In The Supreme Court of the United Kingdom

UKSC 2020/0156

UKSC 2020/0157

UKSC 2020/0158

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

King, Flaux and Singh LJJ
[2020] EWCA Civ 918
Not yet reported

BETWEEN:

SHAMIMA BEGUM

Respondent

-and-

[SPECIAL IMMIGRATION APPEAL COMMISSION]

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

[(1) UN SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COMBATTING TERRORISM
(2) THE NATIONAL COUNCIL FOR CIVIL LIBERTIES ("LIBERTY")]

Interveners

SECRETARY OF STATE'S WRITTEN CASE

INTRODUCTION

1. This case raises questions as to the balance to be struck between degrees of protection of procedural rights and degrees of protection of the public from terrorism. Can it be right that a person who has involved themself in terrorism, and is now abroad and subject to restrictions that affect their ability to participate in domestic proceedings, is able to rely on

those self-created impediments to insist on return to the jurisdiction to enable them to participate now in such proceedings? Can it be right that they should be able to do so if enabling them to do so runs directly contrary to the most effective protection of the public from the risks of harm through terrorism; and directly contrary to the judgement, again based on the risks assessed to be posed by the individual, that they be deprived of British citizenship (with precisely the effect of removing their right to enter the UK as a citizen and making it difficult for a return to take place)?

2. The Court of Appeal granted the Secretary of State permission to appeal its decision that Ms Begum should be granted Leave to Enter ("LTE") the United Kingdom. That Court (sitting concurrently as a Divisional Court) also granted the Secretary of State a "leapfrog certificate" to apply directly to the Supreme Court for permission to appeal the Court's finding on the Article 2/3 practice issue and thus "catch up" with the LTE appeals (and, similarly, granted a leapfrog certificate to Ms Begum to enable her to challenge the Court of Appeal's findings on the fair and effective appeal issue). On 7 September 2020, this Court (Lord Reed, Lord Lloyd-Jones and Lord Sales) granted permission to appeal on those issues. In so doing, the Court indicated that:

> "… *given the effectiveness with which Ms Begum has pursued her appeals (and the associated application for judicial review), the Court will wish to hear argument about her ability to pursue an effective appeal before SIAC.*"

3. Accordingly, the appeals before the Court raise three issues:

   (a) Was the Court of Appeal wrong to conclude that LTE must be granted to Ms Begum on the basis that she could not have a fair and effective appeal (Secretary of State's appeals, Ground 1: Issue 1)?
   (b) Was the Court of Appeal wrong to conclude that SIAC had been in error in determining the Article 2/3 practice issue by applying the principles of judicial review (Secretary of State's appeals, Ground 2: Issue 2)?
   (c) Was the Court of Appeal wrong to hold that it would be wrong in principle to allow Ms Begum's appeal outright on the fair and effective appeal ground (Ms Begum's appeal: Issue 3)?

FACTUAL BACKGROUND

4. Ms Begum was born on 25 August 1999. She was born and brought up in the UK. At birth, she held British citizenship under s.1(1) of the British Nationality Act 1981 ("the 1981 Act"). This is because her parents were at that time both settled in the UK. Ms Begum holds Bangladeshi citizenship by descent through her parents, both of whom are Bangladeshi citizens, pursuant to s.5 of the Bangladesh Citizenship Act 1951. On appeal, the Special Immigration Appeals Commission ("SIAC") accepted the Secretary of State's case on Ms Begum's citizenship. Ms Begum has not sought to challenge that finding in these proceedings.

5. On 17 February 2015, Ms Begum travelled, with Kadiza Sultana and Amira Abase, to Istanbul, Turkey. She was aged 15 at the time and used her older sister's passport to do so. From Istanbul, they travelled on to Syria. Their journey and subsequent residence there attracted considerable media attention. Ms Begum married an ISIL fighter, lived in Raqqah, the capital of ISIL's self-declared caliphate, and remained with ISIL in 2019, in the last pocket of ISIL territory in Baghuz.

6. The Secretary of State's case is that Ms Begum aligned with ISIL in Syria. In February 2019 the Security Service advised the Secretary of State that "*BEGUM is aligned with ISIL, and that she therefore poses a threat to UK national security*."

7. In February 2019, Ms Begum gave several interviews to a reporter with *The Times* newspaper. At that time, she was located in the Al-Hawl refugee camp in northern Syria. From late February 2019, Ms Begum has been residing in the Al-Roj camp for internally displaced persons. The camp is in northern Syria. It is controlled by the Syrian Democratic Forces ("SDF"). In an interview with the Daily Mail, on 25 September 2019, Ms Begum is recorded as stating that she had access to a telephone in the Al-Roj camp.

8. The relevant basic procedural history is set out in the Statement of Facts and Issues. As there appears, Ms Begum has been able to launch the series of challenges that have led to this appeal (see further below under Issue 1).

ISSUE 1: WAS THE COURT OF APPEAL WRONG TO CONCLUDE THAT LTE MUST BE GRANTED TO MS BEGUM ON THE BASIS THAT SHE COULD NOT HAVE A FAIR AND EFFECTIVE APPEAL?

9. At the outset, the Secretary of State makes two overarching points, each of which is relevant to the determination of the first issue.

10. **First**, Ms Begum's situation in the Al-Roj camp is not the consequence of any action on the part of the Secretary of State. It is the direct consequence of Ms Begum's decision to travel to Syria and align with ISIL. Ms Begum left the UK for those purposes more than four years ago. The Secretary of State has not undertaken any actions to place her outside the jurisdiction, as was accepted by the Court of Appeal at §95[1]. As a matter of principle, the ECtHR has recognised the relevance of the fact that a person has left the jurisdiction of their own motion. In *K2 v. United Kingdom* (appln no. 42387/13, unreported, 9 March 2017), the ECtHR held, at §60:

> "*... the Court cannot ignore the fact that the procedural difficulties the applicant complains of were not a natural consequence flowing from the simultaneous decision to deprive him of his citizenship and exclude him from the United Kingdom. As the Court of Appeal noted in the judicial review proceedings, the reason why the applicant had to conduct his appeal from outside the United Kingdom was not the Secretary of State's decision to exclude him, but rather his decision to flee the country before he was required to surrender to his bail…*"

11. The Court of Appeal has recognised the same principle: see *R (G1 (Sudan)) v. Secretary of State for the Home Department* [2012] EWCA Civ 867, [2013] QB 1008, *per* Laws LJ, (with whom Rix and Lewison LJJ agreed) at §16, and Rix LJ (with whom Lewison LJ agreed) at §59; and *S1 v. Secretary of State for the Home Department* [2016] EWCA Civ 560, [2016] 3 CMLR 37, *per* Burnett LJ at §80. The Court of Appeal attempted to distinguish these authorities on the basis that they dealt with the prior question *whether* there could be a fair and effective appeal, rather than the consequences flowing from the lack of such an appeal. However, there was no such limitation on any of the statements of principle in those case.

12. **Secondly**, success in her appeal will not enable Ms Begum to leave the Al-Roj camp. She is, and was at all material times, in detention and under the control of third parties (the

[1] By contrast, for example, with the "*deport first, appeal later*" regime considered in *R (Kiarie & Byndloss) v. Secretary of State for the Home Department* [2017] 1 WLR 2380.

SDF). Her detention is unaffected by her loss of British citizenship. The suggestion that there are two exclusive options – prolonged detention in Syria or transfer to Bangladesh or Iraq – is also wrong. It is possible that Ms Begum will be released at some point in the future. But precisely because she is not within the Secretary of State's control, which of those options eventuates remains uncertain.

The nature of current impediments to a fair and effective appeal

13. SIAC's finding as to Ms Begum's inability to have a fair and effective appeal was clearly a contingent one. It was made by reference to her present conditions. At §143, SIAC held, so far as is relevant:

> *"We accept that, in her current circumstances, A cannot play any meaningful part in her appeal, and that, to that extent, the appeal will not be fair and effective."* (emphasis added)

It was, thus, not a generalised finding as to her ability to have a fair and effective appeal at some stage in the future, but rather a finding which reflected only her present situation at that time. It was a careful and expressly limited finding.

14. The last point has a further significance. The Court of Appeal rejected the Secretary of State's analysis of this passage as indicating temporary difficulties (at §93) and considered that SIAC's finding was in "*clear and categorical terms*" (at §92). Further, at §93, it accepted Ms Begum's submission that it had accepted "*the evidence of Mr Furner as to the difficulties of communication and of obtaining instructions*" which was "*unchallenged*". Indeed, it went further and found that it was not open to the Secretary of State "*to run arguments such as that Ms Begum's situation in the camp might be susceptible to immediate change because she might gain access to a telephone or a videolink or that she can give instructions, albeit in an attenuated form*": §93.

15. However, Mr Furner, in his first witness statement dated 3 May 2019, gave evidence as to his ordinary expectations in terms of taking instructions from a new client, as well as evidence as to his contact with Ms Begum. That evidence, on both counts, related to matters exclusively within his own knowledge and experience. Mr Furner was giving evidence in his capacity as a solicitor as to his contact with his own client. The Secretary of State did not "*challenge*" it because she had no information to suggest, and no reason to suppose, that it was in any way inaccurate. In any event, Mr Furner was only giving

evidence on the current state of affairs with Ms Begum. He was not giving, and was obviously not in a position to give, evidence as to whether, or if so how, that position might change. That was not a matter on which he had, or claimed to have, any knowledge. Accordingly, the absence of challenge to his evidence was of no relevance to the question of whether the position with Ms Begum might change in the future.

16. The correct approach, it is submitted, is that the Secretary of State was entitled to advance arguments both as to the possibility that things might change in relation to Ms Begum's ability to give instructions; and as to the fact of the contact she had had both with newspapers and with her solicitors for the purposes of the various proceedings launched on her behalf.

17. It is notable that Ms Begum's process of challenging the Deprivation Decision began with no fewer than four different firms of solicitors claiming to represent her, her family or her interests. Details of the chronology of communications with the various firms of solicitors is set out in the Chronology accompanying the Statement of Facts and Issues. In summary:

    (a) On 21 February 2019, the Secretary of State was first contacted by Ms Begum's sister, Renu Begum, requesting assistance for Ms Begum's son. She referred to a Mr Akunjee as the family's solicitor.
    (b) On 11 March 2019, Farooq Bajwa & Co wrote two letters to the Secretary of State, claiming to represent Ms Begum's family and referring in one letter to Mr Akunjee as a "*representative of this firm*".
    (c) On 12 March 2019, Imran Khan & Partners wrote to the Secretary of State pursuant to the judicial review pre-action protocol, on behalf of Ms Begum's family, just one day after Farooq Bajwa & Co had written on behalf of the family.
    (d) On 19 March 2019, Birnberg Peirce Solicitors lodged an appeal with SIAC on behalf of Ms Begum directly.
    (e) Also on 19 March 2019, Duncan Lewis Solicitors lodged an appeal with SIAC on behalf of Ms Begum's mother. Its letter was accompanied, *inter alia*, by a witness statement from Ms Begum's mother detailing conversations she had had with Ms Begum on 4 December 2018 and with Ms Begum's husband on 18 January 2019, as well as by a statement from Mr Akunjee, detailing the efforts he had made to contact Ms Begum.

(f) On 20 March 2019, SIAC informed both Duncan Lewis and Birnberg Peirce of the appeals each firm had lodged.

(g) On 21 March 2019, Birnberg Peirce wrote to SIAC giving details of its instructions from Ms Begum. The letter stated that "*The firm's involvement in Ms Begum's case has been as follows; after receiving an urgent message in the early hours of Saturday 16 March asking whether this firm might represent her, and how to formally instruct us, we received an authority which we believed to be from Ms Begum later on Saturday. It was followed by two further communications, one of which included a request that we take specific steps on her behalf on an entirely separate legal matter.*"

(h) On 22 March 2019, Elisabeth Laing J, as Chairman of SIAC, indicated the provisional view that Duncan Lewis were not instructed by Ms Begum.

(i) On 26 March 2019, Duncan Lewis indicated that they did not dispute the authenticity of the evidence obtained by Birnberg Peirce as to Ms Begum's instruction, but referred to "*superseding evidence*" from Ms Begum that indicated she had authorised Duncan Lewis to proceed. The letter was accompanied by a second statement from Mr Akunjee.

(j) On 29 March 2019, Duncan Lewis maintained their position and requested SIAC to determine the matter of instructions as an urgent preliminary issue. The letter included a statement from Ms Begum's sister, Renu, explaining her position. She claimed to have been in contact with Ms Begum approximately every 6-7 months, and in contact with a friend who had left the UK with her approximately every 3-4 months: statement, §9. The letter also included a third statement from Mr Akunjee, who claimed that "*Shamima has made significant efforts to contact her family despite being apparently under the control of an ISIS group*".

(k) Following further correspondence between the parties, including from the Government Legal Department, a preliminary issues hearing was listed on 17 April 2019 to determine the issue of instructions. During the course of that correspondence, Birnberg Peirce resisted the disclosure of its evidence on the matter of instructions to the Secretary of State. However, on 9 April 2019, and apparently after having seen evidence that Birnberg Peirce had intended to file, Duncan Lewis requested that the appeal it had lodged be treated as withdrawn. This was because the evidence it had seen alleviated the concerns of Ms Begum's mother and sister.

18. It is clear, therefore, that, from the outset, Ms Begum has been able to contact firms of solicitors, at least indirectly through third parties. Indeed, the initial contact with Birnberg Peirce appears to have involved a flurry of communications in relation to at least two separate legal matters. In addition, it is clear from this correspondence that Ms Begum was in regular, albeit not frequent, contact with her family.

19. That is consistent with the picture presented in Mr Furner's evidence. He confirms the extent of contact with Ms Begum, at the outset of the appeal proceedings, in §§18-29 of his first statement, he states that:

    (a)
    (b)
    (c)
    (d)
    (e) There is a facility for detainees to make outgoing telephone calls[2]: §28.

20. Although not expressly stated by Mr Furner, there must have been further communications, at least indirectly, with Ms Begum: for example, to seek her authorisation for the making of the entry clearance application. There must also have been a number of communications since the date of Mr Furner's statement: for example, to seek her authority to commence the LTE appeal and related judicial review proceedings, to inform her of the progress of the those cases, to inform her of the SIAC judgment, the decision to judicially review SIAC's judgment, seeking authority to proceed following the permission decision of Swift J (which prompted her solicitors to consider whether to proceed with the substantive SIAC appeal) and seeking authority to proceed with this appeal.

21. Against this background, it is clear that Ms Begum has, in all the circumstances, been able to establish a level of communication with her legal representatives. It has enabled them to launch and maintain a complex array of legal challenges encompassing three sets of legal proceeding and multiple hearings. She has pursued those proceedings from SIAC, through the Divisional Court and Court of Appeal and now to the Supreme Court. There have been several interim disputes and complex procedural arrangements. There can be no

[2] This is consistent with a statement from Ms Begum in an interview with the *Daily Mail*, on 25 September 2019, in which she claimed to have access to a telephone in the Al-Roj camp.

suggestion that her current circumstances have in any way prevented her accessing the courts to vindicate her rights.

22. Mr Furner claimed, at §10 of his first statement, that he would normally anticipate spending 40 hours (or possibly more than twice that) attending on a client in the course of a SIAC appeal. That may be correct. But it is a meaningless comparison with Ms Begum's position in the circumstances of this case. Hers is not an ordinary SIAC appeal. She is outside the UK, in third-party detention, through no fault of the Secretary of State. Those circumstances will inevitably impact upon the degree to which she can liaise with her legal representatives. Neither she nor her lawyers can expect to have the same degree of contact as would ordinarily be the case. The fact that it might not be possible to mirror the level of access to legal advice that would be available if someone were at liberty in the UK does not mean the proceedings are unfair.[3]

23. It is not the Secretary of State who has imposed a rule at the Al-Roj camp that detainees may not use mobile telephones, or that lawyers are not permitted to enter. It is the SDF who have imposed those rules. Yet, Ms Begum relies on the impact of these rules to argue that she should be granted LTE, notwithstanding the national security risk she presents, and irrespective of the fact that her presence in the camp has nothing to do with the Secretary of State.

24. The Court of Appeal held, at §93, that although SIAC did not expressly refer to Mr Furner's evidence, it must have accepted it. On that basis, it proceeded to reject the Secretary of State's argument that SIAC's finding related only to the circumstances immediately in existence at the time of the preliminary issues hearing; and that no longer-term finding could be derived from that. Instead, the Court of Appeal held that "*We have to proceed on the basis that whilst she remains detained in the camp she cannot give effective instructions or take any meaningful part in her appeal, so that, as SIAC found, the appeal cannot be fair and effective.*"

25. But that finding is not even consistent with Ms Begum's own evidence. Mr Furner had made it quite clear that he accepted that "*the circumstances in the camp can change quickly*

[3] And it will often be the case that an appellant in the UK will have limitations placed on their ability to give instructions or take advice. They may, for example, be in detention.

and unpredictably": first statement, §27.[4] Properly analysed, SIAC's finding at §143 was clearly limited and contingent, being subject to change.

26. All that the Secretary of State accepted was that, as matters then stood, Ms Begum could not provide live evidence in support of her own case from within the Al-Roj camp and, to that limited extent, this impacted on her ability to participate as a witness in the substantive hearing of her SIAC appeals: see the Secretary of State's Skeleton Argument in the SIAC proceedings at §83(4). The Secretary of State expressly argued that this did not mean that either the Deprivation Decision or the LTE Decision was unlawful.

27. The matters on which Ms Begum relied below were her ability to:
    (a) Communicate with her own legal representatives;
    (b) Give instructions to the Special Advocates;
    (c) Provide or receive evidence; and
    (d) Give evidence, either live, by video-link or at all.[5]

28. In response to each:
    (a) As set out above, Ms Begum succeeded in communicating with her lawyers for the purposes of instituting her appeals in SIAC, and her judicial review claim; and has now pursued those proceedings to the Supreme Court.
    (b) By the time of the hearing in SIAC, the Special Advocates had been in CLOSED for some time. Once a Special Advocate is in CLOSED they may not freely communicate with an appellant and must send a communication request to the

[4] That was plain at the time of the SIAC hearing which was conducted over a period of intense volatility following the launch of an offensive by Turkey against the border into SDF held Syria and reports that the US would withdraw their troops. There was reporting that the SDF were likely to have abandoned detention facilities holding members of ISIL in order to engage in the offensive.

[5] Ms Begum also relied in the proceedings below on a comment about her ability to access her appeal rights from the Al-Hawl camp in the Home Office ministerial submission. The suggestion is that the Secretary of State knew, at the time of the deprivation decision, that Ms Begum could not have a fair and effective appeal. That characterisation of the submission is simply wrong. The comment related to a different camp, Al-Hawl, from which Ms Begum was removed because of fears for her own safety. It says nothing about the position of Ms Begum in the Al-Roj camp. It expressed no definitive view on the issue, instead merely noting that it was "*difficult to see*" how she would effectively access her appeal rights at the time of the submission. Further, Ms Begum relied on this passage out of context. As is clear from the rest of the paragraph, the point was made in the context of observations that she had no immediate prospect of leaving the Al Hawl camp, or of travelling to a third country where fuller engagement with the appeal process might be possible, and it was not possible to facilitate her travel out of Syria.

Secretary of State for security checking in order to be permitted to do so. They are also prohibited from revealing any of the CLOSED material to the appellant. The Court of Appeal appeared to consider that this was of no assistance because the same national security case was relied on in both OPEN and CLOSED: see §112. But that objection is difficult to understand. If there were no difference in the cases relied on in OPEN and CLOSED, then Ms Begum's inability to communicate with the Special Advocates would make no difference.[6]

(c) Ms Begum is aware of the OPEN case against her and indeed has commented on it in her interviews with the media[7]. The Secretary of State's case against her is straightforward one - she travelled to Syria and aligned with ISIL. As indicated above, she has been able to communicate with her solicitors in a sufficiently effective manner to institute and maintain her two appeals in SIAC.

(d) The Secretary of State accepts that, as matters stood at the time of the hearing before SIAC, Ms Begum could not provide live evidence in support of her own case from within the Al-Roj camp. It is further accepted that that position impacted on SIAC's assessment of her ability to participate as a witness at that time in the substantive hearing of her SIAC appeals. This is the only element of the complaints made by Ms Begum with which the Secretary of State agreed. But, for the reasons set out below, it does not render the decisions under challenge unlawful.

Developments since the hearing before the Court of Appeal

29.

30.

The judicial review appeal on common law grounds

31. The starting point is the appropriate recognition by the Court of Appeal that:

[6] But, of course, the detail of the national security case would be provided in CLOSED, rather than OPEN, and the Special Advocates would be able to challenge it.

[7] See for example her interview with the *Daily Mail* in September 2019 (copy at page 963 of Tab 34 of the Appendix) and the interview she gave to *the Times* on the second day of the hearing before SIAC that was published by *the Times* on 25 October 2019 (copy at page 975 of Tab 34 of the Appendix).

(a) SIAC "*was correct in its analysis … that the three decisions of the Court of Appeal in G1, L1 and S1 support its analysis of the statutory scheme, in particular that the statute does not provide a right to an in-country appeal and that Parliament must have contemplated that a number of appellants would be required to conduct their appeals from abroad*" (§96 of the Judgment).

(b) SIAC was also correct in its analysis of *W2 v. Secretary of State for the Home Department* [2018] 1 WLR 2380: see §100 of the Judgment, citing the earlier §§42-51. In those earlier paragraphs Flaux LJ had cited SIAC's observations that it would be wrong to follow §187 of *W2* if it was to be read as indicating that an application for LTE must be allowed if an appellant cannot play a meaningful part in the appeal: "*If the statements relate to the LTE appeal, they go further, without explanation, than §86 of S1. They assume that the fact that an applicant can play no meaningful part in his appeal imposes, either, a duty on the Secretary of State to grant entry clearance, or a duty on the court, if entry clearance is refused, to order the Secretary of State to grant entry clearance. That cannot be right, as the Secretary of State will have to balance, when considering whether to grant entry clearance, the appellant's procedural difficulties against the public interest in keeping him out of the UK because of the threat he poses to national security, as will the court on any appeal (in an art.8 case) or application for judicial review (in a non-art.8 case)*".[8] (emphasis added)

32. Parliament has not provided a right to an in-country appeal. On the contrary, the statutory scheme even permits the Secretary of State to wait, on national security grounds, until a terrorist suspect has left the country before exercising deprivation powers, even though the effect is to deny the person an in-country appeal: *L1 v. Secretary of State for the Home Department* [2015] EWCA Civ 1410, per Laws LJ, with whom Lewison and Beatson LJJ agreed, at §§19-29; *S1*, per Burnett LJ at §86. The position in the present appeal is thus quite different to that examined by the Supreme Court in *R (Kiarie & Byndloss) v. Secretary of State for the Home Department* [2017] 1 WLR 2380 and on which Ms Begum sought to rely. That case, concerning the "*deport first, appeal later*" regime, involved a statutory scheme which *did* provide a right to an in-country appeal, but one from which

[8] See §50 of the Judgment.

the Secretary of State could depart in individual cases by the exercise of a certification power. That raises entirely different concerns from the present case, where Ms Begum was not removed from the UK by the Secretary of State, but instead travelled to, and remained in, Syria independently of the Secretary of State; and aligned with ISIL there, some four years before the statutory deprivation power was exercised. Unlike the appellants in *Kiarie*, she was not placed outside the UK, and deprived of a right to an in-country appeal, by any action of the Secretary of State.

33. SIAC correctly recognised that its rejection of Ms Begum's primary argument did not mean that her appeal necessarily failed: §191. Instead, it identified three possible outcomes: she could continue with her appeal; she could apply for a stay of the appeal until she was in a position to prosecute it; she could, if she failed to comply with a direction and her appeal was struck out, apply in due course to have it reinstated. In the circumstances of the present case, those were all appropriate and reasonable approaches that she could adopt.

The three alternatives

34. The Court of Appeal rejected the first and third of these possible courses as "*failing to answer the issue of unfairness and lack of effectiveness of the appeal*": §112. In doing so, it failed to take any proper account of three important considerations: the statutory context, the limited nature of the restriction on Ms Begum's access to a fair and effective appeal or the circumstances which had led to that situation.

35. As to the first and third possibilities, there are three objections to the Court's approach. **First**, the statutory context was that there was no right to an in-country appeal, and that the statutory scheme even permits the Secretary of State to wait, on national security grounds, until a terrorist suspect has left the UK before exercising deprivation powers. In those circumstances, the starting point was that Ms Begum did not have a right to be in the UK in order to exercise her appeal.

36. It is also notable that Parliament has permitted a system of service of notices of proposed deprivation "*to file*" in certain cases. Regulation 10(4) of the British Nationality (General)

Regulations 2003, as amended with effect from 9 August 2018[9] by the British Nationality (Amendment) (General) Regulations 2018, provides that where a person's whereabouts are not known, and either there is no address for correspondence or the address provided is defective, false or no longer in use, and no representative appears to be acting, the notice of proposed deprivation "*shall be deemed to have been given when the Secretary of State enters a record of the above circumstances and places the notice or a copy of it on the person's file*". The same ability to serve to file exists in respect of appealable decisions under s.82 of the Nationality, Immigration and Asylum Act 2002 and appealable "*EEA decisions*" under the Immigration (European Economic Area) Regulations 2016: see Regulations 4(1) and 7(2) of the Immigration (Notices) Regulations 2003.

37. Thus, Parliament has endorsed a system under which, in particular circumstances, a person will receive no notice at all of a decision, potentially for a long time (or ever) after it is made; and it has done this in respect of a wide range of important immigration and nationality-related decisions. The first time such a person hears of the decision is likely to be when they are refused entry to the UK, potentially a long time after the decision was taken. Plainly, any subsequent appeal may commence long after the decision in question has been taken. Yet there can be no suggestion that such a system is in any way unfair or ineffective. Equally there is no requirement for there to be a "*clear time sequence of notice to be followed by decision, giving effective or actual notice*" to a potential appellant: see *L1*, per Laws LJ at §19. The ability to serve to file where a person's location is unknown, coupled with the absence of Parliamentary intervention in terms of timing and sequencing of decisions, reflects the wide range of circumstances in which deprivation may take place, which cannot always be predicted in advance by the Secretary of State when faced with the need, sometimes urgently, to make a deprivation decision for imperative reasons of national security.

38. **Secondly**, the impact on Ms Begum's ability to access a fair and effective appeal was limited. The only impact was that, *as matters stood at the time of the hearing*, she could not give live evidence. But as her own evidence accepted, circumstances on the ground in

[9] Between the enactment of the British Nationality (General) Regulations 2003, and their amendment in 2018, notice could be served to a last address when the whereabouts of the subject of the decision were not known. Accordingly, in that situation there was no guarantee at all that the subject of the decision would ever see the notice and find out about the decision.

Syria could change quickly and unexpectedly: Mr Furner's first statement, §27. It was quite possible that, by the time of any hearing, the position might be different. Any unfairness or ineffectiveness which existed was necessarily based on a snapshot analysis of a point in time. The notion of continuing with her appeal – and, if necessary, perhaps applying for a stay at a later date – was an entirely reasonable one in those circumstances.

39. **Thirdly**, the fact that the Secretary of State was not responsible for the circumstances in which Ms Begum found herself was an important factor. Although the Court accepted, at §95, that it had to keep in mind that Ms Begum's predicament was in no sense the fault of the Secretary of State, it held that whether she left the UK of her own free will "*should be irrelevant*" to the question of the legal and procedural consequences of SIAC's conclusion that she could not have a fair and effective appeal: §94.

40. In approaching the matter in that way, the Court obscured the critical point: Ms Begum's predicament was not the fault of the Secretary of State. Whatever else may be said about the circumstances surrounding her departure, it had nothing at all to do with the Secretary of State. In none of the many interviews which Ms Begum has given to the press has she mentioned any other person being involved in her decision to leave the UK and travel to Syria to align with ISIL.

41. For those reasons, the Court was wrong to reject the first and third identified possibilities of continuing with the appeal or continuing until the point of strike out, with the possibility of a later application for reinstatement.

42. As to the second possibility, the Court "*thought long and hard about whether a stay is a satisfactory answer to the issue of unfairness and lack of effectiveness*" (§116 of the Judgment) but concluded that it was not. The Court gave two reasons for its rejection of the possibility of a stay.

43. **First**, it considered that a stay would do "*nothing to address the foreseeable risk, if she is transferred to Iraq or Bangladesh, which is that in either of those countries she could be unlawfully killed or suffer mistreatment*": §116. But the alleged exposure of Ms Begum to a risk of Article 2 or 3 ECHR mistreatment was a separate issue. The question whether a stay was a suitable solution to the (limited) finding of unfairness and ineffectiveness had

nothing to do with reducing the exposure of Ms Begum to alleged risk. That was a matter which fell properly for consideration under the Article 2/3 policy issue.

44. **Secondly**, the Court considered a stay would be wrong in principle because it would render her appeal "*meaningless for an unlimited period of time*": §117. Again, that was wrong. Matters on the ground could change quickly and unpredictably.

45. Against that background, and in any event, the basis on which the Court approached the Secretary of State's submissions about national security was flawed. The OPEN version of the Security Service assessment makes plain that Ms Begum "*travelled to Syria and aligned with ISIL*". The Submission to the Home Secretary noted that the Security Service assessment was that "*BEGUM is aligned with ISIL, and that she therefore poses a threat to national security*." The Secretary of State was therefore invited to deprive Ms Begum "*of her British citizenship on the basis that it would be 'conducive to the public good' due to the threat that BEGUM is assessed to pose to UK national security*". It is clear therefore that the Security Service's assessment is that the risks to national security posed by Ms Begum are <u>best</u> addressed by depriving Ms Begum of her citizenship. The effect of deprivation is to remove the automatic right of return held by a British national.

46. The Security Service's view is unsurprising in the light of the acknowledgement that there is a real national security advantage in being able to prevent persons who may be involved in terrorism from returning to the UK by removing their passports in the Court of Appeal's reasoning in *R (XH) v Secretary of State for the Home Department* [2018] QB 355 at §§94-98. In reaching that conclusion, the Court in *XH* highlighted "*the error of depicting the travel measure and the prerogative powers as capable of achieving the same practical results in preventing or restricting the involvement of an individual in terrorism-related activity*": §94. It recognised that "*There may be good security reasons for seeking to impose a travel measure on an individual even where he or she is already abroad*": §95. *XH* was referred to in the summary of the Secretary of State's submissions at Judgment §79, but was not mentioned in and formed no part of the Court's reasoning.

47. The Court of Appeal should have accepted the Security Service's assessment and thus proceeded on the basis that the return of Ms Begum to the UK would create significant national security risks:

(a) The Security Service's assessment is to be given great weight because it is an assessment based on expertise and advice from people with day-to-day involvement in national security matters (see *Secretary of State for the Home Department v. Rehman* [2003] 1 AC 153 at §26, §57 and §62 and *R (Lord Carlile) v. Home Secretary* [2015] AC 945 at §32 and §88).

(b) There was no basis, in evidence or otherwise, for not doing so. The totality of the Secretary of State's national security case supported this assessment; and there was no material before SIAC or the Court of Appeal to contradict it (because SIAC had not yet heard the substantive appeal).

48. It is submitted that the exposure of the public to an increased risk of terrorism is not justifiable or appropriate in this case on fairness grounds.[10]

(a) Ms Begum's current procedural difficulties in prosecuting her appeal were not in any way caused by the Secretary of State. She went to Syria and aligned with ISIL. The result is that she found herself in a camp in which communication for the purpose of prosecuting that appeal was extremely difficult. This factor is very important in considering where and how the balance between individual interest and the protection of the general community should be struck (as has been consistently recognised: see, for example, *G1*, at §16, endorsed by the ECtHR in *K2* at §60). Yet the Court of Appeal nowhere took this into account in its analysis of how to strike the balance between Ms Begum's private interest in procedural fairness and the public interest in the protection of national security.

(b) There was, as SIAC found, another option which was to stay the proceedings. The effect would be that the appeal was held in abeyance – not that it would be rejected. The abeyance might be for a short or a long period; but the situation on the ground was unpredictable as already noted. But either way, the need for abeyance was caused by Ms Begum's own actions.

(c) In any event, such a stay could be kept under review – it was not necessarily "*indefinite*". Ms Begum relied on press reports to suggest that there was a risk of

[10] The rarity and exceptionality of any such case existing was a point emphasised by Burnett LJ in *S1*, at §86.

onward transfer to a third country such as Iraq or Bangladesh. But the facts were that she had been in the camps in Syria for a prolonged period; and there was no evidence which could properly support a finding that any such transfer was likely to occur as a consequence of the Deprivation Decision, either imminently or at all. The suggestion at §116 that *if* she was transferred, this would lead to a "*foreseeable*" risk of unlawful killing or mistreatment was quite wrong.

The Court of Appeal's approach to the national security case

49. Instead of proceeding on this basis, the Court of Appeal sought to reach detailed conclusions about the precise weight of the national security risk on Ms Begum's return; which they then deployed to suggest that the individual interests of Ms Begum in a fair and effective appeal at the present time outweighed that risk and that a stay was not appropriate. The Court relied on two key conclusions in this respect:

    (a) The first conclusion was that the national security risks posed by Ms Begum's presence in the UK were lower than the risks posed by the subject of the proceedings in *U2 v Secretary of State for the Home Department* [2019] SC/130/2016 ("*U2*").
    (b) The second was that "*the national security concerns about her could be addressed and managed if she returns to the United Kingdom. If the Security Service and the Director of Public Prosecutions consider that the evidence and public interest tests for a prosecution for terrorist offences are met, she could be arrested and charged upon her arrival in the United Kingdom and remanded in custody pending trial. If that were not feasible, she could be made the subject of a TPIM*." (§120 of the Judgment).

50. The Court of Appeal made these findings despite having stated that there was "*no question of prejudging the national security issue in circumstances where the appeal has not been heard*" (§119 of the Judgment). There were fundamental difficulties in seeking to make such findings. Two points are to be noted at the outset.

51. **First**, SIAC had not sought to analyse the detail of the national security case and neither party made submissions on it; it was dealing only with the limited preliminary issues which

Ms Begum had asked it to determine[11]. Instead, SIAC correctly proceeded on the basis that in determining whether Ms Begum was correct in her argument that because of her current procedural difficulties her appeal against the Deprivation Decision must be allowed, proper weight had to be given to the assessment by the Secretary of State and her expert advisers of the national security risk posed by Ms Begum: see SIAC's judgment at §§144-145.[12] That was also SIAC's approach to the LTE Decision: §189 of SIAC's judgment.[13]

---

[11] On the basis that they were matters of "pure" law and did not require any examination of the national security case. Before SIAC, Ms Begum contended that the statelessness issue should *not* be determined as a preliminary issue because it would necessitate some examination of the facts of Ms Begum's case. She made no similar submission in relation to either the fair and effective appeal argument or the Article 2/3 issue: see Ms Begum's skeleton argument for the directions hearing on 11 June 2019. The first time the national security case became relevant was in the Court of Appeal's analysis in the Judgment of whether LTE should be granted.

[12] "*144. The difficulty at the heart of Mr Hickman's submissions is that, if they are right, the fact that a person who has been deprived of her nationality on grounds of national security outside the United Kingdom and is unable, for whatever reason, to instruct lawyers and/or to take part in her appeal by video link, entails, in and of itself, that her appeal should succeed, without any examination of its merits, and, in particular, without any consideration of the national security case against her. Mr Glasson made this point with some force. Mr Glasson also emphasised that it is highly significant that A had left the United Kingdom, apparently of her own free will, some years before Decision 1, and that she was not outside the United Kingdom as a result of Decision 1. Our clear view is that we could only accept Mr Hickman's submission if there is binding authority to that effect. In order to decide whether that is so, it is necessary for us to review the relevant authorities in some detail. But first, we consider whether there is any support for this submission in the legislative framework.*

145. In our judgment, Mr Hickman's submissions were, at least in part an attempt to derive from uncontroversial points about the general characteristics of a statutory right of appeal a universal rule that every deprivation appeal has to be effective. We readily accept that Parliament can be taken to have intended, that, where possible, appeals against deprivation decisions should be fair and effective. We do not consider that there is any warrant for a universal rule of this character in this statutory scheme, however. As we have indicated above, the effect of such a rule would be to convert a right of appeal on the merits into an automatic means of overturning a deprivation decision, regardless of its merits, if, for whatever reason, an appellant is unable to take part in her appeal." (Emphasis added)

[13] *"189. However, in deference to the detailed reasoning of the Court of Appeal, we must explain why we do not consider that we can follow those two statements in this case. There are four potential difficulties with the approach of the Court of Appeal in W2, which mean that, as we are not bound by it, we decline to follow it in this different context.*

i. If and in so far as the statements in paragraph 85 relate to W2's deprivation appeal, they are inconsistent (without explanation) with the express reasoning in paragraphs 83-85 of S1.

ii. If the statements relate to the LTE appeal, they go further, without explanation, than paragraph 86 of S1. They assume that the fact that an applicant can play no meaningful part in his appeal imposes, either, a duty on the Secretary of State to grant entry clearance, or a duty on the court, if entry clearance is refused, to order the Secretary of State to grant entry clearance. That cannot be right, as the Secretary of State will have to balance, when considering whether to grant entry clearance, the appellant's procedural difficulties against the public interest in keeping him out of the United Kingdom because of the threat he poses to

52. **Secondly**, the national security case at this initial stage was in two parts, with OPEN and CLOSED aspects to each part:

    (a) One of those parts (in OPEN and CLOSED) explains the threat to UK national security from UK-linked individuals who have travelled to ISIL-controlled territory to align with ISIL. This was set out in the Security Service statement on the threat to national security from UK-linked individuals who have travelled to ISIL-controlled territory to align with ISIL (known as the OPEN and CLOSED ISIL Threat statements respectively). It concludes, unsurprisingly, that UK-linked individuals who travel to Syria to align with ISIL represent a serious and credible threat to UK national security as a result of being in ISIL-controlled territory; and that the threat they pose would be significantly higher if they returned to the UK.
    (b) The other part (in OPEN and CLOSED) relates to the specific conduct of Ms Begum and establishes why the threat assessment applies in respect of her. This was set out in the Security Service assessment provided as Annex A to the Ministerial Submission made to inform the Deprivation Decision.

53. The only material which the Court of Appeal had before it was the OPEN Begum-specific assessment annexed to the Ministerial Submission, and a reference in that submission to the OPEN ISIL Threat statement. The Court thus did not even have before it the full OPEN national security case at this stage. It did not examine any of the CLOSED material. On 2 June 2020, it had refused to admit SIAC's CLOSED judgment into the appeal proceedings. It did not have before it the full unredacted version of the Security Service assessment[14] that was appended to the Ministerial Submission.

---

national security, as will the court on any appeal (in an article 8 case) or application for judicial review (in a non-article 8 case)."

See also §9 of the judgment of Elisabeth Laing J in the Judicial Review challenge to the LTE Decision.

[14] See §13 of the Judgment referring to Annex A to the Ministerial Submission. Annex A states that the assessment should be read in conjunction with the Security Service statement on the threat to national security from UK-linked individuals who have travelled to ISIL-controlled territory to align with ISIL.

54. In those circumstances, it is submitted that the Court of Appeal had no proper basis for the findings it sought to make as to the nature and weight of the national security risk posed by Ms Begum on return. It weighed the national security case against Ms Begum's procedural interests without knowing what the national security case actually was.

55. As to the two specific conclusions it reached in that respect:

(a) The conclusions made by SIAC in *U2* were made at the end of a full appeal hearing, following consideration of the national security case advanced in those proceedings. The Court in the present case had merely the OPEN version of the initial Security Service assessment. A comparison at that level of generality provided no proper basis for a conclusion about the relative weight of the national security concerns associated with Ms Begum's presence in the UK as compared to her being outside the UK. It also ignored the clear findings of principle in *U2*, at §§142-144, that deprivation of nationality was the most effective way to manage the risk from a terrorist who was outside the UK and was, in principle, a more effective solution that in-country alternatives such as a TPIM. In Ms Begum's case the assessment was made that the most effective way of disrupting the threat that she posed to national security was by depriving her of UK citizenship.

(b) As to the suggested 'protective' steps that the Court of Appeal concluded could be taken on her return:

i. There was no basis for the Court of Appeal's speculation that a prosecution could be brought. The Director of Public Prosecutions has played no part in the proceedings. A decision to arrest Ms Begum would be made by the Police; and a decision to prosecute her would be made by the Crown Prosecution Service. The Secretary of State is independent of those processes and plays no role in them. As such, the prospects of a criminal prosecution being commenced were simply unknown to the Court of Appeal. In any event, the Court's conclusion at §120 depends on (a) a decision to arrest and charge immediately on (and with all the necessary work having been completed by) return and (b) speculation as to bail or remand which is a matter for the courts.

ii. The Court's conclusion on the possible use of a TPIM was contrary to the approach accepted as correct in *XH* and was also entirely speculative. There was

no evidence before the Court on the point nor did the Court hear any submissions as to whether or not a TPIM could and /or would be imposed on Ms Begum. Further, that conclusion was contrary to the approach in *U2*.

56. It is therefore submitted that the Court of Appeal had no proper basis for the findings it made that fed into its balancing exercise. It should have concluded that Ms Begum's return would create a significant increased risk to national security and thus to the public; that the evidence supported that conclusion; and that a stay was the correct answer, as SIAC had found.

57. Alternatively, if the Court of Appeal was correct in reaching its conclusion that SIAC had erred in their approach to a stay and there was a need for some form of balancing exercise of the kind which the Court attempted to conduct at §120 by comparing the facts of *U2* with what it knew of the national security case against Ms Begum, the proper course should have been to remit the appeal to SIAC for reconsideration. At such a reconsideration SIAC could consider in full the OPEN and CLOSED National Security case against Ms Begum as well as the latest evidence in relation to her ability to prosecute her appeal. That would have been the appropriate disposal for precisely the reasons which the Court identified in relation to its disposal of the Article 2/3 practice issue: "*SIAC is better placed than this Court to make findings of fact, particularly in the field of national security. It has well-developed procedures for dealing with such matters, including the availability of cross-examination of witnesses and the holding of CLOSED hearings*." (Judgment at §129).

The LTE appeal on human rights grounds

58. Ms Begum challenged the LTE Decision by an appeal to SIAC under s.2 of the SIAC Act on human rights grounds (in addition to the judicial review on common law grounds). Her Grounds of Appeal in the s.2 appeal to SIAC were limited to the following bare assertion (at §4(1)):

> "*The decision results in a situation in which the Appellant is subject to conditions contrary to Articles 2/ 3 of the ECHR and/or a flagrant breach of her right to liberty and/or right to private life contrary to Articles 5 and 8 respectively. This is because the Appellant is detained in a camp in Syria, the Al Roj camp, which she can only leave by returning to the United Kingdom. The decision to refuse her LTE has meant that a prison with three walls has become a prison with four. The Secretary of State's suggestion that she could go to Bangladesh is impossible (she would not be admitted) and/or would expose her to a further real risk of treatment contrary to Articles 2/3.*"

The remainder of her Grounds before SIAC dealt with the issue whether the ECHR was even engaged (since Ms Begum was, at all material times, outside the territorial jurisdiction of the UK).

59. Before the Court of Appeal, Ms Begum narrowed her submissions and appeared to accept the difficulties of her arguments on jurisdiction and the substance of her human rights LTE appeal in §96 of her Skeleton, where she conceded that "*Given that SB puts her case on the basis of common law principles, she submits that it would be more appropriate for the court to allow her appeal from Laing J's refusal of her judicial review of the LTE decision, which was put on common law grounds*". She advanced no separate substantive arguments in respect of the LTE appeal, whether on the question of jurisdiction or the substantive merits.

60. Against that background, there was no basis for the LTE statutory appeal on ECHR grounds to be allowed at all. The Court's reasoning was based entirely on common law principles, not on the ECHR. Given the way Ms Begum put her case, that is not surprising. But it means that there is no explanation at all for allowing the LTE appeal from SIAC, which, pursuant to s.2 of the SIAC Act 1997, was confined to issues arising under the Human Rights Act 1998.

61. When the Court of Appeal's draft judgment was circulated to the parties, Ms Begum requested clarification of §§121-122 of the Judgment for that very reason. Consistently with the approach she adopted in her Skeleton, Ms Begum again prioritised the common law argument over the ECHR grounds. Her proposed judgment corrections suggested that:

> "*Both of these paragraphs indicate that the Court allows both the LTE appeal from SIAC pursuant to s.2 of the SIAC Act 1997 and the LTE appeal from the Administrative Court's ruling on the judicial review challenge to the LTE decision. The Appellant draws to the Court's attention the fact that since its reasoning is based on common law principles not ECHR, the reasoning does not explain how the LTE appeal from SIAC (as opposed to the LTE appeal from the Administrative Court) came to be allowed. The LTE appeal from SIAC (pursuant to section 2 of the SIAC Act 1997) is confined to issues arising under the Human Rights Act 1998. It is only necessary for the court to allow the LTE appeal from the Administrative Court to give effect to its judgment.*"

62. Notwithstanding that invitation, the Court of Appeal refused to provide any additional reasons on the LTE appeal. Instead, it allowed the LTE appeal without any reasons at all. In those circumstances, it is submitted that there was no basis for allowing the LTE appeal.

63. Given the absence of any developed argument on human rights grounds, this Case does not address the points in any detail. The Secretary of State reserves the right to respond further to any such arguments, if sought now to be raised.

ISSUE TWO: WAS THE COURT OF APPEAL WRONG TO CONCLUDE THAT SIAC HAD BEEN IN ERROR IN DETERMINING THE ARTICLE 2/3 PRACTICE ISSUE BY APPLYING THE PRINCIPLES OF JUDICIAL REVIEW?

64. This is not a case in which Articles 2 and 3 ECHR have extra-territorial effect. Ms Begum is not within the jurisdiction of the United Kingdom. Consideration of them arises as a consequence of a practice voluntarily adopted by the Secretary of State. As a matter of practice the Secretary of State will not deprive an individual of British citizenship if that individual would suffer mistreatment or unlawful killing as a direct consequence of the decision to deprive the individual of British nationality. If the individual would be exposed to such treatment, as a direct consequence of the deprivation decision, the Secretary of State's practice would be not to proceed. The Secretary of State will consider whether, as a direct consequence of the deprivation decision there are substantial grounds for believing that there is a real risk of mistreatment or unlawful killing that would constitute a breach of Articles 2 and/or 3 (if it occurred in the jurisdiction). In approaching the question of whether or not there are substantial grounds for believing there is a real risk, the Secretary of State will take account of issues such as foreseeability, and causation/causal nexus between the deprivation decision and possible future risk that may or may not manifest. The Secretary of State will not, ordinarily[15], give substantive consideration to the risks that may arise in countries other than the one in which the individual is located at the date of the deprivation decision. The Secretary of State's practice is set out in detail in SIAC's judgment in *X2 v Secretary of State for the Home Department* SC/132/2016 ("X2"), §§9-13.

[15] Although repatriation to Bangladesh was not considered a foreseeable outcome of deprivation, for completeness, the Secretary of State was provided with an overview of those risks. Para. i of the OPEN Ministerial Submission concluded that "*We do not consider that any potential Article 2/3 risks that may arise in countries outside of Syria are foreseeable as a consequence of the deprivation decision*".

65. The Court of Appeal concluded that SIAC "*took the wrong approach when it said at §138 that it would apply the principles of judicial review to the issue of whether the deprivation decision and/or the LTE refusal decision breached the extra-territorial policy of the Secretary of State*" (§123 of the Judgment). The Court of Appeal held that SIAC did not make an "*independent assessment of the issue of risk*" (§127 of the Judgment).

66. In its judgment SIAC had described its task as being to determine "*whether the Secretary of State was entitled, on the material before him, to decide*" whether it was a foreseeable and direct consequence of the Deprivation Decision that there were substantial grounds for believing that Ms Begum would be exposed to a real risk of ill-treatment breaching her rights under Articles 2 and 3. It stated that it would do so by "*applying the principles of judicial review*" because it was not deciding the point on its merits.[16]

67. Contrary to the Court of Appeal's conclusions, SIAC did not err in applying this test.

    (a) The point at issue was not whether Ms Begum was at real risk of Article 2 or 3 ill treatment through the direct application of those provisions. Ms Begum was not within the jurisdiction of the UK for the purposes of Article 1, and so Articles 2 and 3 could not apply. Rather, the issue concerned the application of the Secretary of State's practice of considering Article 2 and 3 risk as if those protections applied.

    (b) *X2* correctly describes the Secretary of State's practice. That involved assessing the lawfulness of the Secretary of State's application of her own practice. The question therefore is whether the Secretary of State lawfully applied that practice in Ms Begum's case. The correct approach was to apply the principles of judicial review. Since there is no rule of law limiting the scope of the Secretary of State's consideration of such proxy Article 2 and 3 ECHR risks, "*[a]ny limits must … be set by the general principles of public law*": *X2* at §52. The application of the Secretary of State's practice on Articles 2 and 3 was different, in this respect, from the statutory tests under s.40 BNA 1981 to which Lord Wilson was referring in *Secretary of State for the Home Department v. Al Jedda* [2014] AC 253: see §124 of the Judgment.[17]

[16] §138 of SIAC's judgment cited at §24 of the Judgment.

[17] The same point applies to the reference to *B2 v. Secretary of State for the Home Department* [2013] EWCA Civ 616, *per* Jackson LJ at §96, cited by Lord Wilson in *Al Jedda* and repeated in the Judgment at §124.

(c) The fact that the jurisdiction of SIAC in this case is an appellate one does not alter the approach to the substantive principles of law by which decisions of the Secretary of State are controlled. It is for that reason that SIAC limits itself to the lawfulness of the decision as at the date of the decision when considering all aspects of the appeal to the deprivation decision, whether it be the decision on statelessness[18] or conduciveness[19].

(d) The Court of Appeal was wrong to conclude at §126 that *R (Evans) v. Secretary of State for the Home Department* [2010] EWHC 1445 (Admin) should have informed the approach that SIAC should have adopted. That case involved only the lightest of argument on the point, and (if necessary) was wrong, on this point, in principle.

68. In any event, even if Ms Begum's argument were correct, it could not assist her. SIAC concluded as follows, at §139:

> "*The material before the Secretary of State did not suggest that A, as a person who had been deprived of her British nationality, would be treated any differently from a British woman who had not been deprived of her British nationality, but was, in other respects, in the same situation: that is, a woman who was associated with ISIL and detained by the SDF. A was in that situation as a result of her own choices and of the actions of others, but not because of anything the Secretary of State had done*."

69. It is clear that, in substance, SIAC reached its own view as to the effect of the material that was before the Secretary of State. It examined the material that was before the Secretary of State when making the Deprivation Decision and reached its own conclusion as to what it demonstrated. Even applying Ms Begum's test, there is no error in that approach.[20] The

---

[18] See *Secretary of State for the Home Department v. Al Jedda* [2014] AC 253 *per* Lord Wilson at §32 "*In principle, at any rate, the inquiry is a straightforward exercise both for the Secretary of State and on appeal: it is whether the person holds another nationality at the date of the order*." The same point was made in *Pham v. Secretary of State for the Home Department* [2015] 1 WLR 1591 *per* Lord Carnwath at §37, Lord Mance at §64 and Lord Sumption at §101.

[19] See the decision of SIAC chaired by Irwin J in *Y1 v. Secretary of State for the Home Department* (unreported, SC/112/2011, 13 November 2013) at §§13-17.

[20] For that reason, it is highly likely that the outcome for Ms Begum would not have been substantially different even if SIAC had expressly applied her approach and, accordingly, even if this ground is made out, relief should be refused: Senior Courts Act 1981, s.31(2A)(a). Despite the Secretary of State raising this point, the Court of Appeal did not consider it at all in the Judgment.

Court was directed to this passage but failed to refer to it in §127, when it rejected the argument that SIAC had considered the evidence in any event.

70. Finally, the Court of Appeal was not entitled to conclude that SIAC had not carried out an "*independent assessment of the issue of risk*" in circumstances where the Court had declined to consider SIAC's CLOSED judgment[21] which was concerned with the Article 2/3 risks.

ISSUE 3: WHETHER MS BEGUM'S APPEAL SHOULD HAVE BEEN ALLOWED OUTRIGHT

71. This was Ms Begum's primary submission. For the reasons set out at §§95-111, the Court rejected that submission. It was right to do so, for the reasons it gave.

72. In the Court of Appeal, Ms Begum relied on two bases: the principles of natural justice and an alleged statutory presumption in favour of an effective appeal.

Natural justice

73. Ms Begum makes four points under this head:

(a) There is a presumption that the power to deprive a person of their citizenship can only be lawfully exercised, and such a decision is only valid if there is compliance with the principles of natural justice;
(b) A person is to be afforded an opportunity to challenge the case against them and for their side to be heard before their rights are affected;
(c) Departures from the rules of natural justice must be express; and
(d) Where there is no merits appeal, it is important that individuals can make representations before an executive decision is taken which affects their rights.

[21] See §4 (3) of the Judgment

74. The deprivation power can only be lawfully exercised, but what the rules of natural justice require is a context-specific question. The context here has already been described above and involves:

(a) The public interest in safeguarding national security;
(b) It is not unlawful for the Secretary of State to wait, on national security grounds, until a terrorist suspect has left the UK before exercising deprivation powers even though the effect is to deny the appellant an in-country right of appeal: *L1*, *S1*. The position is *a fortiori* in the present case where Ms Begum's inability to access an in-country right of appeal is a result of her actions, not those of the Secretary of State;
(c) The Secretary of State is not responsible for Ms Begum's current circumstances; and
(d) Success in her appeal will have no direct impact on Ms Begum's circumstances (because she is not detained by the Secretary of State – she is in third-party detention in a foreign state).

75. Ms Begum has been given an opportunity to challenge the case against her through her right of appeal to SIAC and she has exercised it with particular vigour through these preliminary proceedings. The fact that at the time of the hearing before SIAC it was thought that her current circumstances were such that she could not participate in full at a substantive appeal was a result of her own actions. Her current circumstances are certainly not the fault or responsibility of the Secretary of State.

76. Ms Begum is wrong to suggest that Parliament may legislate to restrict the rules of natural justice but only where it does so expressly. She relied on *Al-Jedda v. Secretary of State for the Home Department* SC/66/2008, 18 July 2014, for that proposition, but that was a case about prior notice. That is not the issue in the present case. It offers no real assistance in the correct interpretation of the statutory scheme in the circumstances at issue here. The point made by Ms Begum is that certain procedural rights have been recognised by the common law because judicial review is not a full merits review. But Ms Begum has a full merits review available to her. If, because of her current circumstances, she does not wish to avail herself of it now, she can apply to stay the proceedings. In any event, SIAC found that a right to be consulted could be abrogated by a very clear implication: §157.

77. The Secretary of State is entitled to exercise deprivation powers when the subject of a decision is outside the jurisdiction; indeed, she is even entitled to wait, on national security grounds, until they have left the jurisdiction to do so: see *S1* and *L1*. In circumstances where an individual is outside the UK as a result of their own actions, rather than those of the Secretary of State, there can be no suggestion that any difficulty they then have in accessing fair and effective appeal procedures means that their appeal must automatically succeed. In those circumstances, it would be an extraordinary step to find that an individual who poses a national security risk to the UK is entitled to succeed because she cannot currently take an active part in her appeal in circumstances where her absence from the jurisdiction is a result of her own independent actions over a prolonged period of time[22].

78. Indeed, the logic of Ms Begum's position goes even further. It would mean that the more committed and extreme an individual, the more likely it was that they would find themselves in circumstances where they could not fully engage with the appeal process, with the result that it was less likely that the deprivation power could be used against them. That cannot possibly be right. It would defeat the statutory purpose of the power to deprive. The consequences of Ms Begum's argument demonstrate its inherent flaw.

79. Ms Begum has a right to a full merits appeal; she has exercised it; and she can stay the appeal proceedings until she is in a position to participate more fully. There is nothing unlawful in the Secretary of State's approach in those circumstances.

Presumption of an effective appeal

80. It is uncontroversial that, as a matter of general principle, appeals before judicial tribunals should be fair and effective. But neither that principle, nor the cases on which Ms Begum relied, deals with the legal consequences of a finding that Ms Begum cannot presently

[22] Ultimately, as Laws LJ indicated in *Carnduff v. Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786 "*a case which can only be justly tried if one side holds up its hands cannot, in truth, be justly tried at all*". As the Supreme Court explained in *Home Office v. Tariq* [2011] UKSC 35, [2012] 1 AC 452, the consequence would be that the appeal could not be tried at all and would fail *in limine* (and see also the discussion of the principle in *Al-Rawi v. Security Service* [2012] 1 AC 531). Those consequences were held by the ECtHR to be compatible with Article 6 ECHR: *Carnduff v. United Kingdom* (unreported, appln no. 18905/02, 10 February 2004). Yet the effect of Ms Begum's submission is the opposite: despite the existence of alternative solutions, the Secretary of State is required to hold up her hands and an appeal against a decision taken on national security grounds is decided in Ms Begum's favour without any proper consideration of the national security case.

enjoy a fair and effective appeal. As SIAC held at §143, it could not avoid deciding that issue and could not accept, without investigation, the assumption made by Ms Begum that her appeal should succeed in those circumstances.

81. The cases relied on by Ms Begum were all dealing with different statutory schemes. None of them concern deprivation of citizenship in circumstances where the person concerned was outside the jurisdiction and detained by a third party at the time of the decision under challenge. Equally, none of them lays down an absolute principle of access to fair and effective appeal procedures as a condition for the exercise of the statutory power in question.

82. The position is not altered by Ms Begum's submission that her current circumstances are such she cannot pursue her appeal in circumstances which meet minimum standards of fairness. The answer to that argument is that she can apply to stay the appeal until she is in a position to benefit from what she considers to be the minimum standards of fairness.

83. In determining what presumption may be derived from the statutory scheme, the existence of a statutory scheme for the service of notices to file, as noted above, is also relevant. It demonstrates that Parliament has endorsed a system under which, in particular circumstances, a person will receive no notice at all of a decision, potentially for a long time (or ever) after it is made; and it has done this in respect of a wide range of important immigration and nationality-related decisions.

84. Finally, none of the other cases or statutory schemes on which Ms Begum relied were of any assistance. Similarly, what she described as "*the fundamental nature of citizenship*" did not take the argument any further; and nor did her, or the interveners', submissions on international law. If those submissions are repeated by Ms Begum, or any interveners who obtain permission to intervene in this Court, the Secretary of State will respond in due course.

CONCLUSION

85. The Supreme Court is therefore requested to allow the Secretary of State's appeal, and dismiss Ms Begum's appeal, for the following, among other

REASONS

(a) Because the Court of Appeal erred in allowing Ms Begum's appeal on ground 2 against SIAC's determination of the preliminary issues determination in the Deprivation appeal;

(b) Because the Court of Appeal erred in allowing Ms Begum's LTE appeal;

(c) Because the Divisional Court erred in allowing Ms Begum's LTE judicial review claim;

(d) Because the Court of Appeal did not err in dismissing Ms Begum's appeal against the Deprivation decision on ground 1.

SIR JAMES EADIE QC

JONATHAN GLASSON QC

DAVID BLUNDELL QC

12 OCTOBER 2020