SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC/184/2021**
Hearing Date: **17th January 2023 to 19th January 2023**
Date of Judgment: **3rd March 2023**

Before

THE HONOURABLE MR JUSTICE CHAMBERLAIN
UPPER TRIBUNAL JUDGE GLEESON
MR PHILIP NELSON

Between

E5

Appellant

-and-

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Amanda Weston KC and Anthony Vaughan (instructed by **Leigh Day**) appeared on behalf of the Appellant

David Blundell KC and Jack Anderson (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Adam Straw KC and David Lemer (instructed by **the Special Advocates' Support Office**) appeared as Special Advocates

Introduction

1 E5 was born in 1986 in a non-European country ("X"), of which he was and remains a national. He came to the UK in 2000 and in 2002 was naturalised as a British citizen under s. 3(1) of the British Nationality Act 1981 ("the 1981 Act"). He completed his secondary education in South London.

2 In 2007, when he was 21, E5 pleaded guilty to five counts of being concerned in the supply of Class A drugs and was sentenced to four years' imprisonment, reduced to 3 years and 4 months on appeal.

3 In 2009, after his release from prison, E5 and others were seen acting suspiciously near a block of flats. They got into a car, which crashed after being chased by police. E5 and another man ran off, but were arrested. The police found a blank-firing pistol, fitted with an improvised barrel, with a round of live ammunition in the breach, near the car. The hammer was cocked and the safety catch off. There were a further five rounds in the magazine. E5's DNA was found on the weapon. He was charged with possession of a firearm with intent to endanger life, possession of ammunition with intent to endanger life, possession of a prohibited firearm and possession of ammunition without a certificate. At a late stage in the proceedings, E5 pleaded guilty to these offences. For these and a further unconnected offence of dangerous driving, he was sentenced to a total of 9 years and 4 months' imprisonment (after credit for plea). He was released on licence in 2015.

4 After his release, he moved in with his girlfriend ("M"), with whom he had a daughter ("S") born in 2016. After a few years, E5 separated from M, though they remained on good terms and he continued to see S. He went to live with his father and other members of his family. He worked, often doing night shifts, and made financial contributions to M for S's benefit.

5 E5 made two trips abroad without obtaining permission to do so, in breach of his licence conditions. The first was to Dubai. The second, from 20 to 22 September 2019, was to Poland, to attend a "Krav Maga Urban Extreme Active Shooter" course, run by an organisation called BZ Academy ("the Active Shooter Course"). It is now common ground that this involved training in the use of real firearms. On his way back, he was stopped at London City Airport and questioned under Sch. 7 to the Terrorism Act 2000. A digital download of E5's mobile phone was taken, which showed searches related to weapons.

6 In January 2020, E5 and his father decided that he needed a change of scene. His father bought him a return ticket to country X (the return flight being six months later) and he went to live with family members there. He could not return when he had intended to because of travel restrictions imposed due to Covid-19.

7 On 14 May 2021, the Secretary of State for the Home Department ("SSHD") decided to make an order to deprive E5 of his British citizenship under s. 40(2) of the British Nationality Act 1981 on national security grounds. E5 now appeals pursuant to s. 2B of the Special Immigration Appeals Act 1997 against that decision.

8 There are five grounds of appeal:

The Respondent's national security assessments in respect of E5 are irrational. (**Ground 1**)

The reliance on the port stop was unfair because E5 should have been given the opportunity to comment on it. (**Ground 1A**)

Deprivation of citizenship gives rise to a real risk of treatment which would breach Articles 2 and/or 3 ECHR if those articles were engaged and is therefore in breach of SSHD's policy. (**Ground 1B**)

The decision constituted an interference with E5's rights to respect for his family life under Article 8 ECHR (in particular, because it disrupts his relationship with S and with his father and siblings) and the interference (a) is not prescribed by law in the absence of a published policy explaining the circumstances in which the deprivation power will be used, (b) breaches the procedural requirements of Article 8 because of the absence of proper disclosure and (c) is disproportionate in all the circumstances. (**Ground 2**)

The disclosure given does not meet the minimum standard set out in *AF (No. 3) v SSHD* [2009] UKHL 28, [2010] 2 AC 269 and is inadequate at common law and under Articles 6 and 8 ECHR. (**Ground 3**)

The OPEN case against E5

9 The national security case is contained in an assessment by the Security Service ("MI5"), a version of which was made OPEN and a further OPEN version of which was provided following the rule 38 process. Under the heading "Background", MI5 note E5's history of criminality. The key assessment is that E5 "has an Islamist extremist mindset and has undertaken weapons training, which was likely in preparation for fighting on behalf of an Islamist extremist group". Details of the Active Shooter Course are given. It is noted that, when questioned at London City Airport, E5 said that he did not use any "real firearm" on the Active Shooter Course, yet the course materials available on the web indicate the contrary.

10 MI5's assessment was that, should E5 return to the UK, there is a real risk that he would:

> "a. Use his status as an Islamist extremist to radicalise and inspire others in the UK to conduct Islamist extremist activities.
>
> b. Utilise the training that he has undertaken to provide instruction and guidance to Islamist extremists in the UK. We assess that this could extend to:
>
> i. instructing others in the use of firearms;
> ii. providing firearms to Islamist extremist associates.
>
> c. Himself engage in violent Islamist extremist activity."

11 Accordingly, MI5 recommended that SSHD could be satisfied that E5 should be deprived of his British citizenship "on the grounds that his presence here would pose a threat to UK national security".

12 The basis for the challenged decision was set out in the submission to SSHD, the OPEN version of which includes the following at para. 1:

> "The Security Service (MI5) assess that E5 has an Islamist extremist mindset and has undertaken weapons training, which was likely in preparation for fighting on behalf of an Islamist extremist group. The Security Service note that whilst some of E5's interest in firearms and combat may relate to his criminal interests, his participation in this training is likely to have been related to his Islamist extremist mind-set and was likely undertaken in order to fight on behalf of an Islamist extremist group. The Security Service assesses that the nature and extent of the risk that E5 poses to national security is such that deprivation is the most effective way to fully manage that threat, in that it will prevent E5 from returning to the UK and will restrict his ability to travel."

13 The submission includes a "Mistreatment Risk Statement for [country X]", which acknowledges SSHD's practice of not depriving individuals of citizenship if doing so would expose them to a real risk of mistreatment that would constitute a breach of Articles 2 or 3 if they were within the UK's jurisdiction and those Articles were engaged. The statement notes the Commission's decision in *X2 v SSHD* (SC/132/2016) (18 April 2018), in which the Commission held that SSHD's practice required her to assess foreseeable risks of harm to the appellant which were a direct consequence of the deprivation decision. Under the heading "Key Points", the statement says this:

> - [E5] is currently in [country X].
> - FCDO assesses that if the [country X] authorities were to identify activity by [E5] that broke [country X] law, that he would likely be detained.
> - FCDO assess that [E5] would likely be treated broadly the same in [country X] detention whether or not he mainted [sc. maintained] British nationality.
> - FCDO assess that if [E5] were to be detained, there would be a real risk of cruel, inhumane or degrading treatment.

14 The remainder of the statement makes clear that country X generally applies a lower threshold for detention of those they consider to be a national security risk and that, if the authorities of country X became aware that E5 had been deprived of his British citizenship on national security grounds, this could lead to his detention. If detained, he would be likely to be treated the same whether or not he maintained his British nationality. However, detention facilities in country X "generally fall short of Article 3-compliant standards".

The legal framework

15 The correct legal approach to deprivation and entry clearance appeals was considered by SIAC in *U3 v SSHD* (SC/153/2018 and SC/153/2021) (4 March 2022). The Commission granted permission to appeal to the Court of Appeal, but we understand that the appeal will not be heard until April 2023. Until the Court of Appeal's judgment is handed down, it was common ground that we should follow *U3*, as the Commission did in *B4 v SSHD* (SC/159/2018) (1 November 2022).

A procedural issue

16 Shortly before the hearing, Leigh Day, E5's solicitors, wrote to the tribunal indicating that the parties had been unable to agree a timetable. There was a dispute between the parties as to the order in which evidence should be taken. Leigh Day submitted that SSHD should go first, so that SSHD's witness could be cross-examined on the question whether E5 would put himself at risk of detention in country X if he were to give evidence remotely from that country.

17 As SSHD did not agree with this proposal, we indicated that we would sit in private to consider this procedural issue at the outset of the hearing on 17 January 2022.

18 We decided that the best way to proceed was to permit E5's OPEN representatives to ask questions of SSHD's national security witness, but only on the issue whether giving remote evidence might expose E5 to the asserted risk. We would then hear CLOSED evidence and submissions on that topic alone, before recording our conclusion in OPEN. It would then be for E5 to decide, in consultation with his representatives, whether he wished to give evidence or not. If so, he would give that evidence first, with SSHD's substantive evidence following in the usual way.

19 We indicated orally, in OPEN, that SSHD's view was that the risk to E5 would not be increased by giving evidence remotely via Microsoft Teams; and that, having heard OPEN and CLOSED evidence and submissions, the Commission agreed with this view. We made clear that neither SSHD nor the Commission could say anything about the privacy of the place from which E5 was giving evidence; E5 would have to satisfy himself about this. In the light of this, E5's representatives indicated, having taken instructions, that he was prepared to give evidence remotely and E5 did so.

E5's evidence

20 We heard evidence from E5's father and sister. Both were, in our view, honest witnesses. The most significant point to emerge was that E5 had not told either his father or his sister that he was planning to go to Poland. He told his sister that he had gone after he returned, because he needed her help to secure a refund for an unused portion of his airline ticket, but he did not tell her about the Active Shooter Course. His father was unaware of his trip to Poland until after the decision had been taken to deprive him of his citizenship.

21 As Ms Weston KC submitted, E5 was plainly an unsophisticated witness – though his level of educational attainment is not significantly lower than average. At points, he said rather more in answer to questions than he needed to. It may be right to characterise his

evidence as "unstudied", as Ms Weston submitted. It does not follow, however, that we regard his evidence as satisfactory.

22 First, when asked about his criminal history, he attempted to minimise his culpability unconvincingly. In relation to the first conviction (for drugs supply offences), he maintained that he had not himself been dealing drugs. The judgment of the Court of Appeal (Criminal Division) allowing his appeal against sentence makes clear that he had, at least on one of the two occasions forming the subject matter of the charges. As to the firearms offences, he maintained that he had nothing to do with the loaded weapon found. The judgment of the Court of Appeal (Criminal Division) refusing permission to appeal against sentence makes clear that his DNA was found on it and that he pleaded guilty to possession of a firearm with intent to endanger life. The sentence imposed (9 years for the firearms offences, after credit for plea) reflects the seriousness of this offending.

23 Second, E5's explanation for his trip to Poland was also not convincing. He explained that he had been refused accreditation with the Security Industry Authority (not surprisingly, given his convictions) and had wanted to obtain a certificate that would enable him to work as a close protection bodyguard, which he said would enable him to travel overseas protecting celebrities. Despite E5's lack of sophistication, we found it difficult to credit that he truly believed such a career might be open to him, given his convictions and the refusal of accreditation by the SIA, and equally difficult to credit that he believed that completion of a course of the kind he attended in Poland would be sufficient to qualify him for this role.

24 Third, E5's evidence as to his browsing history, as discovered on the download of his mobile telephone taken at London City Airport, was not credible. He said that he had not searched for weapons. The records deployed in OPEN show that he had searched for "conversion kits" for "submachine guns" and "pistols", "ak 47 with fx ammunition" and "buying ak 47 fx ammunition", among other things. These were not just sites he had stumbled across; they were search terms he had used. E5 gave no adequate explanation for having done this: it certainly cannot have been connected with any desire to work in the security industry, since even if that line of work had been a realistic possibility, he could hardly have thought he would be expected to provide his own weapons.

25 Even if it had not been for the CLOSED evidence, we would have found E5's evidence unreliable. When viewed against the CLOSED evidence, we have no doubt that the evidence E5 gave was false in several respects.

26 We read with care the expert report of Prof. Robert Gleave, Professor of Arabic Studies at the Institute of Arabic and Islamic Studies, University of Exeter. We bore in mind his conclusion that the posts relied on in OPEN case are not, in themselves or taken together with attendance at the Active Shooter Course, indicative of an Islamist extremist mindset. We accept that evidence, but Prof. Gleave's conclusions were necessarily based on OPEN evidence alone and must be seen in that light.

Evidence for SSHD

27 SSHD's evidence on the national security case was given by NG, an MI5 officer. He was not able to answer all of Ms Weston's questions in OPEN. However, we have had the opportunity to hear his answers to those questions in CLOSED. Our overall view is that NG was an impressive witness. He had a good understanding of the material deployed against E5 in OPEN and CLOSED, was careful and balanced in assessing what the material did, and did not, show and made fair concessions when appropriate.

28 NG candidly accepted that the OPEN evidence, taken together, was insufficient to justify the conclusion that E5 had an Islamist extremist mindset. This was an important and, we consider, appropriate concession.

29 In OPEN, NG noted that SSHD's decision was not based on E5's history of criminal offending, but said that his conviction for firearms offences was part of the background against which the risk he posed had to be viewed. NG was, in our view, right to regard as significant what was said on BZ Academy's website about the Active Shooter Course. The course was very clearly marketed as including training with real weapons.

30 We did not find significant the fact that E5 had reposted content by Anwar Al Awlaki (who had subsequently gone on to become well known as an Al Qaeda radicaliser), since the particular content reposted by E5 was not extremist in nature.

Ground 1

31 The parties agreed that the role of SIAC is not to decide for itself whether SSHD was correct in its assessment of E5's state of mind and the risk he posed, but to examine that assessment critically applying the principles applicable in an application for judicial review, i.e. seeking to identify any public law flaw. Ms Weston submitted that SIAC should apply strict scrutiny, mindful of the relationship of necessity between the risk posed and the extreme nature of the measure taken (deprivation of citizenship).

32 As was said at [31]-[33] of SIAC's judgment in *U3,* SIAC and the Administrative Court both (typically) approach national security assessments applying judicial review principles. But they differ in their constitution and procedures. SIAC's partly expert constitution and its ability to hear and probe evidence orally give it a "more powerful microscope", though the flaws it is looking for are the same.

33 In this case, NG candidly and in our view properly accepted that the OPEN evidence is insufficient on its own to sustain the assessment that E5 has an Islamist extremist mindset. Without it, the assessment as to his purpose in attending the Active Shooter Course, and the overall assessment that he poses a risk to UK national security, would fall away. Our consideration of the question whether SSHD's assessment discloses any public law flaw must, therefore, necessarily concentrate on the CLOSED evidence. Having examined that evidence with care, we do not consider that the assessment is irrational. On the contrary, the CLOSED material provides a proper evidential basis for the conclusions reached. Bearing in mind our findings as set out in paras 20-30 above, nothing we have heard in OPEN displaces this view.

Ground 1A

34 By this ground, E5 complains that it was procedurally unfair not to put to him the contents of the record of his interview at London City Airport under Sch. 7 to the 2000 Act. It is well established that natural justice imposes no duty to seek representations (or give OPEN reasons) where doing so would be contrary to national security or another public interest: see e.g. SIAC's decision in *AMA v SSHD* (SN/75/2018), 19 January 2021, at [9] and [36]. In this case, however, Ms Weston says that the disclosure of the port stop interview record to E5 in the SIAC proceedings shows that there was no national security or public interest reason for non-disclosure.

35 SSHD submits that there is in general no duty to seek prior representations in national security cases before making a deprivation order and relies on SIAC's judgments in *Al-Jedda (No. 2) v SSHD* (SC/66/2008), 18 July 2014, at [141]-[161]; *T2 v SSHD* (SN/129/2016), at [57]; *U3*, at [35] and [38]; and *B4*, at [137]-[141]. Insofar as the latter decision suggests (at [140]) that there may be cases where the general rule does not apply, there is nothing here to indicate that this is such a case.

36 SIAC's decision in *Al Jedda* is authority for the proposition that there is no right to make representations in a deprivation case before receiving the notice of decision. The reasoning is based on the language of s. 40(5) of the 1981 Act, which requires written notice of the decision before the order can be made, but does not require the communication of any "minded-to" decision: see the summary of SSHD's submissions at [149] and SIAC's endorsement of those submissions at [156].

37 *T2* was an appeal against an exclusion order, which is governed by a different statutory regime. The principle enunciated there was that, where a decision to exclude is taken for national security reasons, and subject to appeal before SIAC, common law fairness does not require an opportunity to make representations before the decision is made.

38 *U3* was dealing with a slightly different point: to what extent, if at all, is evidence post-dating the challenged decision admissible on an appeal before SIAC? But the passages at [35] and [38] are consistent with the general statements set out above from *Al Jedda* and *T2*.

39 In *B4* at [138], SIAC stated the "general rule in national security cases that there is no duty to seek representations before making the deprivation order" and justified this rule on the basis that "the very act of seeking representations would be contrary to the national security of the UK: the individual would take immediate steps to return, in the knowledge of what was about to happen". SIAC then went on to say that there was no reason for departing from the general rule on the facts of the case.

40 We agree that the formulation at [138] of *B4* accurately states the "general rule" established by the earlier authorities. In a future case, it may be necessary to consider whether this rule is derivable purely from the language of s. 40(5) of the 1981 Act (as *Al Jedda* suggests), in which case it ought to apply to all deprivation cases, or is better understood as a rule applicable to cases where the decision is taken on national security

grounds (an interpretation supported by *T2* and *B4*). Here, the distinction does not matter, because this was a deprivation decision taken on national security grounds.

41 Likewise, we do not need to consider whether (as suggested by [140] of *B4*) there are cases where the general rule does not apply. We can see a possible argument to that effect in a case where (i) the decision is based to a decisive or important extent on conclusions of fact which can be disclosed to the affected person without damage to the public interest and (ii) disclosure would not allow the affected person to frustrate the object of the deprivation. In this case, however, neither of these conditions is satisfied.

42 As to the first, although E5's alleged lack of candour in responding to questions about the Active Shooter Course and about the websites he visited is relied upon as part of the background to the decision, NG's evidence confirms that the OPEN evidence as a whole (of which these matters are part) was insufficient to ground the key national security assessment as to E5's Islamist extremist mindset or the purpose of his attendance on the Active Shooter Course. The OPEN record of the port stop interview was neither decisive, nor even important, in the context of the evidence as a whole.

43 As to the second condition, a key objective of the deprivation decision was to prevent E5 from returning to the UK. Giving him the opportunity to make representations before the decision was taken would have enabled him to frustrate that objective by returning to the UK. So, even if common law fairness requires the decision-maker to provide the affected person with an opportunity to make representations before the decision is taken in some cases, this could not be such a case.

44 Ground 1A therefore fails.

Ground 1B

45 It is common ground (see [13]-[14] above) that:

(a) if the authorities of country X knew that E5 had been deprived of his British citizenship on national security grounds, they would detain him;

(b) in that event, there would be a real risk that he would suffer treatment that would be incompatible with Article 3 ECHR if that provision were engaged; and

(c) this would be contrary to SSHD's policy.

46 For E5, Ms Weston drew attention to SIAC's decision in *J1 v SSHD* (SC/98/2010), 11 July 2011, a case about deportation to Ethiopia. At [4], SIAC recorded SSHD's acknowledgement that the Government had a moral obligation to inform the Ethiopian authorities of the gist of what it knew about the appellant. This, Ms Weston says, must apply here too. If such information has been or will be given here, the deprivation decision gives rise to a real risk of treatment contrary to Article 3 ECHR, on SSHD's own case.

47 SSHD says this at para. 70 of her skeleton argument:

> "…there is no evidence that the Secretary of State or any other agent of the British state will contact the [country X] authorities about the Appellant's deprivation of citizenship or these proceedings. Nor is there any reason why the outcome should be made public… There is no evidence that an attempt by E5 to leave [country X] would put him at risk nor why general contact with the [country X] authorities would put him at risk. It is notable that by the time of the appeal hearing he will have been present there for more than three years. He has made no complaint of any ill-treatment or interest in him in that period."

48 We note that *J1* was a deportation case in which SSHD was proposing to send to Ethiopia someone who was not already there. That is a very important part of the context in which the "moral obligation" identified arose. We do not think it safe to extrapolate from that case to the present, where E5 left the UK of his own accord some considerable time before SSHD had decided to deprive him of his citizenship.

49 In any event, it is not necessary for us to consider the precise circumstances in which an equivalent moral obligation might arise on the present facts. We have set out above SSHD's OPEN stance, that there is no evidence that SSHD or any other agent of the state will contact the authorities of country X to inform them about E5. Like SSHD, we consider it telling that the authorities of country X have shown no interest whatsoever in E5 in the more than three years since he went there to live. Nothing in CLOSED has altered our clear conclusion that there is no evidence of any real risk that the authorities of country X will detain E5.

50 We would add that SIAC itself has been careful to avoid any publication of E5's name and has made orders prohibiting publication of anything likely to identify him, his family or the country of which he is a national. In these circumstances, and in the light of the CLOSED evidence, ground 1B fails.

Ground 2

51 All limbs of this ground of challenge depend on the proposition that the challenged deprivation decision constituted an interference with E5's and/or his family members' rights to respect for private and family life as conferred by Article 8(1) ECHR.

Does the deprivation decision constitute an interference with E5's or his family members' right to respect for their private or family life?

52 For E5, Ms Weston submitted that Article 8 was engaged, given that the avowed purpose of the decision was to prevent E5's return to the UK, where his father, siblings and minor daughter lived. It was clear that the deprivation decision had an impact on the latter relationship in particular and thus interfered with the Article 8 rights of E5's daughter, who was within the jurisdiction for the purposes of Article 1 (which imposes on contracting states the obligation to secure to everyone "within their jurisdiction" the

Convention rights). The decision was also determinative of E5's rights as a British citizen to public funds, healthcare and other pecuniary advantages conditional upon citizenship.

53 For SSHD, Mr Blundell said that Article 8 was not engaged at all. The legal effect of deprivation was simply to extinguish E5's right of abode in the UK. That did not have the effect of excluding E5 from the UK. It simply put him in the same legal position as any other foreign national wishing to travel to the UK, i.e. it required him to apply for entry clearance. Only a refusal of entry clearance would engage Article 8 ECHR.

54 In *U3*, the appellant's children were all outside the jurisdiction at the time when the deprivation decision was made, so the question whether that decision would have engaged their rights under Article 8 did not arise: see at [45]. By the time of the entry clearance refusal, U3's children were within the jurisdiction, so it was common ground that their Article 8 rights were engaged and could in principle generate a positive obligation to facilitate family reunion. SIAC considered at [47] whether U3's own Article 8 interests were engaged and concluded that strictly they were not (since she was outside the UK's jurisdiction for the purposes of Article 1 ECHR), although in many cases (including U3's) it would be "artificial to attempt to separate the part of the interest which attaches to the family members in the jurisdiction from the part which attaches to the person outside it". In our view, the same is true here.

55 This case raises a question that did not arise in *U3*: does the deprivation decision itself constitute an interference with the Article 8 rights of E5's family members? The engagement of Article 8 was considered by the Court of Appeal in the context of an appeal against deprivation decisions taken on grounds of criminality in respect of individuals who were in the UK at the time: *Aziz v SSHD* [2018] EWCA Civ 1884, [2019] 1 WLR 266. There, Sales LJ (with whom Sir Terence Etherton MR and Sir Stephen Richards agreed) noted that the making of deprivation orders were "a prelude to possible deportation to Pakistan" (see at [2]), before holding at [27] that "deprivation itself would be likely to have minimal impact upon each appellant's family life and the interests of their children". At [28], he said that it had been unnecessary for the First-tier Tribunal to conduct a "proleptic analysis of whether each appellant would be likely to be deported or removed at a later stage".

56 Although the facts of *Aziz* were different (because the appellants were in the jurisdiction), the reasoning seems to us to underscore the importance of analysing the direct legal consequences of the decision under challenge and not factoring in the consequences of any further step that might be taken, even if there is good reason to believe that such a step will in fact be taken. The decision in *P3 v SSHD* [2021] EWCA Civ 1642, [2022] 1 WLR 2869, at [107]-[111], is consistent with this: see in particular Elisabeth Laing LJ's criticism of SIAC at [110] for framing the question as "whether a deprivation appeal in the abstract engages, or interferes with, article 8 rights," rather than "whether a deprivation decision on particular facts does so".

57 Neither *Aziz* nor *P3* determines the question whether Article 8 is capable of imposing positive obligations in a case such as the present, where the appellant left the UK of his own accord, but was subsequently deprived of his citizenship on national security grounds

in order to prevent him from returning. In our view, however, the correct analysis is as follows.

58 Although we see force in Ms Weston's submission that an application for entry clearance is unlikely to be successful at the present time (given the avowed purpose of the deprivation decision), there are sound reasons why the Article 8 rights of E5's family members should be considered only once the entry clearance decision has been made, rather than on a "proleptic" basis (to use the language of Sales LJ in *Aziz*):

(a) The deprivation decision does not, as a matter of strict law, prevent E5 from entering the UK. Its effect is to prevent him from doing so as of right – or, in other words, to require him to make an entry clearance application before doing so.

(b) As Elisabeth Laing LJ observed in *P3*, the strength of an entry clearance application (or an Article 8 appeal against a refusal of such clearance) depends critically on the reasons advanced for it. An applicant for entry clearance for family reunion purposes will be expected to file evidence about the strength of the relevant family relationships at the time when the application is made and the reasons why entry clearance should be granted. It makes sense for SIAC's analysis of Article 8 to take place after these representations have been formulated and considered by SSHD, not least because SIAC is required to accord appropriate weight to SSHD's balancing of the relevant interests.

(c) This does not give rise to any significant procedural complexity, since SIAC can hear deprivation and entry clearance appeals together, as happened in *U3* and *Begum*.

59 It follows that the Article 8 rights of those of E5's family members who are within the jurisdiction may well be engaged if E5 applies for and is refused entry clearance on family reunion grounds. But the deprivation decision on its own does not interfere with the Article 8 rights of any of E5's family members.

60 As to the submission that Article 8 is engaged because of the effect of the deprivation decision on E5's rights to civic or social benefits conditional upon citizenship, any such effect seems to us to be too remote, given that E5 was out of the jurisdiction when the decision was taken and he has not identified any particular benefit that he was receiving by virtue of his citizenship at the time of the decision.

61 We have considered separately here an argument raised under Ground 3 and based on the decision of the Court of Appeal's decision in *QX*. That was a challenge to a temporary exclusion order ("TEO"), which required the appellant to obtain a permit before returning to the UK and imposed obligations post-return to report once a day to a police station and to attend two two-hour appointments every week. It was argued that proceedings to challenge the TEO involved a determination of the appellant's Article 8 rights, by analogy with *Pomiechowski v Poland* [2012] UKSC 20, [2012] 1 WLR 1604 (in which a British citizen's right to remain in the UK was determined by extradition proceedings). Elisabeth Laing LJ (with whom Nugee LJ and, on this point, Coulson LJ agreed) saw "considerable force" in the analogy, since both extradition and a TEO constituted "a significant

interference with a person's right of abode and with his right to come and go from the United Kingdom as he pleases": [117]. She considered it unnecessary to decide the point, however, since the TEO imposed obligations which on any view interfered with Article 8 rights post-return.

62 In this case, there is nothing equivalent to the post-return obligations. Moreover, insofar as *QX* provides support for the proposition that an interference with the right of abode engages Article 8, it is important to note that the appellant in that case (like the appellant in *Pomiechowski*) was in the UK, and so fell within the jurisdiction for the purposes of Article 1 ECHR, at the point when he was relying on his Article 8 rights. Nothing in *QX* suggests that Article 8 imposes obligations on SSHD in respect of a person who has at all material times been outside the jurisdiction for Article 1 purposes.

63 This conclusion is sufficient to dispose of ground 2. However, we have gone on to consider the position if (contrary to our view) Article 8 were engaged.

Is any interference with E5's family's Article 8 rights prescribed by law?

64 Ms Weston submitted that Article 8 imported requirements of accessibility and foreseeability. Thus, in *Silver v United Kingdom* (1983) 5 EHRR 347, the Strasbourg Court said at [85] that "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail… A law which confers discretion must indicate the scope of that discretion." She relied also on *S v United Kingdom* (2009) 48 EHRR 50, at [95]-[96] and *Fernandez Martínez v Spain* (2015) 60 EHRR 3 [GC], at [117]. The Court must be satisfied that there are adequate guarantees against arbitrariness. In assessing whether there are, it must consider the nature, scope and duration of the possible measures, the grounds required for ordering them, the authorities competent to permit, carry out and supervise them and the kind of remedy provided by national law: *Uzun v Germany* (2011) 53 EHRR 24, [60]-[74].

65 Ms Weston points out that the Home Office has no published policy setting out the circumstances in which the deprivation power in s. 40(2) of the 1981 Act will be exercised, save that it is stated that the power may be exercised where the person in question poses a risk to national security. The assessment whether a person poses such a risk is subject to no independent oversight prior to the measure having legal effect. In particular, the Home Office Extremism Strategy (Cm 9148), published in 2015, defines "extremism" very broadly. It catches conduct which does not constitute or threaten violence. This approach has been criticised by the UN Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism (Fionnuala Ní Aoláin): see paras 24-27 of her report of 21 February 2020. Given the broad discretion accorded to the Home Office to decide when someone constitutes a "national security risk" (see *Rehman v SSHD* [2001] UKHL 47, [2003] 1 AC 153, [22], [26], [62]), Ms Weston submitted that the application of that term is insufficiently foreseeable, the law is insufficiently accessible and there are insufficient safeguards and oversight.

66 Thus, Ms Weston submitted that there was no way for a person to know what conduct would be regarded as constituting or evidencing a sufficient risk to national security to

justify invocation of the deprivation power. For example, SSHD did not say that attendance on the Active Shooter Course alone would do so. E5's attendance evidenced a risk to national security only because of his prior history and the port officer's suspicions. E5 had no way of knowing that this view would be taken.

67 Moreover, Ms Weston submits, the fundamental nature of citizenship (see e.g. *Pham v SSHD* [2015] UKSC 19, [2015] 1 WLR 1591), and the permanent effect of deprivation, increase the need for proper and effective safeguards, substantive and procedural. Without a requirement for key allegations to be put to the person affected prior to the decision having effect, Ms Weston submitted that the safeguard of an appeal to SIAC is inadequate.

68 In a note filed with our permission after the hearing, Ms Weston relied on *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345 as an example of a case where a domestic legal regime did not satisfy the "quality of law" requirements of Article 8. In that case, the Code for Crown Prosecutors was not formulated with sufficient precision to enable citizens to know under what circumstances they would be subject to prosecution for assisting suicide. Ms Weston says that the present case is *a fortiori*, because there is no policy at all.

69 For SSHD, Mr Blundell submitted that the question whether a person is a national security risk is necessarily a matter of evaluation on the particular facts. SSHD is not obliged to publish a policy or guidance which, by being more prescriptive, could narrow the circumstances in which she could exercise her power. The range of national security cases is extremely broad and not susceptible of definition or specification in the kind of policy Ms Weston says is required. SIAC provides independent scrutiny, given its CLOSED procedure, the use of special advocates and its ability to examine the rationality of SSHD's decision using its "powerful microscope" (as SIAC put it in *U3 v SSHD*).

70 For our part, we consider it important to analyse this point in the light of the concrete facts of this case, rather than in the abstract. It may be that some forms of conduct are such that one could not predict whether they would constitute or evidence a national security risk sufficient to trigger the deprivation power. We can conceive, for example, that an issue might arise about whether the deprivation power met the "quality of law" requirements of Article 8 ECHR (and potentially Article 10) if the power were exercised on the basis purely of speech that was judged to be "extremist" in nature but was not intended to condone or encourage violence. This is the kind of case which could engage the concerns expressed by the UN Special Rapporteur in the passages of her report on which Ms Weston relied.

71 In this case, however, SSHD did not deprive E5 of his British citizenship because of concerns about what he was saying. The OPEN evidence shows that the deprivation decision was taken on the basis that E5 had "an Islamist extremist mindset" and had "undertaken weapons training, which was likely in preparation for fighting on behalf of an Islamist extremist group". Even in the absence of a policy saying so in terms, neither E5 nor anyone else could be in any real doubt that conduct of this kind would be regarded as posing a risk to the national security of the UK. The point can be addressed in this way, paraphrasing the test for foreseeability in *Silver*. If a dual national considering

undertaking weapons training in preparation for fighting on behalf of an Islamist extremist group asked whether, if he did so, he would render himself liable to be deprived of his citizenship, a competent lawyer could only give one answer: yes.

72 More generally, the Strasbourg Court has emphasised that, when considering whether a discretionary power meets "quality of law" requirements, there is no "one size fits all" standard. The level of precision required to guard against arbitrariness "depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed": *S v United Kingdom,* [96].

73 The Strasbourg Court considered an Article 8 challenge to the UK's deprivation of citizenship regime and found that a deprivation decision could raise an issue under Article 8, but only if the decision was "arbitrary": *K2 v United Kingdom* (2017) 64 EHRR SE18, [49] and [61]. The "quality of law" challenge advanced by Ms Weston here was not considered in that case (see [50]), nor any other, so far as we are aware. The Strasbourg Court has, however, considered such a challenge in the context of expulsion measures taken on the basis of national security. In *G v Bulgaria* (2008) 47 EHRR 51, at [40], in a passage to which SIAC referred in *U3* at [30(c)], the Court said this:

> "The Court is naturally mindful of the fact that in the particular context of measures concerning national security, the requirement of foreseeability cannot be the same as in many other fields. In particular, the requirement of 'foreseeability' of the law does not go so far as to compel states to enact legal provisions listing in detail all conduct that may prompt a state to expel an individual on national security grounds. By the nature of things, threats to national security may vary in character and may be unanticipated and difficult to define in advance. However, even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that deportation measures affecting fundamental human rights be subject to some form of adversarial proceedings before an independent authority or a court competent to effectively scrutinise the reasons for them and the relevant evidence, if need be with appropriate procedural limitations on the use of classified information. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority or court must be able to react in cases where the invocation of this concept has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary."

74 This passage was relied upon by the Strasbourg Court in *IR v United Kingdom* (2014) 58 EHRR SE14, at [57], in support of the conclusion that SIAC's procedures were sufficient to comply with the procedural aspect of Article 8, even without the minimum level of disclosure required in cases where *AF v SSHD (No. 3)* [2009] UKHL 28, [2010] 2 AC 269 applies.

75 The above passage from *G* seems to us to answer Ms Weston's submission that "national security" is too broad to satisfy "quality of law" requirements unless fleshed out by a

detailed policy. This is a context in which it would be impossible to define in advance all the circumstances in which conduct will be considered a risk to national security and undesirable to attempt to do so. What Article 8 requires in such a context is an adversarial procedure capable of ensuring that the executive does not interpret "national security" in such a way that it is "stretched beyond its natural meaning" (see *G* at [43]; *U3*, at [30(c)]) and capable of scrutinising the reasons for the individual decision and the relevant evidence. The appeal before SIAC provides such an adversarial procedure, though we consider separately below whether the appeal satisfies the minimum procedural requirements imposed by Article 8.

76 Even if, contrary to our view, the deprivation decision interfered with the Article 8 rights of E5 or his family, we would therefore reject E5's complaint that the exercise of the deprivation power for national security reasons did not meet the accessibility and foreseeability requirements of Article 8.

E5's procedural rights

77 Ms Weston relied on *Fernandez Martínez v Spain* at [147] as authority for the proposition that Article 8 requires that the decision-making process, seen as a whole, provide the applicant with sufficient protection for his interests. She submitted that this necessarily involves: a meaningful review of the substantive issues; the provision to the affected person of sufficient information meaningfully to contest the facts and arguments advanced by the state; an independent and objective decision-making process; and an ability on the part of the affected person to participate effectively in the proceedings.

78 Ms Weston submitted that the appeal before SIAC does not comply with these requirements in a case where the decision would be unsustainable on the OPEN material alone, as NG has conceded is the case here.

79 Ms Weston submitted that this point should be read together with Ground 3 and we consider it under that head.

Proportionality of any interference with Article 8 rights

80 As we have noted, the Strasbourg Court has indicated a decision to deprive an individual of his citizenship will raise an issue under Article 8 ECHR only if it is "arbitrary" – a test that is narrower than the usual proportionality one: see *K2*, [49] and [61]. That test is not satisfied here. However, we have nonetheless considered the position if, contrary to our view, the deprivation decision engaged the Article 8 rights of E5 and/or his family members and it fell to us to consider whether the interference was proportionate.

81 In that case, it would be for us to balance the national security reasons given for making the deprivation decision against the rights of E5's family members to respect for their family lives, given the impact of their separation from him. In carrying out that balancing exercise, we would have to treat the best interests of S as a primary consideration, bearing in mind that they can be outweighed by the cumulative effect of other considerations: see *U3*, [48], citing *ZH (Tanzania) v SSHD* [2011] UKSC 4, [2011] 2 AC 166, [33] (Lady Hale).

82 In balancing the various considerations, and in the light of s. 55 of the Borders, Citizenship and Immigration Act 2009, we bear in mind that:

(a) E5's separation from S in January 2020 was the result of his own deliberate decision to travel to country X. The fact that he was prepared to countenance physical separation from his young daughter for six months (the originally intended length of his stay) is, we consider, an important starting point when assessing the strength of the relationship.

(b) We have no doubt that S misses physical contact with her father, but it is relevant to note that E5 has been able to maintain remote contact with her since he left the UK in January 2020. That being so, separation will not necessarily mean the end of the relationship.

(c) Because we have not heard from M, we do not know whether it is likely that she would wish to travel with S, or allow S to travel with other family members, to country X to see E5. But, unlike in U3's case (where nevertheless SIAC found the interference with the children's rights to be clearly proportionate), this is not a situation where travel is impossible.

(d) Because we have heard no evidence about S from M, or from any professional witness, we find it difficult to reach a view about whether it would be in S's best interests for E5 to be permitted to return to the UK. We are prepared to assume, however, that it would, because she misses her father and would benefit from his physical presence a few times per week (as before he left); and that there is value in the father-daughter relationship above and beyond that which can be realised by remote communication.

(e) We are also prepared to assume that E5's father, sister and other siblings would benefit from E5's physical presence; and that there is value in these familial relationships which cannot be realised by remote communication or occasional visits by the family to country X.

83 Bearing all this in mind, we nonetheless conclude that the Article 8 interests of E5's family and, to the extent that they fall to be taken into account, E5, are firmly outweighed by the risk which SSHD assesses E5 would pose to UK national security. Thus, since the national security assessment is neither irrational nor otherwise flawed, any interference with E5's or his family's Article 8 interests is, in our view, clearly proportionate to the legitimate aim of protecting UK national security (if that were the correct test).

84 Ground 2 therefore fails.

Ground 3

85 Ms Weston submitted that the deprivation appeal is determinative of E5's and his family's Article 8 rights to respect for their family life (since it leads to their physical separation) and of his rights as a British citizen to public funds, healthcare and other pecuniary

advantages conditional upon citizenship. That being so, it determines his civil rights for the purposes of Article 6: *SSHD v BC and BB* [2009] EWHC 2926 (Admin), as approved in *QX v SSHD* [2022] EWCA Civ 1541, at [118]. Therefore, E5 is entitled to be provided with the essence of SSHD's CLOSED case that he has an Islamist extremist mindset and undertook weapons training in preparation for fighting on behalf of an Islamist extremist group, in accordance with *AF (No. 3)*. In addition, it is said that disclosure is inadequate to meet common law standards of procedural fairness.

86 Mr Blundell submitted that SIAC's decision in *Al Jedda*, [170], shows that Article 6 cannot bite where the appellant is out of the jurisdiction. That conclusion cannot be avoided by reference to Article 8. E5's Article 8 rights are not engaged, since he is out of the jurisdiction. The Article 8 procedural rights of his family members cannot assist, since the rights he is seeking to protect are his: see by analogy *P3*, at [107] et seq. *QX* takes matters no further since it was a case about temporary exclusion orders and involved very real restrictions on Article 8 rights. It was also an in-country case. Insofar as the argument in favour of disclosure is made on common law grounds, Mr Blundell submitted that common law procedural fairness requirements are displaced by the statutory regime.

87 We note at the outset that arguments about disclosure, including OPEN arguments as to the applicable standard for disclosure, should generally be made as part of the rule 38 process. Nonetheless, we have considered the competing arguments and, in our view, the legal position is as follows:

(a) The principal provisions of the ECHR conferring procedural rights are Articles 5 and 6. Outside the criminal context, Article 6 applies only where there is a "determination of… civil rights and obligations". That phrase has an autonomous meaning. In *Maaouia v France* (2001) 33 EHRR 42, at [33]-[40], the Grand Chamber of the Strasbourg Court held that decisions concerning the entry, stay and deportation of aliens do not concern civil rights and obligations and so do not engage Article 6. That is so even if those decisions have incidental consequences on an individual's private or family life: *R (BB) v SIAC* [2012] EWCA Civ 1499, [2013] 1 WLR 1568, [8]-[17] (Lord Dyson MR).

(b) We have already said that we do not consider that the deprivation decision constitutes an interference with E5's or his family members' Article 8 rights. However, in case we are wrong about that, we note that Article 8 may also confer procedural rights, including in cases where Article 6 does not apply. In *IR v UK*, the Strasbourg Court considered the content of those procedural rights in cases where SSHD excluded the applicants from the UK for national security reasons. It held that SIAC offered sufficient procedural guarantees to satisfy the requirements of Article 8, even without applying the minimum standard of disclosure under *AF (No. 3)*: see at [63]. SIAC has itself endorsed this approach in the exclusion context: see *D2 v SSHD* (SC/116/2012), 15 April 2014 (Irwin J).

(c) We are not aware of any express consideration of the question whether this approach applies also to deprivation of citizenship cases. However, in *Al Jedda*, at [170], the appellant conceded that the authorities considered in *D2* established that "Articles 6 and 8 of the ECHR do not confer a right to a core irreducible minimum

of disclosure in immigration or deprivation proceedings" (emphasis added). And in *K2* (a deprivation case), the Strasbourg Court cited *IR* as authority for the proposition that SIAC's procedures satisfied the requirements of Article 8: see at [55]. This is a strong indicator that the Strasbourg Court considered that there is no material difference in the standard of disclosure required between deprivation and exclusion cases.

(d) As a matter of principle, we consider that the standard of disclosure required is more likely to depend on what is at issue as a matter of substance, rather than on whether the procedural rights relied upon are derived from Article 6(1) or Article 8. In *QX*, the Court of Appeal did not consider the applicable standard of disclosure: see the last sentence of [119]. The first instance judge (Farbey J) had done so and had held that *AF (No. 3)* applied, but this was on the basis that the post-return obligations were comparable with those described in *Tariq v Home Office* [2011] UKSC 35, [2012] 1 AC 452 as "virtual imprisonment": see [2020] EWHC 1221, [2021] QB 315, [83]. In this case, as we have said, the deprivation decision, made after E5 had voluntarily left the UK, does not determine whether E5 will be granted entry clearance in the future (should he apply for it) and certainly does not purport to impose restrictions on his liberty post-return.

(e) Accordingly, the better view, whether the case is analysed through the lens of Article 6(1) or the procedural limb of Article 8, is that the procedural obligations applicable under the ECHR in a deprivation appeal are satisfied by the availability of an appeal to SIAC, without the requirement for the minimum disclosure set out in *AF (No. 3)*.

88 It follows that we consider the disclosure process to have been properly concluded on the basis that *AF (No. 3)* does not apply.

89 Insofar as reliance is placed on the common law, we regard it as clear that the disclosure given in this case would not satisfy the requirements of natural justice. But those requirements are abrogated by the statutory regime contained in s. 5(3) of the Special Immigration Appeals Commission Act 1997, which expressly empowers the Lord Chancellor to make rules "enabling the proceedings before the Commission without the appellant being given full particulars of the reasons for the decision which is the subject of the appeal" and "enabling the Commission to hold proceedings in the absence of any person, including the appellant and any legal representative appointed by him". Section 5(6) expressly authorises the Lord Chancellor to strike a balance between the need to secure a proper review of decisions and the need to prevent disclosure of information contrary to the public interest.

90 Those powers have been exercised in the Special Immigration Appeals Commission Rules 2003, which include rule 4, requiring SIAC to secure that information is not disclosed contrary to the interests of national security (or otherwise in a way likely to harm the public interest). The argument that, notwithstanding this regime, the common law requires disclosure of an "irreducible minimum" necessary to enable an appellant to understand the essence of the case against him was considered and rejected by the Court of Appeal in *W (Algeria) v SSHD* [2010] EWCA Civ 898, [43]-[57].

91 Ground 3 therefore fails.

A disclosure issue raised by the Special Advocates in written submissions after the hearing

92 During the rule 38 process, the Special Advocates requested disclosure of a passage in one of the CLOSED documents before SSHD. SSHD resisted disclosure on the basis that disclosure of this passage would be contrary to the interests of national security. The Special Advocates did not press for disclosure at the rule 38 stage, but renewed their disclosure application on the basis that the passage is relevant to the arguments as they developed in the course of the OPEN hearing.

93 We do not propose to direct any further disclosure in this case, for three reasons.

94 First, it is procedurally important that disclosure submissions be made during the rule 38 process where possible. That process relies on the judgment of experienced Special Advocates and experienced counsel for SSHD about which points should be pursued and which dropped. Applications for disclosure of matters which the Special Advocates have decided at the rule 38 stage not to pursue can in principle be made at the substantive hearing. If granted, it may be possible for disclosure to be given and for OPEN submissions to be made during the hearing. But acceding to such applications after the hearing has concluded is apt to cause considerable delay, because it is likely to require all of the following steps to be completed before SIAC produces its draft OPEN and CLOSED decisions: (i) SIAC to give a written decision on disclosure or hold a further CLOSED hearing to assess the national security objection to the disclosure; (ii) if disclosure is ordered, SSHD to provide the disclosure ordered or elect not to do so; (iii) either a further substantive hearing or further sequential filing of written submissions and responses; and (iv) further consideration by SIAC. This is highly undesirable, unless there is good reason for pursuing the application so late and good reason to suppose that the disclosure of the material would make a difference.

95 Second, although we accept that the arguments developed somewhat during the OPEN hearing, we cannot see that the disclosure of the passage in question would add anything to those arguments. The key part of that passage is already in OPEN. If anything, the CLOSED passage is more obviously consistent with SSHD's OPEN arguments.

96 Third, although it is not obvious that the passage in question would indeed reveal anything whose disclosure would be contrary to the interests of national security, experience of conducting rule 38 hearings suggests that the damage done by disclosure of matters such as these is not always obvious. This is the kind of point SIAC would normally determine at an oral hearing. It would be wholly disproportionate to list such a hearing in current circumstances.

Conclusion

97 For these reasons, none of the OPEN grounds succeeds. Nothing in the CLOSED material suggests that the decision was irrational or otherwise unlawful. On the contrary, a careful

examination of that material convinces us that the decision was properly open to SSHD. The appeal is therefore dismissed.