrow, and one which is not required by *Begum*. *Begum* is authority for the proposition that, broadly, SIAC should take a public law approach to challenges to the Secretary of State's assessment of national security. It is not authority for any wider proposition.

115. The 1997 Act clearly distinguishes between appeals and applications for statutory reviews (see sections 2C-E of the 1997 Act). SIAC must apply the principles which apply on an application for judicial review to the latter, but not to the former. On the appeals which are not statutory reviews, SIAC is not confined, on all issues which might arise on that appeal, to applying public law principles, still less to considering only the materials which were before the Secretary of State when the Secretary of State made the impugned decision. There are at least two relevant distinctions. First, on some issues, the law does not require SIAC to apply a traditional public law approach at all (for example, on issues about Convention rights, as is clear from many of the passages in *Begum* which I have quoted or summarised above) and see paragraph 82, above. Second, even where SIAC is limited to applying public law principles (for example, when it considers the Secretary of State's assessment of the interests of national security), it does not necessarily follow that SIAC should confine itself to material which was before the Secretary of State. For example, SIAC is entitled to take into account material which comes to light on an exculpatory review; and that material might not have been before the Secretary of State when she made the decision. Moreover, SIAC may exclude material which the Secretary of State took into account, for example, if it decides that there is a risk that it was obtained as a result of article 3 ill treatment. In any event, SIAC hears evidence on an appeal, which was not before the Secretary of State, and is entitled to make of that evidence what it may.

Conclusion

116. For the reasons I have given above, I would allow the Secretary of State's appeal on all grounds. I consider that SIAC erred in law in substituting its assessment of the interests of national security for that of the Secretary of State. Further, and in any event, for the reasons given in the CLOSED judgment, I also consider that SIAC erred in law in its approach to the CLOSED material, by failing to take into account potentially significant material. I also consider that SIAC erred in law on the question of jurisdiction and, if it arose, on the question whether P3's right to an effective appeal would be stifled. I consider that all the issues should be remitted to SIAC for it to reconsider them in the light of this judgment and of SIAC'S relevant findings of fact.

Sir Stephen Irwin:

117. I am indebted to Elisabeth Laing LJ for her erudite judgment, which I have had the advantage of reading in draft. I gratefully adopt her account of the facts of the case.

However, since this case has important implications for the approach in SIAC, I will set out my view in as economical a way as possible.

118. I begin with the first issue defined by Elisabeth Laing LJ in paragraph 94 of her judgment: "What approach should SIAC take when it is considering the Secretary of State's assessment of the interests of national security in a human rights case?" I agree that the passages from the decision in *Begum* in the Supreme Court relied on by the Secretary of State are "… obiter … [but] nonetheless strongly persuasive". I agree that there is no fundamental conflict between the approach set out by Lord Reed in his judgment in *Begum* and the critical distinctions derived from section 2B of the 1997 Act (right of appeal) and sections 2C to 2E (right of review). Put simply, a proper degree of "deference" or respect for the national security assessment of the Secretary of State for the Home Department is consistent with that distinction. Put equally simply, a proper degree of respect for the national security assessment of the Secretary of State for the Home Department (something which, in my own experience of this practice of SIAC, at first instance or hitherto on appeal, has always been observed) must not be mis-translated into an erosion of the right of appeal under section 2B so that it becomes indistinguishable from a review under sections 2C to 2E.

119. The remarks of Lord Hoffmann in *Rehman*, summarised by Elisabeth Laing LJ, do require careful consideration and in context. The context was an approach then adopted by SIAC under the first evolution of the 1997 Act, which amounted to a fresh, *de novo* approach to all aspects of an appeal, including the relevant national security assessment. Lord Hoffmann was delivering a corrective to that approach. In setting out his "three important functions" he was explicit in expressing them to be the minimum functions in an appeal: the Commission was serving "at least" those functions. Lord Hoffmann did not (could not) of course have had in mind the distinctions between an appeal and a statutory review as expressed by Parliament in the later statutory amendments.

120. I regard this last as an important point to bear in mind, since it appeared to me that the end point of the argument advanced by Mr Blundell QC for the Secretary of State would be to obliterate the distinction, both as to the approach to a national security assessment, and as to the evidence by which it would be assessed, within the carefully designed procedures arising in SIAC. Those two elements are closely intertwined. It follows that I agree with the observations of Elisabeth Laing LJ in paragraph 115 of her judgment.

121. Lord Hoffmann identifies two key principles at work within the first of these functions: "for an appeal in SIAC: the limitations of an appellate process and the separation of powers". It may be that neither in *Rehman* nor in *Begum*, the House of Lords and the Supreme Court respectively were given a full picture of the degree of disclosure which the SIAC procedures can and do make available to the Commission. Importantly, the procedures are explicit in prescribing that material which is adverse to the case of the Secretary of State, and in the jargon "exculpatory" of the appellant, is always made available. This goes well beyond the disclosure of the material the Secretary of State relies on (in CLOSED). The material was, or by implication must have been, discounted in reaching the adverse assessment on national security. Any diminution of disclosure would indeed confine the appeal to the dimensions of a review.

122. Lord Hoffmann in *Rehman* stated that the principle of separation of powers prevented the Commission, where the individual "was shown to be actively supporting" terrorism in Kashmir, from rejecting the assessment that this activity "was contrary to the interests of national security". This is an unsurprising proposition, since the implications of active support for terrorism in Kashmir are matters of high policy and lie far beyond the evidence properly disclosed in a SIAC appeal. That is far different, for example, from the consideration as to whether the individual's "active support" meant expressing his views at one demonstration, or mounting a global internet campaign, matters in which the "degree of deference" to be shown by a fully informed specialist tribunal must necessarily be less than in respect of questions of high policy. One difficulty which it seems to me is attendant on such short formulations as those expressed by Lord Hoffmann is that subsequently they may be misapplied in too sweeping a fashion.

123. Lord Hoffmann's second "function" of SIAC was that the Commission may reject the Home Secretary's opinion on the ground that it was "one which no reasonable minister advising the Crown could in the circumstances reasonably have held" – in effect, a *Wednesbury* test. This part of Lord Hoffmann's speech provided a key focus for Lord Reed in *Begum*. I hope it is sufficient to refer to paragraph 69 of the judgment of Lord Reed in *Begum*, summarised by Elisabeth Laing LJ in paragraph 83 above. Lord Reed there makes clear that:

> "… the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. …in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, 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, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment."

124. I will return to the last part in that passage very shortly, but before leaving the second function of Lord Hoffmann, summarised by Lord Reed as approximating "largely" to the approach in judicial review, I wish to refer briefly to the decision of the European Court of Human Rights in *IR v United Kingdom* (2014) 58 EHRR SE14. This case was cited by Lord Reed in paragraph 64 of *Begum*. It was not the subject of oral argument before us. It was touched on by Elisabeth Laing LJ in paragraph 99 above. In *IR v UK* the Strasbourg Court was considering the adequacy of the procedures in SIAC as a safeguard for Convention rights in national security cases. Much of the focus was on procedures. However, the formulation of the requisite basis of interventions, quoted in paragraph 99, might be thought to go a little beyond a strict *Wednesbury* test: the relevant independent authority "must be able to react in cases where the assessment has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense (emphasis added) and arbitrary …"

125. Both Lord Hoffmann and Lord Reed are explicit in stating that it is the function of the judicial body to make its own independent assessment of compliance with the Human Rights Act. In respect of a qualified right, this inevitably involves a balancing exercise. As Lord Hoffmann emphasised: "Whether a sufficient risk exists is a question of evaluation and prediction based on evidence. In answering such a

question, the executive enjoys no constitutional prerogative" [*Rehman* paragraph 54; *Begum* paragraph 71]. As Lord Reed made clear in *Begum* at paragraph 133, the question of breach of the Human Rights Act did not arise in that case.

126. Drawing the threads together, I accept that in approaching the evaluation of the national security assessment of the Secretary of State, SIAC must pay real respect, or great deference, to that assessment. That is the clear impact of *Rehman* and of the remarks of Lord Reed, strictly *obiter dicta* but of the highest persuasive authority, in *Begum*. I agree with Elisabeth Laing LJ that it is not a permissible approach for SIAC simply to substitute its own views on national security. However, it is the function of SIAC to scrutinise all the evidence, OPEN and CLOSED, with a critical and expert intelligence, 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, to decide whether the conclusions of the Secretary of State were reasonable and, adopting the phrase of the Strasbourg Court, conformed with common sense. In doing so, SIAC is bound to show deference at all stages and at all levels, to the assessments of those responsible for making those assessments professionally. In matters of high policy, that deference will be effectively simply acceptance. At more granular levels, SIAC will ask questions and consider the detailed replies. Experience suggests these questions will be considered thoughtfully, and the answers very frequently persuasive. Proper deference there must be, but it does not amount to a simply supine acceptance of the conclusions advanced by the Secretary of State. I do not understand that to be in any way implied by the decisions in *Rehman* or *Begum*.

127. I therefore turn to the conclusions of SIAC in this case. I am less critical perhaps than Elisabeth Laing LJ of the language used by SIAC in this case. The Commission did make it clear that it was "paying due regard" to the assessment of the Security Service, although I quite agree that the degree of regard was not further developed. I too have considered the CLOSED judgment on this aspect of the case. I too agree that there are sufficient indications there to suggest that the Commission may have paid inadequate respect or deference to the assessments of the Security Service. For those reasons, I agree that SIAC's existing conclusions on this issue cannot stand.

128. I agree with Elisabeth Laing LJ that this case should be remitted to SIAC.

129. For all the reasons I have given, proper deference in the context of properly tested evidence is not to be equated to obligatory acceptance of the position advanced by the Secretary of State. When giving permission to appeal, the Chairman indicated that if the national security assessment of the Secretary of State were accepted, then that might well outweigh the human rights claim here, but that premise may yet not be made out, even following the approach indicated in *Begum* and in this Court. There are sufficient indications in the two judgments of SIAC that such might be the outcome to justify the remittal of the case.

130. I have not dealt with the remaining issues in the case, as addressed by Elisabeth Laing LJ in paragraph 107 and following. Briefly, I agree with her that the analysis by SIAC of the Article 8 rights in play, substantive and procedural, as affecting the entry clearance and the deprivation appeal, was in error. I do not intend to extend this judgment by discussing these matters more fully, but to my mind they also add benefit to a reconsideration of the case once remitted. Finally, it may be that the passage of time will mean that fresh considerations arise as to what arrangements can now be made for a fair and effective out of country appeal.

131. I would further add that arising from the matters set out in paragraphs 31 and 32 of the CLOSED judgment of Elisabeth Laing LJ, there would be a further benefit from remitting the case for reconsideration.

132. For these reasons, I agree with Elisabeth Laing LJ that the decision of SIAC should be quashed, the appeal allowed and the matters remitted.

Lord Justice Bean:

133. I also agree that the Home Secretary's appeal should be allowed and the decision of SIAC quashed. I too would remit the matters to SIAC – constituted, so far as practicable, as before – for reconsideration. I do not regard the outcome of the remitted case as a foregone conclusion. At the remitted hearing SIAC will be able to consider the whole of the evidence as it then stands, with the advantage (which it did not have previously) of the guidance given by the Supreme Court in *Begum* as well as our judgments in the present appeal.

134. SIAC is a specialist judicial tribunal which hears appeals in national security cases and has power to use the closed material procedure. There would be no purpose in Parliament establishing such a body if it could not scrutinise with a critical eye the assessment of risk made by those advising the Secretary of State; and I do not find anything in the carefully calibrated judgment of Lord Reed PSC in *Begum* to suggest that it should not do so.

135. As Sir Stephen Irwin has written at paragraph 126, with which I entirely agree, SIAC must grant due deference to the assessment made by the Secretary of State. In matters of high policy, that deference is likely to amount simply to acceptance. But at more granular levels there must be careful scrutiny of the evidence as a whole, and proper deference in the context of properly tested evidence is not to be equated with obligatory acceptance of the position advanced by the Secretary of State.