THE COURT ORDERED THAT:
1. The CONFIDENTIAL witness statement of Daniel Furner dated 30 August 2019 and its exhibits shall remain confidential to the parties and the court and, subject to further order of the court, shall not be available for inspection.
2. The witness relied on by Ms Begum, witness B, be granted anonymity in relation to the conduct of these proceedings and be identified only as "Witness B" and nothing may be published which, directly or indirectly, identifies Witness B as a witness in these proceedings.
3. The steps taken on behalf of the Secretary of State and Her Majesty's Government to facilitate Ms Begum's involvement in the deprivation appeal, as described in the Witness Statements of Lauren Cooper dated 12 October 2020 and 5 November 2020, shall be confidential and no party or other person shall publish or disclose the same.

Hilary Term
[2021] UKSC 7
On appeal from: [2020] EWCA Civ 918

JUDGMENT

R (on the application of Begum) (Appellant) *v* Special Immigration Appeals Commission (Respondent)
R (on the application of Begum) (Respondent) *v* Secretary of State for the Home Department (Appellant)
Begum (Respondent) *v* Secretary of State for the Home Department (Appellant)

before

Lord Reed, President
Lord Hodge, Deputy President
Lady Black
Lord Lloyd-Jones
Lord Sales

JUDGMENT GIVEN ON

26 February 2021

Heard on 23 and 24 November 2020

Appellant (SSHD)
Sir James Eadie QC
Jonathan Glasson QC
David Blundell QC
(Instructed by The Government Legal Department)

Respondent/Appellant (Begum)
Lord Pannick QC
Tom Hickman QC
Jessica Jones
(Instructed by Birnberg Peirce Ltd)

Special Advocates
(written submissions only)
Angus McCullough QC
Adam Straw
(Instructed by The Government Legal Department)

Intervener (1)
Professor Guglielmo Verdirame QC
Jason Pobjoy
Belinda McRae
(Instructed by Leigh Day (London))

Intervener (2)
Richard Hermer QC
Ayesha Christie
(Instructed by Liberty)

Intervener (3)
Felicity Gerry QC
Eamonn Kelly
(Instructed by JUSTICE)

Interveners:-

(1) UN Special Rapporteur on Counter-Terrorism (written submissions only)
(2) Liberty
(3) JUSTICE

LORD REED: (with whom Lord Hodge, Lady Black, Lord Lloyd-Jones and Lord Sales agree)

Introduction

1. On 19 February 2019 the Home Secretary, the Rt Hon Sajid Javid MP, wrote to Shamima Begum in the following terms:

> "As the Secretary of State, I hereby give notice in accordance with section 40(5) of the British Nationality Act 1981 that I intend to have an order made to deprive you, Shamima Begum of your British citizenship under section 40(2) of the Act. This is because it would be conducive to the public good to do so.
>
> The reason for the decision is that you are a British/Bangladeshi dual national who it is assessed has previously travelled to Syria and aligned with ISIL. It is assessed that your return to the UK would present a risk to the national security of the United Kingdom. In accord with section 40(4) of the British Nationality Act 1981, I am satisfied that such an order will not make you stateless."

I shall refer to that decision as the deprivation decision. On the same date, Mr Javid made an order that Ms Begum "be deprived of her British citizenship on grounds of conduciveness to the public good".

2. Mr Javid also certified, pursuant to section 40A(2) of the British Nationality Act 1981 ("the 1981 Act"), that his decision had been taken partly in reliance on information which in his opinion should not be made public in the interests of national security and in the public interest. The consequence of that certificate was that Ms Begum's right of appeal against the decision lay to the Special Immigration Appeals Commission ("SIAC"), under section 2B of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"), rather than to the First-tier Tribunal ("the Tribunal"), under section 40A of the 1981 Act. Ms Begum appealed against the decision to SIAC under section 2B. I shall refer to that appeal as the deprivation appeal.

3. On 3 May 2019 Ms Begum made an application for entry clearance and leave to enter the United Kingdom outside the scope of the Immigration Rules, under section 3 of the Immigration Act 1971 ("the 1971 Act"). The basis on which she made this application meant that it included, but was not limited to, a human rights

claim, within the meaning of section 113 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That provision defines a human rights claim as:

> "… a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 …"

Ms Begum's application was made on the understanding that, following the judgment of the Court of Appeal in *R (W2) v Secretary of State for the Home Department* [2017] EWCA Civ 2146; [2018] 1 WLR 2380 ("*W2*"), where a person claims that she cannot have a fair and effective appeal from a decision depriving her of citizenship from outside the United Kingdom, she should request leave to enter and, if it is refused, challenge that decision.

4. On 13 June 2019 Mr Javid refused Ms Begum's application for leave to enter outside the Immigration Rules, on the ground that she had failed to comply with a requirement, imposed as a matter of policy in relation to applications of that kind, that she should provide a record of her fingerprints and a photograph of her face. He refused the part of her application which involved her human rights claim on the basis that the European Convention on Human Rights ("ECHR") had no application to her and that, even if it had applied, there was no evidence that the refusal of leave to enter would result in a breach of her Convention rights. I shall refer to the decision to refuse leave to enter as the LTE (leave to enter) decision.

5. Mr Javid also certified, pursuant to section 97(3) of the 2002 Act, that his decision had been taken wholly or partly in reliance on information which in his opinion should not be made public in the interests of national security and in the public interest. The consequence of that certificate was that Ms Begum's right of appeal against the LTE decision lay to SIAC, under section 2 of the 1997 Act, rather than to the Tribunal, under section 82(1) of the 2002 Act.

6. Ms Begum appealed against the LTE decision to SIAC so far as concerned her human rights claim and, since there was no general right of appeal to SIAC in respect of that decision, also challenged the LTE decision in the Administrative Court by means of an application for judicial review, in accordance with her advisers' understanding of *W2*: that is to say, on the basis that she could not have an effective appeal against the deprivation decision unless she was granted leave to enter the United Kingdom, with the consequence, it was argued, that the Secretary of State was obliged to grant her such leave.

7. Following a directions hearing on 11 June 2019, the chairman of SIAC, Elisabeth Laing J, made an order dated 13 August 2019 directing that the deprivation appeal and the LTE appeal should be linked, and that there should be a hearing to determine three issues. The issues are recorded in somewhat different terms in the order and in SIAC's subsequent judgment, but the parties agree that they were:

(1) Whether the deprivation decision rendered Ms Begum stateless.

(2) Whether the deprivation decision or the LTE decision was contrary to the Secretary of State's extra-territorial human rights policy (explained in para 21 below) because it exposed her to a risk of death or of inhuman or degrading treatment.

(3) Whether she could have a fair and effective appeal against the deprivation decision from outside the United Kingdom and in Syria, and, if not, whether her appeal should be allowed on that ground alone.

The hearing on those issues was ordered to take place concurrently with the hearing of the LTE appeal.

8. Elisabeth Laing J, sitting in the Administrative Court, also ordered a "rolled up" hearing of Ms Begum's application for permission to apply for judicial review of the LTE decision and, if the application were granted, of her application for judicial review. That hearing proceeded concurrently with the hearing before SIAC.

9. On 7 February 2020 SIAC (Elisabeth Laing J, Upper Tribunal Judge Blum and Mr Roger Golland) handed down a judgment drafted by Elisabeth Laing J, holding that the deprivation decision did not make Ms Begum stateless, that the Secretary of State did not depart from his policy when he made the deprivation decision, and that although Ms Begum could not have an effective appeal against that decision in her current circumstances, it did not follow that her appeal succeeded. SIAC also decided that the LTE appeal should be dismissed: *Begum v Secretary of State for the Home Department* (Appeal No SC/163/2019) [2020] HRLR 7. On the same date Elisabeth Laing J handed down a judgment in the Administrative Court, holding that Ms Begum should be granted permission to apply for judicial review of the LTE decision, but that her application for judicial review should be dismissed: *R (Begum) v Secretary of State for the Home Department* [2020] EWHC 74 (Admin).

10. Ms Begum appealed to the Court of Appeal under section 7 of the 1997 Act against SIAC's decision to dismiss the LTE appeal. She also appealed to the Court

of Appeal against the Administrative Court's decision to dismiss her application for judicial review of the LTE decision. She could not appeal against SIAC's decision in the deprivation appeal, because there had not yet been a final determination of that appeal, and no appeal therefore lay under section 7 of the 1997 Act. Instead, she challenged SIAC's decision in that appeal, so far as relating to the second and third issues only, in the Administrative Court, by means of an application for judicial review. That application was heard, concurrently with the hearing before the Court of Appeal, by a Divisional Court comprising the same judges as comprised the constitution of the Court of Appeal.

11. On 16 July 2020 the Court of Appeal and Divisional Court handed down a judgment given by Flaux LJ, with which King and Singh LJJ agreed: *R (Begum) v Special Immigration Appeals Commission (UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism intervening)* [2020] EWCA Civ 918; [2020] 1 WLR 4267. The Court of Appeal allowed Ms Begum's appeal against SIAC's decision in the LTE appeal, and her appeal against Elisabeth Laing J's decision to dismiss the application for judicial review of the LTE decision. It ordered the Secretary of State to grant Ms Begum leave to enter the United Kingdom and to provide her with the necessary travel documents. The Divisional Court allowed Ms Begum's application for judicial review of SIAC's decision on the second issue in the deprivation appeal, concerning the Secretary of State's policy, and remitted that issue to SIAC for re-determination. It dismissed Ms Begum's application for judicial review of SIAC's decision on the third issue in the deprivation appeal, namely whether her appeal should automatically be allowed if leave to enter the United Kingdom was refused.

12. The present Home Secretary, the Rt Hon Priti Patel MP, now appeals to this court against the decisions of the Court of Appeal and the Divisional Court in relation to all of these matters (a leapfrog certificate having been granted by the Divisional Court under section 12 of the Administration of Justice Act 1969), with the exception of the Divisional Court's decision on the third issue in the deprivation appeal, on which she was successful. Ms Begum cross-appeals in relation to that matter (again with the benefit of a leapfrog certificate). The order requiring the Secretary of State to grant Ms Begum leave to enter and to provide her with the necessary travel documents has been stayed until further order.

13. This court therefore has before it appeals in three separate sets of proceedings:

> (1) First, the Secretary of State has appealed against the Divisional Court's decision to allow Ms Begum's application for judicial review of SIAC's decision concerning the Secretary of State's policy. The issue arising in that appeal is whether the Divisional Court was wrong to conclude that SIAC had erred in determining that issue by applying principles of

administrative law. There is also a cross-appeal in those proceedings by Ms Begum. The issue arising in the cross-appeal is whether the Divisional Court was wrong to reject her argument that the deprivation appeal should automatically be allowed if it could not be fairly and effectively pursued as a consequence of the refusal of her application for leave to enter the United Kingdom.

(2) Secondly, the Secretary of State has appealed against the Court of Appeal's decision to allow Ms Begum's appeal against SIAC's decision dismissing the LTE appeal, and to order that leave to enter must be granted. The issue arising in that appeal is whether the Court of Appeal was wrong to conclude that leave to enter must be granted to Ms Begum because she could not otherwise have a fair and effective hearing of her appeal against the deprivation decision.

(3) Thirdly, the Secretary of State has appealed against the Court of Appeal's decision allowing Ms Begum's appeal against Elisabeth Laing J's decision to dismiss the application for judicial review of the LTE decision, and ordering the Secretary of State to grant Ms Begum leave to enter the United Kingdom. The issue arising in that appeal is, again, whether the Court of Appeal was wrong to conclude that leave to enter must be granted to Ms Begum because she could not otherwise have a fair and effective hearing of her appeal against the deprivation decision.

14. The court has received written submissions by three interveners, as well as the parties: the United Nations Special Rapporteur on Counter-Terrorism, Liberty, and JUSTICE. This judgment will focus on the parties' submissions, but those made by the interveners have also received careful consideration.

The factual background

15. These appeals do not turn on the facts of Ms Begum's case. It is, however, necessary to understand some aspects of the factual background, including in particular the advice which the Secretary of State received before making the decisions in question.

The background to the deprivation decision

16. On 19 February 2019 the Home Secretary was invited by his officials 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 she was assessed to pose to national security.

The submission before him, which included an assessment by the Security Service, advised him that Ms Begum was born in the United Kingdom in 1999 and possessed both United Kingdom and Bangladeshi citizenship. She was said to have travelled to Syria in February 2015, when she was 15 years old, and aligned with ISIL (the so-called Islamic State of Iraq and the Levant). Although she travelled there as a minor, she had remained in ISIL-controlled territory since turning 18. Media reports indicated that, following her arrival in the ISIL-controlled city of Raqqa, she had applied to marry an ISIL fighter. She had had three children, two of whom had died (the third also subsequently died). She was understood to be held in the Al-Hawl Internally Displaced Persons Camp in Syria, which was controlled by the Syrian Democratic Forces ("SDF"). The Security Service considered that any individual assessed to have travelled to Syria and to have aligned with ISIL posed a threat to national security. It was noted that individuals, such as Ms Begum, who were radicalised as minors might be considered victims. That did not, however, change the threat which the Security Service assessed Ms Begum as posing to the United Kingdom. It did not justify putting the United Kingdom's national security at risk by not depriving her of her citizenship.

17. The material provided by the Security Service included a detailed statement dated April 2017 on the threat to national security from UK-linked individuals who had travelled to ISIL-controlled territory to align with ISIL. It explained that, following ISIL's declaration of a caliphate in June 2014, it had encouraged individuals to travel to Syria and Iraq to align with the group on a permanent basis. The Security Service's assessment was that anyone who had travelled voluntarily to ISIL-controlled territory to align with ISIL since the declaration of the caliphate was aware of the ideology and aims of ISIL and the attacks and atrocities that it had carried out. As such, they were assessed to have made a deliberate decision to align themselves with the group and its ideology in support of its terrorism-related activity. The primary role for most women who travelled to join the group was as wives of fighters and mothers of their children, raising the next generation of fighters and citizens of the caliphate. Anyone who travelled to ISIL-controlled territory, even to fill non-combatant roles, was actively supporting a terrorist organisation that was engaged in mass murder and grave human rights abuses, with an agenda to intimidate and attack governments and citizens globally.

18. The Security Service advised that the threat from individuals who returned to the United Kingdom from ISIL-controlled territory could manifest itself in a number of ways: (1) involvement in ISIL-directed attack planning, (2) involvement in ISIL-enabled attacks, (3) radicalising and recruiting UK-based associates, (4) providing support to ISIL operatives, and (5) posing a latent threat to the United Kingdom.

19. In relation to the first of these possibilities, the Security Service's assessment was that the United Kingdom was a priority target for ISIL terrorist activity. In relation to the second possibility, the statement noted that ISIL encouraged women

to carry out attacks. Any individual, male or female, who returned to the United Kingdom having spent a prolonged period of time in ISIL-controlled territory was likely to have developed the capability to carry out an attack. In relation to the third possibility, there was a risk that individuals who returned to the United Kingdom from ISIL-controlled territory might inspire, encourage or provide support to those who had not travelled there to carry out attacks. In relation to the fourth possibility, the Security Service considered that individuals who returned to the United Kingdom from ISIL-controlled territory might provide support to ISIL, for example as couriers or by helping to plan or carry out an attack in the United Kingdom. They were likely to have developed contacts in ISIL, who might then direct them to undertake support activities in the United Kingdom. Known examples were cited as evidence of each of these risks.

20. The Home Secretary was also provided with an updated statement by the Security Service dated March 2018. It maintained the assessment set out in the earlier statement, and in particular its conclusion that "the national security threat from UK-linked ISIL-aligned individuals would increase significantly if they returned to the UK".

21. The submission to the Home Secretary also noted that it had been stated in a memorandum during the passage of the Immigration Act 2014 ("the 2014 Act"), when the Home Secretary was the Rt Hon Theresa May MP, that:

> "[T]he Secretary of State has a practice of not depriving individuals of British citizenship when they are not within the UK's jurisdiction for ECHR purposes if she is satisfied that doing so would expose those individuals to a real risk of treatment which would constitute a breach of article 2 or 3 if they were within the UK's jurisdiction and those articles were engaged."

That statement of practice was the subject of the second issue decided by SIAC in the deprivation appeal (see para 7 above). It is referred to in this judgment as the Secretary of State's extra-territorial human rights policy, or more simply as the Secretary of State's policy.

22. In relation to that policy, the submission advised the Home Secretary that "there are no substantial grounds to believe that a real risk of mistreatment contrary to articles 2 (right to life) or 3 (prohibition of torture) will arise as a result of Begum being deprived of her British citizenship while in Syria", and 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".

23. The Home Secretary was also provided with a Mistreatment Risk Statement dated 18 February 2019, prepared by the Security Service, which related specifically to Ms Begum's circumstances, and with a cross-Government Mistreatment Risk Statement for Syria and Iraq, dated 28 January 2019. The Security Service statement explained that it had been prepared in accordance with the Home Secretary's policy, as it had been explicated by SIAC in its case law:

> "In its judgment in *X2* [*X2 v Secretary of State for the Home Department* (Appeal No SC/132/2016) (unreported) given 18 April 2018], SIAC addressed what the Home Secretary is required to assess in order to comply with his stated practice. SIAC concluded that the risks which the Home Secretary is required to assess are risks of harm which would breach articles 2 or 3 of the ECHR (if they applied) that are a direct consequence of the decision to deprive. SIAC described a two-stage test which it drew from the case law of the European Court of Human Rights: (i) a test of 'direct consequence' as the criterion for establishing state responsibility, liability being incurred if a state takes action which as a direct consequence exposes the individual to the relevant risk; and (ii) a test of 'foreseeability' as the criterion for establishing whether there are substantial grounds for believing the individual would be exposed to the relevant risk. The risk must be both foreseeable and a direct consequence of the deprivation."

24. Both the Security Service statement and the cross-Government statement concluded that "a UK-linked individual who has been deprived of his/her British nationality is likely to receive broadly the same treatment (for better or worse) as an individual who retains British nationality". In relation to the possibility of Ms Begum's being transferred to Bangladesh, the Security Service concluded:

> "We do not consider that a repatriation to Bangladesh is a foreseeable outcome of deprivation and as such the Home Secretary may consider that there is no real risk of return - let alone of mistreatment on return - for the purpose of complying with his practice."

The background to the LTE decision

25. On 13 June 2019 the Home Secretary received a submission from his officials recommending that he refuse Ms Begum's application for leave to enter the United Kingdom and her human rights claim. The submission and its annexes are before

the court in a heavily redacted form, but that is sufficient for the purposes of these appeals.

26. The submission advised that Ms Begum was then located in the Al-Roj Internally Displaced Persons Camp in Syria, where she currently remains. She sought leave to enter the United Kingdom in order to be able to participate effectively in her appeal against the deprivation decision, and in order to avoid the risk of mistreatment. As a consequence of her circumstances, her application for leave to enter could not be made in accordance with the Home Office's policy, which required the provision of a record of her fingerprints and a photograph of her face. Ms Begum sought a waiver of that requirement. It was recommended that the requirement should not be waived, for reasons which were explained. It was noted, among other matters, that "there is no realistic possibility of her being able to travel to the UK even if LTE were to be granted", and that any grant of leave to enter would not result in her release from detention by the SDF. If her circumstances were to change so that she would be in a position to make use of a visa, a new assessment of the position, and of the requirement to comply with the biometrics policy, would be necessary. Her application for leave to enter, and for the waiver of the biometrics requirement, was therefore considered to be premature. The Home Secretary's decision not to waive the requirement is not in issue in the appeals before this court.

27. In relation to the human rights claim, the submission advised that Ms Begum was no longer a British citizen, and that her circumstances did not engage any extra-territorial application of the ECHR. Furthermore, she had not adduced any evidence to suggest that the refusal of leave to enter would make any difference to her circumstances which was material to the articles of the ECHR which she relied upon, even if they applied.

The jurisdiction and powers of SIAC

28. Before considering the issues in the appeals before the court, it is necessary first to consider in detail the jurisdiction and powers of SIAC on appeals under sections 2 and 2B of the 1997 Act. This is an issue on which differing views were taken by SIAC and the Court of Appeal in the present case. In relation to the appeal under section 2 against the LTE decision, SIAC proceeded on the basis that it was confined to the question whether there had been a breach of the Secretary of State's duty under section 6 of the Human Rights Act 1998. In relation to the appeal under section 2B of the 1997 Act against the deprivation decision, SIAC's approach is encapsulated in para 138 of its judgment, where, in relation to the issue of the Secretary of State's compliance with his policy, Elisabeth Laing J stated:

> "We remind ourselves that we are not deciding this question on its merits. We must approach it, rather, by applying the principles of judicial review."

29. That passage can be contrasted with para 123 of the judgment of Flaux LJ, with which the other members of the Court of Appeal agreed:

> "… SIAC took the wrong approach when it said at para 138 that it would apply the principles of judicial review to the issue of whether the deprivation decision breached the extra-territorial policy of the Secretary of State. The appeals to SIAC under sections 2 and 2B of the 1997 Act are full merits appeals and as such it is for SIAC to decide for itself whether the decision of the Secretary of State in question was justified on the basis of all the evidence before it, not simply determine whether the decision of the Secretary of State was a reasonable and rational one on the material before him as in a claim for judicial review."

In support of that view, Flaux LJ cited the judgment of SIAC, given by Mitting J, in *Al-Jedda v Secretary of State for the Home Department* (Appeal No SC/66/2008) (unreported) given 7 April 2009, para 7, the judgment of the Divisional Court in *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), para 240, and the judgment of Lord Wilson in *Al-Jedda v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2013] UKSC 62; [2014] AC 253, para 30. Counsel for Ms Begum and for Liberty have also cited a number of other authorities in support of the Court of Appeal's position. Counsel for the Secretary of State, on the other hand, supported the position adopted by SIAC.

30. The jurisdiction and powers of SIAC in appeals under sections 2 and 2B are a matter of some complexity, as a result of the interlocking of the provisions in different legislation (notably the 1997 and 2002 Acts), and the frequent amendment to which they have been subject. Care is therefore required in identifying the provisions in force at any relevant time, including the time when relevant authorities were decided.

31. SIAC was created by the 1997 Act in order to enable the United Kingdom to comply with the ECHR as interpreted by the European Court of Human Rights in the case of *Chahal v United Kingdom* (1996) 23 EHRR 413. That case concerned a deportation decision. There was at that time no right of appeal against such a decision where the order was made on the grounds that the person's deportation was conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and another country, or for other reasons of

a political nature. Instead of a right of appeal, there was a right to make representations to an extra-statutory panel appointed by the Home Secretary to advise him. In *Chahal*, the European Court decided that this procedure was inadequate to safeguard the deportee's rights under article 13 and, if he was detained, article 5(4), of the ECHR.

Appeals to SIAC under section 2 of the 1997 Act

32. Section 2(1) of the 1997 Act gave SIAC jurisdiction to hear appeals against a number of immigration decisions, including deportation decisions and decisions refusing leave to enter the United Kingdom, where they were made on the ground that the measure in question would be conducive to the public good. It has been amended several times. The version of section 2(1) which is currently in force (as amended with effect from 31 August 2006) provides:

> "(1) A person may appeal to the Special Immigration Appeals Commission against a decision if -
>
> > (a) he would be able to appeal against the decision under section 82(1), 83(2) or 83A(2) of the Nationality, Immigration and Asylum Act 2002 but for a certificate of the Secretary of State under section 97 of that Act (national security, &c), or
> >
> > (b) an appeal against the decision under section 82(1), 83(2) or 83A(2) of that Act lapsed under section 99 of that Act by virtue of a certificate of the Secretary of State under section 97 of that Act."

An appeal therefore lies to SIAC where an appeal would have lain to the Tribunal under (inter alia) section 82(1) of the 2002 Act but for a certificate of the Secretary of State under section 97 of that Act.

33. The 2002 Act has also undergone repeated amendment. In the version of section 82(1) which is currently in force (as substituted by section 15 of the 2014 Act with effect from 20 October 2014), an appeal lies to the Tribunal against the refusal of a protection claim (section 82(1)(a)), the refusal of a human rights claim (section 82(1)(b)), and the revocation of protection status (section 82(1)(c)). Ms Begum's application for leave to enter did not involve either a protection claim or protection status as defined by section 82(2), but it did involve a human rights claim: see para 3 above. Ms Begum would therefore have had a right of appeal to the

Tribunal under section 82(1) against the LTE decision in so far as it refused her human rights claim, but for the certificate issued under section 97(3). In those circumstances, section 2 of the 1997 Act therefore provides Ms Begum with a right of appeal against the LTE decision in so far as it refused her human rights claim.

34. In relation to the grounds upon which an appeal may be brought, and the powers available to SIAC, section 4(1) of the 1997 Act, as originally enacted, required SIAC to allow any appeal to it under the Act if it considered "(i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently", and otherwise to dismiss the appeal. That provision was repealed by Schedule 9 to the 2002 Act, with effect from 1 April 2003.

35. Since the repeal of section 4 of the 1997 Act, the position has been governed by section 2(2) of that Act, as substituted by paragraph 20 of Schedule 7 to the 2002 Act. Section 2(2) provides that a number of other provisions of the 2002 Act are to apply, with any necessary modifications, to "an appeal against an immigration decision under this section", as they apply to an appeal under section 82(1) of the 2002 Act. According to section 2(6) of the 1997 Act the expression "immigration decision" has the meaning given by section 82(2) of the 2002 Act. As originally enacted, section 82(2) set out a list of "immigration decisions", which included the refusal of leave to enter the United Kingdom. As substituted by the 2014 Act, however, section 82(2) no longer contains any reference to immigration decisions. (Section 2(6) of the 1997 Act is one of a number of provisions of section 2 containing references to provisions of the 2002 Act which have been repealed: references which are themselves prospectively repealed by paragraph 26 of Schedule 9 to the 2014 Act, which has not yet been brought into force). The parties are however in agreement that section 2(2) of the 1997 Act should be understood as applying to an appeal which lies to SIAC in circumstances where an appeal would otherwise lie to the Tribunal under section 82(1) of the 2002 Act; and that is how I also construe the provision. On that basis, the provisions of the 2002 Act which are listed in section 2(2) of the 1997 Act apply to Ms Begum's appeal against the refusal of her human rights claim as part of the LTE decision.

36. The relevant provisions of the 2002 Act include section 84 of that Act, which concerns grounds of appeal, section 85, which concerns the matters to be considered, and section 86, which concerns the determination of the appeal. As originally enacted, section 84 enabled an appeal to be brought on the grounds, inter alia, that the decision in question was not in accordance with the law, and that the person taking the decision should have exercised differently a discretion conferred by immigration rules (section 84(1)(e) and (f)). Section 85(4) allowed the adjudicator (subject to specified exceptions) to consider evidence about any matter which he

considered relevant to the substance of the decision, including evidence which concerned a matter arising after the decision. Section 86(3) required the adjudicator to allow the appeal in so far as he thought that the decision was not in accordance with the law or that a discretion should have been exercised differently. Each of those provisions was either repealed or substantially amended by the 2014 Act, with the effect of restricting the scope of appeals and narrowing the powers of the Tribunal and SIAC.

37. In particular, in terms of the version of section 84 which is currently in force (as substituted by section 15 of the 2014 Act with effect from 20 October 2014), an appeal against the refusal of a human rights claim "must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998". Ms Begum's appeal against the LTE decision is therefore limited to the refusal of her human rights claim, and can only be brought on the ground that the refusal of that claim is unlawful under section 6 of the Human Rights Act. It has been clear since the decision in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 that SIAC's task, in considering an appeal on that ground, is not a secondary, reviewing, function dependent on establishing that the Secretary of State misdirected himself or acted irrationally, but that SIAC must decide for itself whether the impugned decision is lawful.

Appeals to SIAC under section 2B of the 1997 Act

38. Appeals against deprivation decisions have an entirely separate history, such decisions not being "immigration decisions" as that expression was understood prior to the 2014 Act. Rights of appeal were first introduced by section 4(1) of the 2002 Act, which substituted a new section 40 and section 40A for the original section 40 of the 1981 Act with effect from 1 April 2003. Those provisions established a right of appeal to an adjudicator (currently to the Tribunal), unless the Secretary of State certified that the decision had been taken in reliance on information which in his opinion should not be made public in the interests of national security, in the interests of the relationship between the United Kingdom and another country, or otherwise in the public interest (here, and subsequently, I employ the masculine pronoun in accordance with the statutory language). Where such a certificate had been issued, section 4(2) of the 2002 Act established a right of appeal to SIAC under section 2B of the 1997 Act.

39. Section 2B has also undergone amendment, as have the other provisions with which it is interlinked. The version which is currently in force provides:

> "A person may appeal to the Special Immigration Appeals Commission against a decision to make an order under section 40 of the British Nationality Act 1981 (c 61) (deprivation of

> citizenship) if he is not entitled to appeal under section 40A(1) of that Act because of a certificate under section 40A(2) (and section 40A(3)(a) shall have effect in relation to appeals under this section)."

40. There does not appear ever to have been any statutory provision relating to the grounds on which an appeal under section 2B may be brought, the matters to be considered, or how the appeal is to be determined (as mentioned in para 34 above, section 4 of the 1997 Act was repealed on the same date as section 2B came into force; and sections 84-86 of the 2002 Act were not applied to appeals under section 2B). The same appears to be true of an appeal to the Tribunal under section 40A of the 1981 Act.

41. In relation to the scope of the jurisdiction created by section 2B, counsel for Ms Begum and for Liberty referred to some decisions of the Upper Tribunal in which the jurisdiction of the First-tier Tribunal in an appeal under section 40A of the 1981 Act was considered. The earliest of them is *Deliallisi v Secretary of State for the Home Department* [2013] UKUT 439 (IAC) (unreported) given 30 August 2013, which was concerned with deprivation of citizenship under section 40(3) of the 1981 Act. That provision applies where the citizenship results from registration or naturalisation and "the Secretary of State is satisfied that the registration or naturalisation was obtained by means of - (a) fraud, (b) false representation, or (c) concealment of a material fact".

42. In that case, the First-tier Tribunal concluded that it had no power to exercise the Secretary of State's discretion differently, since such a power could only be conferred by express statutory provision. Subject to compliance with the Human Rights Act, the scope of an appeal under section 40A of the 1981 Act, in the view of the First-tier Tribunal, was to examine the facts on which the Secretary of State made the decision, examine the evidence and determine whether the basis upon which the decision was made was made out.

43. The Upper Tribunal, chaired by Upper Tribunal Judge Lane, adopted the opposite approach, holding (para 31) that "[i]f the legislature confers a right of appeal against a decision, then, in the absence of express wording limiting the nature of that appeal, it should be treated as requiring the appellate body to exercise afresh any judgement or discretion employed in reaching the decision against which the appeal is brought". The judge found support for that position in the earlier judgment of the Upper Tribunal in *Arusha and Demushi (Deprivation of Citizenship)* [2012] UKUT 80 (IAC); [2012] Imm AR 645, another case concerned with a decision made under section 40(3). However, the judge mistakenly understood the judgment in that case to have "approved" (para 28) remarks made by the First-tier Tribunal, which the Upper Tribunal had in reality merely recorded (see paras 11 and 14 of its judgment). The judge also found support in remarks made by a minister in the course

of a debate during the passage of the 2002 Act through Parliament, which he mistakenly treated (para 34) as revealing Parliament's intention, applying *Pepper v Hart* [1993] AC 593 in a manner which was disapproved in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paras 58-60. The judge also cited textbook authority that a fresh exercise of judgment was excluded if the decision involved a consideration of matters which were non-justiciable, and stated that that could not possibly be said of a decision under section 40: a questionable proposition so far as some decisions under section 40(2) are concerned, but one which can be accepted in relation to section 40(3). However, the apparent reasoning, that (1) an appellate body's ability to re-take a discretionary decision is excluded if the subject-matter is non-justiciable, and (2) the subject-matter of this decision is not non-justiciable, therefore (3) this decision can be re-taken by the appellate body, is fallacious. It depends on the unstated premise that an appellate body can always re-take a discretionary decision unless the subject-matter is non-justiciable: a premise which, as explained below, is incorrect. The judge also referred in *Deliallisi* to a number of potentially helpful authorities concerned with the scope of appellate jurisdiction, but did not discuss them. It will be necessary to return to some of those authorities.

44. A different approach was adopted by the Upper Tribunal, chaired by Mr C M G Ockelton, in *Pirzada (Deprivation of Citizenship: General Principles)* [2017] UKUT 196 (IAC); [2017] Imm AR 1257. He stated at para 9 of his judgment that section 84 of the 2002 Act did not apply to appeals under section 40A of the 1981 Act, but added that the grounds of appeal, in appeals under section 40A of the 1981 Act, must be directed to whether the Secretary of State's decision was empowered by section 40, and that "[t]here is no suggestion that a Tribunal has the power to consider whether it is satisfied of any of the matters set out in sub-sections (2) or (3); nor is there any suggestion that the Tribunal can itself exercise the Secretary of State's discretion."

45. In *BA (Deprivation of Citizenship: Appeals)* [2018] UKUT 85 (IAC); [2018] Imm AR 807 the Upper Tribunal, chaired by Lane J, repeated what had been said in *Deliallisi* and stated that the passage just cited from *Pirzada* was accordingly not to be followed. In support of his view of the proper ambit of an appeal under section 40A, Lane J cited the decision of this court in *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799. However, that decision was not concerned with an appeal under section 40A, but with an immigration appeal subject to the pre-2014 version of section 84 of the 2002 Act (para 36 above), and was therefore not in point.

46. Before considering the authorities concerned directly with appeals to SIAC, it is worth considering some other authorities concerned with the scope of appellate jurisdiction, most of which were cited in *Deliallisi*. It is apparent from them that the principles to be applied by an appellate body, and the powers available to it, are by no means uniform. At one extreme, some authorities, concerned with licensing

appeals to courts of summary jurisdiction, have held that such appeals should proceed as re-hearings, reflecting the terms of the relevant legislation and the procedures followed by such courts. Other authorities, concerned with appeals to the Court of Appeal against discretionary decisions by lower courts, have held that the scope of the appellate jurisdiction was much more limited. Modern authorities concerned with the scope of the jurisdiction of tribunals hearing appeals against discretionary decisions by administrative decision-makers have adopted varying approaches, reflecting the nature of the decision appealed against and the relevant statutory provisions. Two examples were mentioned in *Deliallisi*.

47. The first is the decision of the Court of Appeal in *John Dee Ltd v Comrs of Customs and Excise* [1995] STC 941. The case concerned the jurisdiction of the VAT Tribunal on an appeal from a decision of the Commissioners that a taxpayer should provide security for the payment of tax. The Commissioners had a discretion to require security, in terms of the relevant legislation, "[w]here it appears to the Commissioners requisite to do so for the protection of the revenue". No statutory guidance was given as to the scope of an appeal against the exercise of the power or as to the powers of the tribunal on such an appeal. The tribunal was, however, given powers to hear evidence and make orders relating to discovery.

48. Neill LJ, with whom the other members of the court agreed, held that the question for the tribunal was not whether it appeared to it that the provision of security was requisite for the protection of the revenue: the statutory condition was whether it appeared to the Commissioners to be requisite. In examining whether that condition was satisfied, the tribunal would, to adopt the language of Lord Lane in *Customs and Excise Comrs v J H Corbitt (Numismatists) Ltd* [1981] AC 22, 60, "consider whether the Commissioners had acted in a way in which no reasonable panel of Commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight" (p 952). The tribunal might also have to consider whether the Commissioners had erred on a point of law. The tribunal could not, however, exercise the statutory discretion itself. The legislature had conferred on the Commissioners alone, and not on the tribunal or the court, the assessment of whether security was requisite. Although that case arose in the circumstances of taxation, the reasoning was not confined to that context, but turned on the nature of the discretion and the fact that it had been confided to the primary decision-maker.

49. The case of *Customs and Excise Comrs v J H Corbitt (Numismatists) Ltd*, which Neill LJ followed, concerned an appeal to the VAT Tribunal against the Commissioners' exercise of their discretion to recognise a taxpayer's records as sufficient for the purposes of a statutory scheme. It was in that context that Lord Lane, with whom Lord Diplock, Lord Simon of Glaisdale and Lord Scarman agreed, said at p 60 that the tribunal could only properly review the Commissioners' decision "if it were shown that the Commissioners had acted in a way in which no reasonable

panel of Commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight".

50. The judgment in *Deliallisi* also mentioned the case of *Banbury Visionplus Ltd v Revenue and Customs Comrs* [2006] EWHC 1024 (Ch); [2006] STC 1568, where Etherton J distinguished *John Dee* and held that the appellate jurisdiction was of wider scope. He identified the critical feature of *John Dee* as being that "the statutory pre-condition for the imposition by the Commissioners of security was that 'it appears to the Commissioners requisite to do so for the protection of the revenue'" (para 48). In other words, "the legislature had expressly conferred on the Commissioners alone, and not on the tribunal or the court, the assessment of whether security was necessary for the protection of the revenue". In the case before him, on the other hand, the Commissioners' discretion was limited to the choice of the means of achieving a specified statutory objective. A decision of the Commissioners could therefore be challenged on the ground that it did not comply with their duty to achieve that objective: a question which it was fully within the jurisdiction of the appellate tribunal to decide.

51. In the present appeals, counsel for the Secretary of State cited the decision of the House of Lords in the case of *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153. The case was concerned with an appeal to SIAC under section 2 of the 1997 Act against a deportation decision made on the basis that "the Secretary of State deems [the person's] deportation to be conducive to the public good". In forming that view in relation to Mr Rehman, the Secretary of State relied on interests of national security.

52. The case was decided at a time when appeals under section 2 were not limited, as they are now, to human rights issues. Section 4(1) of the 1997 Act (subsequently repealed by the 2002 Act) directed SIAC to allow an appeal if it considered "(i) that the decision or action against which the appeal is brought was not in accordance with the law or with any immigration rules applicable to the case, or (ii) where the decision or action involved the exercise of a discretion by the Secretary of State or an officer, that the discretion should have been exercised differently", and otherwise to dismiss the appeal. In the light of the terms in which its jurisdiction was conferred, SIAC concluded in Mr Rehman's case that it was entitled to form its own view as to what was capable of being regarded as a threat to national security, and its own view of whether the allegations against Mr Rehman had been proved, differing in both respects from the view of the Secretary of State.

53. That decision was reversed by the Court of Appeal, whose decision was upheld by the House of Lords. Lord Slynn of Hadley noted that section 4(1) of the 1997 Act empowered SIAC to review all aspects of the Secretary of State's decision, including his findings of fact (para 11). He stated at para 22 that "when specific acts

which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof". But he immediately added that "that is not the whole exercise", stating:

> "The Secretary of State … is not merely finding facts but forming an executive judgment or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a 'high civil degree of probability'. Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be deportation for the public good."

He also stated at para 26 that "the Commission must give due weight to the assessment and conclusions of the Secretary of State", since he was "undoubtedly in the best position to judge what national security requires". The assessment of what was needed in the light of changing circumstances was primarily for him.

54. Lord Steyn, who agreed with Lord Slynn, also based his decision on the terms of section 4, citing with approval Lord Woolf MR's judgment in the Court of Appeal at para 42:

> "SIAC were … correct to regard it as being their responsibility to determine questions of fact and law. The fact that Parliament has given SIAC responsibility of reviewing the manner in which the Secretary of State has exercised his discretion, inevitably leads to this conclusion. *Without statutory intervention, this is not a role which a court readily adopts*." (Emphasis added)

As the last sentence indicates, Lord Woolf treated SIAC's express power to review the merits of the Secretary of State's exercise of his discretion as the key to the scope of its jurisdiction.

55. Lord Hoffmann, in a speech with which Lord Clyde and Lord Hutton agreed, stated at para 49 that the fundamental flaw in SIAC's reasoning was that, although it correctly said that section 4 gave it full jurisdiction to decide questions of fact and law, it "did not make sufficient allowance for certain inherent limitations, first, in the powers of the judicial branch of government and secondly, within the judicial function, in the appellate process". Those limitations, being inherent in the judicial

function and in the appellate process, must also apply to SIAC (and to the Divisional Court and the Court of Appeal) under the current legislation.

56. The limitations upon judicial power arose from the principle of the separation of powers, as Lord Hoffmann explained at para 49:

> "However broad the jurisdiction of a court or tribunal, whether at first instance or on appeal, it is exercising a judicial function and the exercise of that function must recognise the constitutional boundaries between judicial, executive and legislative power."

In particular, as Lord Hoffmann went on to state at para 50, although what was meant by "national security" in the 1971 Act was a question of law (to which the answer was "the security of the United Kingdom and its people"), the question of whether something was in the interests of national security was not a question of law:

> "It is a matter of judgment and policy. Under the constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interests of national security are not a matter for judicial decision. They are entrusted to the executive."

57. There were, however, at least three important functions which SIAC served under section 4 of the 1997 Act, as Lord Hoffmann explained at para 54. First, the factual basis for the executive's opinion that deportation would be in the interests of national security must be established by evidence. It was therefore open to SIAC to say that there was no factual basis for the Secretary of State's opinion. However, as Lord Hoffmann noted, SIAC's ability to differ from the Secretary of State's evaluation in that respect was limited by considerations inherent in an appellate process. Secondly, SIAC could reject the Home Secretary's opinion on the ground that it was one which no reasonable minister advising the Crown could in the circumstances reasonably have held. Thirdly, an appeal to SIAC might turn upon issues which did not lie within the exclusive province of the executive, such as compliance with article 3 of the ECHR (as given effect by the Human Rights Act).

58. In relation to the first of these points, Lord Hoffmann rejected the concept of a standard of proof, stating at para 56 that the issue was not whether a given event happened but the extent of future risk. The question of whether the risk to national security was sufficient to justify the appellant's deportation could not be answered by taking each allegation seriatim and deciding whether it had been established to some standard of proof:

> "It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee."

59. A contrast might be drawn between the hybrid approach favoured by Lord Slynn, as it might be described, under which some facts had to be proved on a balance of probabilities, and the evaluation based on the facts had to be reasonable, and Lord Hoffmann's more orthodox (in public law terms) identification of the relevant questions as being (1) whether the Secretary of State's evaluation had a proper factual basis (or, as he also put it, whether there was no factual basis for the Secretary of State's opinion), and (2) whether the Secretary of State's opinion was one which no reasonable minister could have held. Lord Steyn and Lord Hutton expressed agreement with Lord Slynn; Lord Clyde and Lord Hutton expressed agreement with Lord Hoffmann. Whatever conclusion one might draw as to how the law stood at that time, the subsequent repeal of section 4 of the 1997 Act, and the absence of any similar provision in the current legislation, indicate that it is Lord Hoffmann's approach which is now the more relevant. As Lord Woolf observed, in the passage cited by Lord Steyn (para 54 above), the express powers conferred by section 4 were the basis for attributing to SIAC a role which a court would not readily adopt.

60. Turning next to the limitations of the appellate process, Lord Hoffmann explained at para 49 that:

> "They arise from the need, in matters of judgment and evaluation of evidence, to show proper deference to the primary decision-maker."

He pointed out at para 57, first, that SIAC was not the primary decision-maker, and that it was institutionally less well qualified than the Secretary of State:

> "Not only is the decision entrusted to the Home Secretary but he also has the advantage of a wide range of advice from people with day-to-day involvement in security matters which the Commission, despite its specialist membership, cannot match."

61. A further factor was the nature of the decision under appeal, which did not involve a yes or no answer as to whether it was more likely than not that someone had done something, but an evaluation of risk:

> "In such questions an appellate body traditionally allows a considerable margin to the primary decision-maker. Even if the appellate body prefers a different view, it should not ordinarily interfere with a case in which it considers that the view of the Home Secretary is one which could reasonably be entertained."

Lord Hoffmann acknowledged that this limited approach might not be necessary in relation to every issue which SIAC had to decide. For example, the approach to whether the rights of an appellant under article 3 of the ECHR were likely to be infringed might be very different.

62. Finally, Lord Hoffmann explained at para 62 that a further reason for SIAC to respect the assessment of the Secretary of State was the importance of democratic accountability for decisions on matters of national security:

> "It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."

These points have been reiterated in later cases, including *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 ("*A*") and *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60; [2015] AC 945.

63. Considering, against that background, the functions and powers of SIAC in an appeal under section 2B of the 1997 Act against a decision to deprive a person of their citizenship under section 40(2) of the 1981 Act, it is clearly necessary to examine the nature of the decision and any statutory provisions which throw light on the matter, bearing in mind that the jurisdiction is entirely statutory.

64. It is also necessary to bear in mind that the appellate process must enable the procedural requirements of the ECHR to be satisfied, since many appeals will raise issues under the Human Rights Act. Those requirements will vary, depending on the context of the case in question. In the context of immigration control, including the exclusion of aliens, the case law of the European Court of Human Rights establishes that they generally include, in particular, that the appellant must be able to challenge the legality of the measure taken against him, its compatibility with absolute rights

such as those arising under articles 2 and 3 of the ECHR, and the proportionality of any interference with qualified rights such as those arising under article 8. SIAC must also be able to allow an appeal in cases where the Secretary of State's assessment of the requirements of national security has no reasonable basis in the facts or reveals an interpretation of "national security" that is unlawful or arbitrary: see, for example, *IR v United Kingdom* (2014) 58 EHRR SE14, paras 57-58 and 63-65 (concerning an appeal under section 2 of the 1997 Act, prior to the amendments made by the 2014 Act). A more limited approach has been adopted in cases concerned with deprivation of citizenship. The European Court of Human Rights has accepted that an arbitrary denial or deprivation of citizenship may, in certain circumstances, raise an issue under article 8. In determining whether there is a breach of that article, the Court has addressed whether the revocation was arbitrary (not whether it was proportionate), and what the consequences of revocation were for the applicant. In determining arbitrariness, the Court considers whether the deprivation was in accordance with the law, whether the authorities acted diligently and swiftly, and whether the person deprived of citizenship was afforded the procedural safeguards required by article 8: see, for example, *K2 v United Kingdom* (2017) 64 EHRR SE18, paras 49-50 and 54-61.

65. Section 2B of the 1997 Act confers a right of appeal, in distinction to sections 2C to 2E, which provide for "review". The latter provisions require SIAC to apply the principles which would be applied in judicial review proceedings, and enable it to give such relief as may be available in such proceedings: see section 2C(3) and (4), and the equivalent provisions in sections 2D and 2E. No such limitations are imposed upon SIAC when determining an appeal under section 2B. It is also relevant to note section 5(1)(b), which enables the Lord Chancellor to make rules regulating "the mode and burden of proof and admissibility of evidence". Clearly, appeals involving questions of fact as well as points of law are contemplated. That is also reflected in the rules made under section 5.

66. In relation to the nature of the decision under appeal, section 40(2) provides:

> "(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good."

The opening words ("The Secretary of State may …") indicate that decisions under section 40(2) are made by the Secretary of State in the exercise of his discretion. The discretion is one which Parliament has confided to the Secretary of State. In the absence of any provision to the contrary, it must therefore be exercised by the Secretary of State and by no one else. There is no indication in either the 1981 Act or the 1997 Act, in its present form, that Parliament intended the discretion to be exercised by or at the direction of SIAC. SIAC can, however, review the Secretary

of State's exercise of his discretion and set it aside in cases where an appeal is allowed, as explained below.

67. The statutory condition which must be satisfied before the discretion can be exercised is that "the Secretary of State is satisfied that deprivation is conducive to the public good". The condition is not that "SIAC is satisfied that deprivation is conducive to the public good". The existence of a right of appeal against the Secretary of State's decision enables his conclusion that he was satisfied to be challenged. It does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied. That is a further reason why SIAC cannot exercise the discretion conferred upon the Secretary of State.

68. As explained at paras 46-50, 54 and 66-67 above, appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014: see paras 34 and 36 above). They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.

69. For the reasons I have explained, that appears to me to be an apt description of the role of SIAC in an appeal against a decision taken under section 40(2). That is not to say that SIAC's jurisdiction is supervisory rather than appellate. Its jurisdiction is appellate, and references to a supervisory jurisdiction in this context are capable of being a source of confusion. Nevertheless, the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend upon the nature of the decision under appeal and the relevant statutory provisions. Different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable. So, for example, in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, the principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights,

contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment.

70. In considering whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. The exercise of the power conferred by section 40(2) must depend heavily upon a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety, as in the present case. Some aspects of the Secretary of State's assessment may not be justiciable, as Lord Hoffmann explained in *Rehman*. Others will depend, in many if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are incapable of objectively verifiable assessment, as Lord Hoffmann pointed out in *Rehman* and Lord Bingham of Cornhill reiterated in *A*, para 29. SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect, for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*, para 29.

71. Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act. In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State, as Lord Hoffmann explained in *Rehman* and Lord

Bingham reiterated in *A*. In reviewing compliance with the Human Rights Act, it has to make its own independent assessment.

72. In the present proceedings, the approach of the Court of Appeal and the Divisional Court was premised on a different understanding of SIAC's jurisdiction and powers, as was explained at para 29 above. They were not referred to the case of *Rehman*, or to the other authorities which I have discussed, with the exception of *Deliallisi*. They referred, however, to two other authorities concerned with SIAC as demonstrating the breadth of its jurisdiction and powers.

73. The first was the judgment of SIAC itself, given by Mitting J, in *Al-Jedda v Secretary of State for the Home Department* (Appeal No SC/66/2008) (unreported) given 7 April 2009. Mitting J rejected a submission in that case that SIAC's powers were narrower in an appeal under section 2B of the 1997 Act than in an appeal under section 2, because section 86 of the 2002 Act applied to the latter but not to the former. Section 86(3) in its then form required that an appeal must be allowed if the Tribunal thought that a discretion exercised in making the decision in question should have been exercised differently (see para 36 above). Mitting J considered, first, that the non-application of that provision "enlarges rather than diminishes the power of the Tribunal/Commission, by leaving it free to decide what to do in the light of its findings", and secondly, that "[a]n appeal is a challenge to the merits of the decision itself, not to the exercise of a discretion to make it" (para 7). For the reasons I have explained, I am unable to agree with that view.

74. Mitting J went on to state at para 8 that the scheme of appeals to SIAC was "described in detail" in the judgment of the Court of Appeal in *Rehman* [2003] 1 AC 153, paras 4-16, and in the judgment of Lord Woolf CJ in *Secretary of State for the Home Department v M* [2004] EWCA Civ 324; [2004] 2 All ER 863, paras 6-16. In the first of those cases, however, what was described was the scheme governing appeals under section 2 of the 1997 Act, not section 2B, at a time when section 4 was in force, giving SIAC a very broad jurisdiction: see para 34 above. Section 4 had been repealed by the time of Mitting J's judgment, and no similar provision had ever applied to appeals under section 2B.

75. As for the judgment of Lord Woolf CJ in *Secretary of State for the Home Department v M*, it concerned an appeal under section 25 of the Anti-terrorism, Crime and Security Act 2001 ("the 2001 Act"), which is no longer in force. Mitting J quoted Lord Woolf's statement at para 15 that "SIAC's task is not to review or 'second guess' the decision of the Secretary of State but to come to its own judgment in respect of the issue identified in section 25". But section 25 of the 2001 Act, providing a right of appeal against decisions made under section 21, was a very different provision from section 2B of the 1997 Act, as it applies to decisions made under section 40(2) of the 1981 Act. Section 21(1) of the 2001 Act enabled the Secretary of State to issue a certificate in respect of a person if he "reasonably …

(a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist". Under section 25, SIAC "must cancel the certificate if … it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or … it considers that for some other reason the certificate should not have been issued". The Lord Chief Justice correctly analysed the effect of a provision in those terms. But section 2B of the 1997 Act and section 40(2) of the 1981 Act are materially different. The fallacy which appears to underlie Mitting J's reasoning is an assumption that SIAC's jurisdiction is uniform, without regard to the nature of the particular decision under appeal or the terms of the relevant statutory provisions.

76. Mitting J went on at para 9 to decline to follow Lord Hoffmann's observations in *Rehman* concerning SIAC's ability to determine if the Secretary of State's opinion had no factual basis, and his statement that the Secretary of State's opinion could only be rejected if it was one which no reasonable minister advising the Crown could in the circumstances reasonably have held. Mitting J stated that "[w]e do not accept this limitation upon our decision-making power". Mitting J's reluctance to accept guidance from the House of Lords is also evident in another of his judgments which was cited by counsel for Ms Begum. In *Zatuliveter v Secretary of State for the Home Department* (Appeal No SC/103/2010) (unreported) given 29 November 2011, para 8, he declined to follow the guidance given in *Rehman* as to the weight to be attached to the Secretary of State's assessment, on the basis that "we believe that we are able to, and do, give more careful and detailed scrutiny to the risk posed by an individual appellant to national security than the Secretary of State".

77. The other authority cited by the Court of Appeal and the Divisional Court was the judgment of Lord Wilson in *Al-Jedda v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2013] UKSC 62; [2014] AC 253. This was an appeal in the same proceedings as Mitting J's judgment (which had been overturned on appeal, following which another constitution of SIAC had taken a fresh decision). The only issue in the appeal was whether section 40(4) of the 1981 Act (the prohibition on making an order depriving a person of citizenship if the Secretary of State is satisfied that it would make the person stateless) prevented the Secretary of State from making a deprivation order if she considered that the person would be stateless only because he had not made an application for Iraqi nationality. That was a question of law falling squarely within SIAC's jurisdiction.

78. The case was cited by the Court of Appeal and the Divisional Court for a passage in the judgment of Lord Wilson at para 30, concerning the effect of the word "satisfied" in section 40(2), (3) and (4). He observed:

> "Parliament has provided a right of appeal against [the Secretary of State's] conclusion that one or other of the grounds

> [for deprivation of citizenship] exist and/or against her refusal to conclude that the order would make the person stateless; and it has been held and is common ground that such is an appeal in which it is for the appellate body to determine for itself whether the ground exists and/or whether the order would make the person stateless (albeit that in those respects it may choose to give some weight to the views of the Secretary of State) and not simply to determine whether she had reason to be satisfied of those matters: *B2 v Secretary of State for the Home Department* [2013] EWCA Civ 616 at para 96, Jackson LJ."

79. In that passage, which appears in the section of his judgment headed "Argument", Lord Wilson was not laying down any rule of law. In the first place, he was recording a concession ("it has been held and is common ground …"). Secondly, it is apparent that he was not endorsing the concession, or the approach adopted in *B2*: he said, immediately before the passage just cited, that the word "satisfied" "should, if possible, be given some value", but that "I confess, however, that I do not find it easy to identify what that value should be". That issue, in relation to section 40(4), has been the subject of later judicial consideration, but lies beyond the scope of the present proceedings. Thirdly, the judgment contains no discussion of the matter which was said to be common ground, nor any reference to the relevant authorities discussed above. It is of no relevance in the present context in any event, since the dictum cited (*B2 v Secretary of State for the Home Department* [2013] EWCA Civ 616, para 96), was concerned solely with section 40(4), which was held by the Court of Appeal to have been intended to give domestic effect to article 8(1) of the Convention on the Reduction of Statelessness of 1961. On that basis, the Court of Appeal considered that section 40(4) should be construed and applied consistently with that provision.

80. Another decision of this court which was relied on by counsel for Ms Begum was *Pham v Secretary of State for the Home Department (Open Society Justice Initiative intervening)* [2015] UKSC 19; [2015] 1 WLR 1591, which was an appeal against the decision of the Court of Appeal in *B2 v Secretary of State for the Home Department*. This court appears to have mistakenly understood that appeals under section 2B of the 1997 Act were governed by section 4 of that Act, which had in fact been repealed by the 2002 Act and had never applied to appeals under section 2B: see para 5. Nevertheless, the judgments proceeded on the basis that SIAC's jurisdiction required it to review the reasonableness or rationality of the Secretary of State's decision under section 40(2): see, for example, paras 59-60, 98, 103, 107-108 and 112.

81. In the present case, counsel for Ms Begum relied on Lord Sumption's statement at para 108:

> "The suggestion that at common law the court cannot itself assess the appropriateness of the balance drawn by the Home Secretary between [a person's] right to British nationality and the relevant public interests engaged, is in my opinion mistaken. In doing so, the court must of course have regard to the fact that the Home Secretary is the statutory decision-maker, and to the executive's special institutional competence in the area of national security."

As is clear from para 107 of his judgment, Lord Sumption was referring to the common law test of rationality or reasonableness. As he observed, the application of that test "must necessarily depend on the significance of the right interfered with, the degree of interference involved, and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision-maker was called on to make given the subject matter". These observations are consistent with the approach which I have described at paras 66-71 above. They are not consistent with an approach which would place SIAC "in the shoes" of the decision-maker and treat it as competent to re-consider the matter de novo or to re-take the decision itself.

The jurisdiction and role of the Court of Appeal and the Divisional Court

82. It is also necessary to consider briefly the jurisdiction and role of the Court of Appeal and the Divisional Court in the present proceedings. The appeal to the Court of Appeal against SIAC's decision in the LTE appeal was brought under section 7 of the 1997 Act. In terms of that provision, an appeal lies against SIAC's final determination of an appeal "on any question of law material to the determination". The Court of Appeal's jurisdiction in relation to the LTE appeal was therefore restricted to questions of law.

83. The Court of Appeal's jurisdiction in the appeal against Elisabeth Laing J's decision in the judicial review challenge to the LTE decision was its ordinary appellate jurisdiction in judicial review proceedings. The Divisional Court's jurisdiction in the judicial review challenge to SIAC's decision in the deprivation appeal was the ordinary jurisdiction of the Administrative Court, applying principles of administrative law.

(1) Ms Begum's cross-appeal against the Divisional Court's decision in relation to the deprivation appeal

84. Having established the nature of the exercise upon which the various courts and tribunals were properly engaged, it is possible to consider the appeals to this

court. It is convenient to begin by considering the issue raised in Ms Begum's cross-appeal against the Divisional Court's decision on her application for judicial review of SIAC's decision in the deprivation appeal. The issue is whether the Divisional Court was wrong to reject her argument that the deprivation appeal should automatically be allowed if it could not be fairly and effectively pursued as a consequence of the refusal of her application for leave to enter the United Kingdom.

85. In its judgment, SIAC stated in the first sentence of para 143:

> "We accept that, in her current circumstances, A [Ms Begum] cannot play any meaningful part in her appeal, and that, to that extent, the appeal will not be fair and effective."

SIAC did not accept that the consequence of that situation was that Ms Begum's appeal must be allowed. It observed at para 144 that the difficulty with Ms Begum's argument was that, if it was correct, the fact that a person who had been deprived of her nationality on grounds of national security was unable to instruct lawyers or to take part in her appeal entailed, in and of itself, that her appeal should succeed, without any examination of its merits, and without any consideration of the national security case against her. It also noted that Ms Begum's difficulties were not the consequence of the deprivation decision. It commented at para 145 that the argument attempted to derive from uncontroversial points about the general characteristics of a statutory right of appeal a universal rule that every deprivation appeal must be effective. SIAC did not consider that there was any warrant for such a rule in the statutory scheme. It would convert a right of appeal into an automatic means of overturning a deprivation decision, regardless of its merits, if for whatever reason an appellant was unable to take part in her appeal.

86. SIAC found support for its view in a number of aspects of the statutory scheme applicable to deprivation decisions. First, section 40A(6) of the 1981 Act, which at one time prevented a deprivation order from being made while an appeal was pending or could be brought, was repealed by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. Parliament must therefore have contemplated that a person might have to pursue her appeal after being deprived of her British citizenship, with the disadvantages which that might entail. Secondly, section 78 of the 2002 Act, which prevents the removal of an appellant from the United Kingdom while her appeal is pending, and section 92, which provides for some rights of appeal to be exercisable in the United Kingdom, do not apply to appeals against deprivation decisions. Parliament cannot therefore have intended that such an appeal should be a bar to removal from the United Kingdom, or that it should necessarily be exercisable in the United Kingdom.

87. The Divisional Court did not find assistance in those provisions, but agreed with SIAC's conclusion on this point. Flaux LJ stated at para 95:

> "It seems to me to be contrary to principles of fairness and justice simply to conclude that the appeal should be allowed and the deprivation decision set aside without any consideration of the merits of the case by the court. Fairness is not one-sided and requires proper consideration to be given not just to the position of Ms Begum but the position of the Secretary of State. The court has also to keep in mind the public interest considerations, including the interests of national security which led to the deprivation decision, together with the important fact … that Ms Begum's predicament is in no sense the fault of the Secretary of State."

88. In support of Ms Begum's appeal to this court, counsel argued that the power to deprive a person of her citizenship could only be lawfully exercised if there was compliance with the principles of natural justice. The appeal process was the mechanism which Parliament had established for ensuring that a deprivation decision conformed to those principles. This meant that, if a person could not have a fair and effective appeal, the deprivation decision would not be consistent with natural justice. That reasoning, with respect, appears to me to be fallacious. The fact that the appeal process is a safeguard against unfairness does not mean that a decision which cannot be the subject of an effective appeal is unfair.

89. In considering the consequences of a person's inability to pursue an effective appeal against a deprivation decision, it is necessary to acknowledge at the outset that Parliament has conferred upon that person a right of appeal. Parliament has not, however, stipulated what the appellate tribunal should do if the person's circumstances are such that she cannot effectively exercise that right. In answering that question, it is necessary to consider how such a body should reasonably respond to a problem of that kind, having regard to its responsibility for the administration of justice, the nature and consequences of the decision in question, and any relevant provisions of the legislation.

90. From the perspective of the administration of justice, Flaux LJ was clearly correct to say that fairness is not one-sided and requires proper consideration to be given not just to the position of Ms Begum but also to the position of the Secretary of State. As Eleanor Roosevelt famously said, justice cannot be for one side alone, but must be for both. It follows that an appeal should not be allowed merely because the appellant finds herself unable to present her appeal effectively: that would be unjust to the respondent. There are, indeed, many situations in which a party to legal proceedings may be unable to present her case effectively: for example, because of the unavailability of evidence as a result of the death, illness or incapacity of a

witness. If the problem is liable to be temporary, the court may stay or adjourn the proceedings until the disadvantage can be overcome. If the problem cannot be overcome, however, then the court will usually proceed with the case. The consequence is not that the disadvantaged party automatically wins her case: on the contrary, the consequence is liable to be that she loses her case, if the forensic disadvantage is sufficiently serious.

91. Where, on the other hand, the difficulty is of such an extreme nature that not merely is one party placed at a forensic disadvantage, but it is impossible for the case to be fairly tried, the interests of justice may require a stay of proceedings. The point is illustrated by the case of *Carnduff v Rock* [2001] EWCA Civ 680; [2001] 1 WLR 1786, where a police informer brought an action to recover reasonable remuneration for information he had supplied. The Court of Appeal held that, since a fair trial of the issues would require the police to disclose material which should in the public interest remain confidential, and the public interest in its confidentiality outweighed the countervailing public interest in having the claim litigated, it followed that the claim should be struck out. Laws LJ observed at para 36 that the case "cannot, in truth, be justly tried at all". A subsequent complaint to the European Court of Human Rights under article 6 of the ECHR was held to be manifestly ill-founded: *Carnduff v United Kingdom* (Application No 18905/02) (unreported) given 10 February 2004.

92. The correctness of that decision is not in doubt. Lord Mance and Lord Kerr cited it in *Tariq v Home Office* [2011] UKSC 35; [2012] 1 AC 452, when considering the claimant's argument that a closed material procedure should not be used to protect national security material which was essential to the defence of the claim, but the production of which would be contrary to the public interest. Lord Mance, with whose reasoning Lord Phillips, Lord Hope, Lady Hale, Lord Clarke, Lord Kerr and Lord Dyson agreed, observed at para 39 that, if that argument was accepted:

> "… a court might, following the Court of Appeal decision in *Carnduff v Rock* [2001] 1 WLR 1786, determine that, if the national security material could not be deployed in defence, the claim might not be fairly justiciable at all … Under that possibility, it would be Mr Tariq's case which would fail in limine."

(See also the judgment of Lord Kerr at para 110.) The correctness of the approach adopted in *Carnduff v Rock*, in circumstances where a claim cannot be justly tried, was also accepted by all the members of the court in *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531: see paras 23, 50, 76, 86, 88, 103, 108 and 157.

93. Another example, in a different context, is the case of *Hamilton v Al Fayed* [2001] 1 AC 395. The plaintiff, a former Member of Parliament, brought proceedings for defamation in respect of allegations which the defendant had made against him, and which had been upheld by a Parliamentary committee following an inquiry. He waived his Parliamentary privilege pursuant to section 13 of the Defamation Act 1996. The House of Lords held that, but for the waiver, the principle of Parliamentary privilege would have made a fair trial of the action impossible, by preventing any challenge to the veracity of evidence given to the Parliamentary committee. It would therefore have necessitated a stay of the action, following the approach approved by the Privy Council in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.

94. The nature and consequences of the decision in question in the deprivation appeal do not point towards a different conclusion. It is, of course, true that a deprivation decision may have serious consequences for the person in question: although she cannot be rendered stateless, the loss of her British citizenship may nevertheless have a profound effect upon her life, especially where her alternative nationality is one with which she has little real connection. But the setting aside of the decision may also have serious consequences for the public interest. In such a case, it would be irresponsible for the court to allow the appeal without any regard to the interests of national security which prompted the decision in question, and it is difficult to conceive that the law would require it to do so.

95. There is nothing in the statutory provisions which points towards a different conclusion. I would not, however, agree with SIAC that the provisions positively point away from that conclusion. The provisions to which SIAC referred provide a context for considering what a fair procedure might amount to, and are a reminder that the constituent elements of a fair process are not absolute or fixed, but they do not provide an answer to the question as to what is to happen if a fair procedure is impossible.

96. I should add that the authorities principally relied upon by counsel for Ms Begum do not appear to me to be in point. In *AN v Secretary of State for the Home Department* [2010] EWCA Civ 869, the Secretary of State made a non-derogating control order which had the effect of interfering with the claimant's liberty. When the order was challenged in accordance with the relevant statutory procedure, the Secretary of State was unable to produce even a gist of the material justifying the order, for reasons of national security. Following *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269, the challenge to the order was upheld, since it had not been shown to be justified at a hearing which was compliant with article 6 of the ECHR, as the statutory scheme required. That decision was not an example of a claimant succeeding because he was unable to present an effective appeal. He succeeded because the statutory scheme required the Secretary of State to justify the order at a hearing which complied with article 6 of

the ECHR, and he was unable to do so. There is no difficulty of that kind in the present case.

97. For the foregoing reasons, I conclude that Ms Begum's cross-appeal should be dismissed.

(2) The Secretary of State's appeal against the Court of Appeal's decision in the LTE appeal, and (3) the Secretary of State's appeal against the Court of Appeal's decision in the proceedings for judicial review of the LTE decision

98. As has been explained, the Secretary of State has appealed against the Court of Appeal's decision to allow Ms Begum's appeal against SIAC's decision dismissing the LTE appeal, and to order that leave to enter must be granted. It is also convenient to deal in this section of the judgment with the Secretary of State's appeal against the Court of Appeal's decision to allow Ms Begum's appeal against the Administrative Court's decision to dismiss her application for judicial review of the LTE decision, and to order that leave to enter must be granted. Both appeals raise the same issue: whether the Court of Appeal was wrong to conclude that leave to enter must be granted to Ms Begum because she could not otherwise have a fair and effective hearing of her appeal against the deprivation decision. The issue arises in the two appeals, however, in different jurisdictional contexts, as was explained in paras 37 and 66-71 above.

99. The issue arose before SIAC as a consequence of its decision that Ms Begum "cannot have an effective appeal [against the deprivation decision] in her current circumstances, but it does not follow that her appeal succeeds" (para 192). How, then, should matters proceed? SIAC suggested three possible ways forward. First, Ms Begum could decide to continue with the deprivation appeal. Secondly, she could ask for a stay of the appeal, "in the hope that, at some point in the future, she will be in a better position to take part in it" (para 191). That solution would be in accordance with the discussion at paras 90-95 above. Thirdly, if she did not ask for a stay, it was possible that her appeal might be struck out at some point in the future because of her failure to comply with a procedural requirement. If her circumstances were subsequently to change, it might be open to her to apply to reinstate her appeal.

100. SIAC did not discuss the LTE appeal separately from the deprivation appeal, but it noted at paras 188-189 that the reasoning in *R (W2) v Secretary of State for the Home Department* [2017] EWCA Civ 2146; [2018] 1 WLR 2380, an article 8 case where it had been held that the effective appeal issue could be raised in an appeal against the refusal of leave to enter, did not apply in a case where the ECHR was not engaged. That follows from the fact that an LTE appeal can only be brought against the refusal of a human rights claim, on the ground that the decision is

unlawful under section 6 of the Human Rights Act, as explained in paras 32-37 above.

101. In her judgment on the application for judicial review of the refusal of leave to enter, Elisabeth Laing J noted the argument advanced on Ms Begum's behalf: in summary, that since Parliament must have intended the statutory right of appeal under section 2B of the 1997 Act to be effective, and the appeal would not be effective unless Ms Begum could take part in it, it followed that either her deprivation appeal must be allowed or the Secretary of State must grant her leave to enter. Elisabeth Laing J rejected that reasoning for the reasons given in the SIAC judgment. That disposed of the application for judicial review, and rendered it unnecessary for her to deal with an argument that the Secretary of State's decision not to waive the biometrics requirement was irrational.

102. In the Court of Appeal, Flaux LJ proceeded on the basis that "the entitlement to be heard and to fairness in decision-making … does not lead inevitably to the answer that if an appeal cannot be fair and effective it must be allowed, *if there are other ways in which the unfairness and lack of effectiveness can be addressed*" (para 107: emphasis added). As was explained earlier, however, it is a mistake to suppose that, if an appeal cannot be fair and effective, it must therefore be allowed, even if there are no ways in which the unfairness and lack of effectiveness can be addressed: see paras 90-94 above.

103. Proceeding, however, on the basis that some means of ensuring an effective appeal must be found, Flaux LJ rejected the three potential solutions suggested by SIAC. In particular, he rejected the suggestion that the appeal might be stayed in the hope that at some point in the future Ms Begum would be in a better position to take part in it. He did not accept that SIAC, in the first sentence of para 143 of its judgment (see para 85 above), and in para 191 (see para 99 above), "was only expressing some provisional or pro tem view" (para 93). In his view, it was not open to the Secretary of State to argue that Ms Begum's situation in the camp might change. The court had to proceed on the basis that while she remained in the camp her deprivation appeal could not be fair and effective. He concluded, at paras 116-117:

> "First, the suggestion that Ms Begum's appeal should be stayed indefinitely in circumstances where she is being detained by the SDF in the camp, does 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.

> Second, it seems to me that simply to stay her appeal indefinitely is wrong in principle. It would in effect render her appeal against an executive decision to deprive her of her British nationality meaningless for an unlimited period of time."

104. In relation to this part of Flaux LJ's judgment, a number of observations might be made. First, SIAC had made no finding that there was a foreseeable risk that Ms Begum would be transferred to Iraq or Bangladesh, let alone that she could be unlawfully killed or mistreated there. The Court of Appeal could not itself make such a finding. Ms Begum's appeal against SIAC's decision was confined by statute to a point of law: see para 82 above. Nor did Ms Begum's appeal against the decision of the Administrative Court confer a fact-finding jurisdiction on the Court of Appeal. In the absence of such a finding, the risk of mistreatment if Ms Begum were transferred to Iraq or Bangladesh was immaterial. Secondly, the risk of transfer to Iraq or Bangladesh, and possible mistreatment there, was in any event irrelevant to the question of how the court should respond to Ms Begum's inability to pursue an effective appeal while she continued to be detained in the camp. The risk of mistreatment was a separate issue, which arose in relation to the Secretary of State's application of his extra-territorial human rights policy. Thirdly, it seems to me to be apparent from the terms of its judgment that, when SIAC found that Ms Begum could not play an effective part in the deprivation appeal, and suggested that the appeal might be stayed, it was not excluding the possibility that there might be a relevant change in her circumstances, although not necessarily in the camp. On the contrary, it had that possibility in its contemplation when it suggested a stay of the appeal, at para 191, "in the hope that, at some point in the future, she will be in a better position to take part in it". Fourthly, the only issue which could properly be raised in Ms Begum's LTE appeal was whether the LTE decision was unlawful under section 6 of the Human Rights Act 1998, in so far as it refused her human rights claim.

105. However, having decided that a stay of the appeal was not the answer, Flaux LJ concluded at para 118 that the only way in which Ms Begum could have a fair and effective appeal was to allow her appeal against the LTE decision and her appeal against the dismissal of her application for judicial review of that decision, and to order the Home Secretary to allow her to enter the United Kingdom.

106. Flaux LJ reached that conclusion notwithstanding the national security concerns about Ms Begum. In relation to those, Flaux LJ made a number of points. First, he stated that the assessment of the risk posed by Ms Begum "would appear to be at a lower level of seriousness than in the case of U2" (para 119). U2 was the designation given to the appellant in the case of *U2 v Secretary of State for the Home Department* (Appeal No SC/130/2016) (unreported) given 19 December 2019, where SIAC rejected an argument that he could be allowed to return to the United

Kingdom since there were adequate measures available within this country to address the risk which he posed. Secondly, Flaux LJ stated that "[i]t seems to me that, given the difference in level of seriousness between U2 and Ms Begum, the national security concerns about her could be addressed and managed if she returns to the United Kingdom", either by her being arrested and charged upon her arrival in the United Kingdom, or by her being made the subject of a TPIM (ie, a measure taken under the Terrorism Prevention and Investigation Measures Act 2011) (para 120). Thirdly, he stated that "given that the only way in which she can have a fair and effective appeal is to be permitted to come into the United Kingdom to pursue her appeal, fairness and justice must, on the facts of this case, outweigh the national security concerns, so that the LTE appeals should be allowed" (para 121).

107. It is necessary, with respect, to make a number of critical observations about this part of Flaux LJ's judgment. First, there was no basis for allowing the LTE appeal. As has been explained, the only ground on which such an appeal could be brought was that the LTE decision was unlawful under section 6 of the Human Rights Act. No such ground was argued before the Court of Appeal: counsel for Ms Begum put her case solely on the basis of common law principles. The only context in which those arguments could properly be considered was in her appeal against the dismissal of her application for judicial review of the LTE decision. Her counsel pointed this out to the Court of Appeal, stating in their skeleton argument that "[g]iven that [Ms Begum] 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 [Elisabeth] Laing J's refusal of her judicial review of the LTE decision". They reiterated the point when the draft judgment was circulated, correctly stating:

> "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."

108. Secondly, the exercise which the Court of Appeal undertook, of comparing the level of risk to national security posed by Ms Begum with the risk posed by U2, seems to me to have been misguided. In the first place, the Court of Appeal was in no position either factually or jurisdictionally to undertake such a comparison. There had been no hearing by SIAC or the Administrative Court of the substantive case on national security. No relevant findings had been made. In the second place, the comparison between Ms Begum and U2 could not in any event support the conclusion which the Court of Appeal drew from it, namely that "given the

difference in level of seriousness between U2 and Ms Begum, the national security concerns about her could be addressed and managed if she returns to the United Kingdom". The fact that U2 could not be managed safely within the United Kingdom did not entail that anyone posing a lesser risk could be so managed. The judgment in *U2* concluded that deprivation of nationality, which ensured that a person could never come to the United Kingdom unless he obtained entry clearance, was the most effective way to manage the risk which a person posed, and that lesser measures, such as a TPIM, would not be as effective. SIAC observed in that case that it was "obvious that no amount of conditions, or careful watching of a person who is in the United Kingdom, can achieve the assurance of knowing that they are outside the UK permanently" (para 144). That observation was not confined to the individual known as U2, or to people presenting identical levels of risk to that person.

109. Thirdly, there was no basis for the Court of Appeal's finding that the national security concerns about Ms Begum could be addressed and managed by her being arrested and charged upon her arrival in the United Kingdom, or by her being made the subject of a TPIM. As to the first of those alternatives, there was no evidence before the court from the police, the Crown Prosecution Service or the Director of Public Prosecutions as to whether it was either possible or appropriate to ensure that Ms Begum was arrested on her return and charged with an offence. Those were not, of course, matters for decision by the Secretary of State. Nor was it known whether, if she were arrested and charged, she would be remanded in custody: that would be a matter for the courts. As to the second alternative, there was no evidence, nor any submissions, before the Court of Appeal as to whether or not a TPIM could or would be imposed on Ms Begum, or as to the effectiveness of any such measure in addressing the risk which she might pose, having regard, for example, to the resources available to monitor compliance with TPIMs and the demands on those resources. The Court of Appeal also appears to have overlooked the limitations to its competence, both institutional and constitutional, to decide questions of national security, as explained in *Rehman*, *A*, and *Lord Carlile*'s case.

110. Fourthly, the proposition that "given that the only way in which she can have a fair and effective appeal is to be permitted to come into the United Kingdom to pursue her appeal, fairness and justice must … outweigh the national security concerns" appears to have been based on the view that the right to an effective appeal is a trump card. That view is mistaken, as explained at paras 90-94 above. If, however, the Court of Appeal was purporting to make an evaluative judgment on the particular facts, balancing the public interest in Ms Begum's ability to pursue her appeal against the public interest in minimising the risk of terrorism, and deciding whether on balance her application for leave to enter the United Kingdom should be granted, then (1) that was not its function on an appeal in proceedings in which the Secretary of State's decision had not been challenged on that basis (indeed, even in the deprivation appeal, the national security case had not yet been considered), and (2) even if the issue had properly been before it, it would have been

confined to reviewing the reasonableness of the Secretary of State's assessment, bearing in mind the limitations of the judicial role which were explained in *Rehman* and other cases.

111. For these reasons, I would allow the Secretary of State's appeal against the Court of Appeal's decision in the LTE appeal. SIAC was correct to dismiss that appeal. I would also allow the Secretary of State's appeal against the Court of Appeal's decision in the proceedings for judicial review of the LTE decision. Elisabeth Laing J was correct to dismiss the application for judicial review.

(4) The Secretary of State's appeal against the Divisional Court's decision to allow Ms Begum's application for judicial review of SIAC's decision concerning the Secretary of State's policy

112. It remains to consider the issue raised in the Secretary of State's appeal against the Divisional Court's decision to allow Ms Begum's application for judicial review of SIAC's decision in the deprivation appeal. That issue is whether the Divisional Court was wrong to conclude that SIAC had erred in determining the issue concerning the Home Secretary's extra-territorial human rights policy by applying principles of administrative law. Although the issue appears also to have been raised in the LTE appeal (see para 7 above), neither SIAC nor, on appeal, the Court of Appeal, had any jurisdiction to consider it in that context, for the reasons explained in para 37 above.

113. In its judgment, SIAC noted the nature of the policy as explained in paras 21 and 23 above, the material before the Home Secretary, and the conclusion which had been reached, as summarised in para 22 above. It observed at para 138:

> "The question which the Policy posed for the Secretary of State was whether it was a foreseeable and a direct consequence of Decision 1 [the deprivation decision] that there were substantial grounds for believing that A [Ms Begum] would be exposed to a real risk of ill treatment breaching the ECHR … The question for us is whether the Secretary of State was entitled, on the material before him, to decide that it was not. We remind ourselves that we are not deciding this question on its merits. We must approach it, rather, by applying the principles of judicial review."

114. Approaching the matter on that basis, SIAC concluded that the Secretary of State was reasonably entitled to rely on the material in and annexed to the submission made to him. On the basis of that material, he was reasonably entitled to

decide that the deprivation decision would not breach the policy, since a change in the relevant risks was not a foreseeable and direct consequence of that decision. As SIAC stated, "[t]he material before the Secretary of State did not suggest that [Ms Begum], 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" (para 139). The Secretary of State accordingly succeeded on that issue.

115. The Court of Appeal disagreed. As noted at para 29 above, Flaux LJ stated at para 123 that SIAC took the wrong approach when it said that it would apply the principles of judicial review:

> "The appeals to SIAC under sections 2 and 2B of the 1997 Act are full merits appeals and as such it is for SIAC to decide for itself whether the decision of the Secretary of State in question was justified on the basis of all the evidence before it, not simply determine whether the decision of the Secretary of State was a reasonable and rational one on the material before him as in a claim for judicial review."

Flaux LJ cited the judgment of SIAC, given by Mitting J, in *Al-Jedda v Secretary of State for the Home Department*, which was discussed at paras 73-76 above, and the judgment of Lord Wilson in *Al-Jedda v Secretary of State for the Home Department*, para 30, which was discussed at paras 77-79 above, in support of that view. For the reasons there explained, neither judgment provided reliable support for Flaux LJ's approach. He also cited the judgment of the Divisional Court in *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), para 240, which is discussed at paras 127-128 below.

116. Flaux LJ went on to state at para 125 that "the full merits appeal is a hearing *de novo* in which SIAC has to stand in the shoes of the Secretary of State and determine whether, on all the evidence before it, the conditions for making a deprivation decision are made out." In his view, that was as true of the issue under the policy as it was of the issue of statelessness, which SIAC had decided for itself on the basis of expert evidence. He could see "no reason in principle for drawing a distinction between the nature of the task which SIAC had to undertake in relation to the two issues merely because one issue concerned a policy or practice of the Secretary of State". Furthermore, he added at para 126, "the issue in relation to risk under articles 2 and/or 3 where they are directly applicable is one which is for SIAC to decide for itself on the basis of all the evidence before it". In his judgment, there was no principled reason why SIAC should adopt a different approach to assessment of risk where the policy applied, given that the test under the policy was the same as applied where the ECHR had direct effect.

117. In my respectful opinion, however, it was the Court of Appeal rather than SIAC which erred in its approach to this matter. Flaux LJ's reference to the appeal under section 2 of the 1997 Act against the LTE decision can immediately be put to one side. As was explained in paras 32-37 above, an appeal under section 2 is subject to section 84(2) of the 2002 Act, in terms of which the appeal "must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998". The Home Secretary's extra-territorial human rights policy only applies in circumstances falling outside the scope of the Human Rights Act. Any question as to whether the policy was properly applied does not, therefore, impugn the lawfulness of the LTE decision under section 6 of the Human Rights Act, and accordingly falls outside the scope of an appeal against that decision under section 2 of the 1997 Act.

118. Turning next to the appeal against the deprivation decision, under section 2B of the 1997 Act, I have explained at paras 66-71 above why I respectfully disagree with the view that SIAC's jurisdiction places it "in the shoes" of the Secretary of State and entitles it to exercise de novo the discretion conferred on him by section 40(2) of the 1981 Act in the light of the evidence before it.

119. The scope of SIAC's jurisdiction in an appeal against a decision taken under section 40(2) was summarised in para 71 above: first, to determine whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety; secondly, to determine whether he has erred in law, for example by making findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held; thirdly, to determine whether he has complied with section 40(4); and fourthly, to determine whether he has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act.

120. The Court of Appeal approached the present issue as if the principles relevant to the Secretary of State's application of his policy were indistinguishable from those which were relevant to his duties under the Human Rights Act. That was, in my view, a misunderstanding. There are important differences between the legal principles applicable to a statutory duty and those which apply to an administrative policy. For example, where section 6(1) of the Human Rights Act applies, it is unlawful for the Home Secretary to act in a way which is incompatible with a Convention right. The person challenging a deprivation decision on the basis that it is contrary to section 6 is entitled not to be subjected to a violation of his Convention rights, and it is for SIAC to determine whether or not the decision would result in such a violation. In deciding that question, as was explained at para 37 above, SIAC must reach its own view of the compatibility of the decision with Convention rights,

as an independent tribunal, rather than reviewing the decision of the Secretary of State. But the position is different where the person challenging the deprivation decision relies instead upon a practice or policy which the Secretary of State has said that he intends to follow. The policy does not confer on that person an enforceable legal right not to be subjected to a violation of his Convention rights (if they were applicable). Instead, the legal effect of the policy, like any other administrative policy, is to be found in principles of administrative law.

121. The decision to deprive a person of British citizenship is taken in the exercise of a discretionary power conferred by Parliament on the Secretary of State, to be exercised on the basis of the Secretary of State's assessment of the public interest. As section 40(2) of the 1981 Act states:

> "The Secretary of State *may* by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good." (Emphasis added)

122. As in the case of other discretionary powers exercised by public authorities, it is open to the decision-maker to adopt general principles or policies by which he intends to be guided in the exercise of his discretion. That is what Mrs May did in the Supplementary Memorandum quoted in para 21 above. To repeat what was stated there:

> "[T]he Secretary of State has a practice of not depriving individuals of British citizenship when they are not within the UK's jurisdiction for ECHR purposes if she is satisfied that doing so would expose those individuals to a real risk of treatment which would constitute a breach of article 2 or 3 if they were within the UK's jurisdiction and those articles were engaged."

Her successors in the office of Home Secretary have chosen to continue to follow that practice.

123. The adoption of that practice or policy has a number of legal consequences, under well-established principles of administrative law, but it does not alter the discretionary nature of the Secretary of State's decision, or convert the practice into a rule of law. As Lord Clyde said in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295, para 143:

> "The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. … Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to applicants and decision-makers."

See also the fuller discussion of this issue by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407, 496-497.

124. It follows that policy is not law, and can be consciously departed from. However, a failure by a public authority to follow its policy without good reason can be open to challenge. There are many examples of discretionary decisions being successfully challenged on the ground that the relevant authority failed to have regard to its policy, misdirected itself as to the meaning of its policy, or departed from its policy without good reason. They include authorities on which counsel for Ms Begum relied, such as *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; [2015] 1 WLR 4546, para 29. On the other hand, the question how the policy applies to the facts of a particular case is generally treated as a matter for the authority, subject to the *Wednesbury* requirement of reasonableness. That is most obviously the correct approach where, as in the present case, the application of the policy expressly depends upon the primary decision-maker's exercise of judgment ("if she is satisfied that doing so would expose those individuals to a real risk …").

125. That point is illustrated by the case of *R (LE (Jamaica)) v Secretary of State for the Home Department* [2012] EWCA Civ 597, which concerned the Home Secretary's policy concerning the use of immigration detention pending removal. The relevant policy document stated that there was a presumption in favour of temporary release, and that there must be strong grounds for believing that a person would not comply with conditions of temporary release for detention to be justified. It set out a list of factors to be taken into account when considering the need for detention, including the risk of absconding. The Home Secretary decided that the appellant should be detained, for reasons which included that he was otherwise likely to abscond. A challenge to that decision was rejected. The judge found that the decision was a rational one. On appeal, it was argued that the judge was wrong to analyse the matter in terms of the rationality of the decision: the court, it was argued, was not limited to applying a *Wednesbury* test, but was required to act as the primary decision-maker in deciding on the evidence whether detention was in accordance with the policy.

126. That argument was rejected by the Court of Appeal. Richards LJ, in a judgment with which Maurice Kay and Kitchin LJJ agreed, reviewed a number of previous authorities on the point, and concluded at para 29(viii) that a distinction had to be drawn between "the question whether the decision-maker directed himself correctly as to the meaning of the policy (a matter on which the court is the ultimate decision-maker) and the question whether, if so, the decision-maker acted within the limits of his discretion when applying the policy to the facts of the case (a matter in relation to which a *Wednesbury* test applies)". The core reasoning supporting that conclusion was set out in para 29(iii):

> "… the power to detain is discretionary and the decision whether to detain a person in the particular circumstances of the case involves a true exercise of discretion. That discretion is vested by the 1971 Act in the Secretary of State, not in the court."

It followed that "[t]he role of the court is supervisory, not that of a primary decision-maker: the court is required to review the decision in accordance with the ordinary principles of public law, including *Wednesbury* principles, in order to determine whether the decision-maker has acted within the limits of the discretionary power conferred on him by the statute."

127. A different approach was adopted by the Divisional Court in the earlier case of *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), in which the judgment was given by Richards LJ and Cranston J. This case, which was cited by Flaux LJ in support of his approach in the present proceedings, concerned the Defence Secretary's policy in relation to the transfer to the Afghan authorities of suspected insurgents detained by UK armed forces in the course of operations in Afghanistan. The policy required the Ministry of Defence and armed forces to ensure that detained persons were not transferred from UK custody to any nation where there was a real risk at the time of transfer that they would suffer torture or serious mistreatment. It was alleged that transfers could not proceed, consistently with the policy. At para 240, the court recorded counsel for the Defence Secretary as submitting that the relevant question was whether the Secretary of State could properly have concluded that there was no real risk. Counsel accepted, however, that the court would apply anxious scrutiny in answering that question, and that it would make no material difference in practice whether the court proceeded by way of review of the Secretary of State's conclusion or made its own independent assessment of risk on the evidence before it, as it would in a case brought under the Human Rights Act. The court stated:

> "In our judgment, the question whether the Secretary of State's practice complies with his policy requires the court to determine for itself whether detainees transferred to Afghan

> custody are at real risk, and it is therefore for the court to make its own assessment of risk rather than to review the assessment made by the Secretary of State. That is how we have proceeded. We agree, however, that in practice the two approaches lead to the same answer in this case."

128. The first sentence in that passage was not supported by reasoning, and it is not apparent from the judgment that the point was fully argued. It did not affect the outcome of the case, as the court made clear in the last sentence. I have difficulty reconciling what is said there with Richards LJ's reasoning in the Court of Appeal in *LE (Jamaica)*. In *Evans*, the court appears to me to have mistaken its function when it placed itself in the position of the primary decision-maker on a question of fact.

129. Approaching the present case in accordance with the principles explained in para 124 above, it follows that the point in issue was not, as the Court of Appeal supposed, whether Ms Begum was at real risk of treatment which would contravene articles 2 or 3 of the ECHR, if those provisions had been applicable. The issue was whether the Secretary of State, when exercising his discretion under section 40 of the 1981 Act, had acted in compliance with his policy. (That is why, as is common ground, the issue has to be determined as at the date of the Secretary of State's decision, whereas a question whether an administrative decision was compatible with articles 2 or 3, as given effect by the Human Rights Act, would normally be determined by a court or tribunal as at the date of its own decision.) The policy entailed that he should not have decided to deprive Ms Begum of British citizenship "if [he was] satisfied that doing so would expose [her] to a real risk of treatment which would constitute a breach of articles 2 or 3 if [she was] within the UK's jurisdiction and those articles were engaged". In order to comply with his policy, the Secretary of State therefore had to make a judgment as to the degree of risk of such treatment to which Ms Begum would be exposed, on the basis of a body of material which enabled him to make such an assessment, and to decide whether he was satisfied that Ms Begum would be exposed to a real risk of such treatment.

130. That is what the Secretary of State did. He had before him detailed assessments by his officials and by the Security Service, which concluded that there were no substantial grounds to believe that a real risk of mistreatment contrary to articles 2 or 3 would arise as a result of Ms Begum being deprived of her British citizenship while in Syria, and that any potential risks in countries outside Syria were not a foreseeable consequence of the deprivation decision: see paras 22-24 above. Having considered that material, the Secretary of State was not satisfied that depriving Ms Begum of British citizenship would expose her to a real risk of such mistreatment. His conclusion in relation to that issue was open to challenge on the ground of unreasonableness, but SIAC considered the issue on that basis, and rejected the challenge. I can see no defect in its reasoning in relation to that question.

131. For these reasons, I would allow the Secretary of State's appeal against the Divisional Court's decision to allow Ms Begum's application for judicial review of SIAC's decision concerning the Secretary of State's policy, and would dismiss that application.

Conclusions

132. Standing back from the detail, and summarising the position, it appears to me that the Court of Appeal erred in four respects.

133. First, it misunderstood the role of SIAC and the courts on an appeal against the Home Secretary's decision to refuse a person leave to enter the United Kingdom. As I have explained, the scope of an appeal in such cases is confined to the question whether the decision is in accordance with section 6 of the Human Rights Act. That question does not arise in the present appeal.

134. Secondly, the Court of Appeal erred in its approach to the appeal against the dismissal of Ms Begum's application for judicial review of the Home Secretary's refusal of leave to enter the United Kingdom. It made its own assessment of the requirements of national security, and preferred it to that of the Home Secretary, despite the absence of any relevant evidence before it, or any relevant findings of fact by the court below. Its approach did not give the Home Secretary's assessment the respect which it should have received, given that it is the Home Secretary who has been charged by Parliament with responsibility for making such assessments, and who is democratically accountable to Parliament for the discharge of that responsibility.

135. Thirdly, the Court of Appeal mistakenly believed that, when an individual's right to have a fair hearing of an appeal came into conflict with the requirements of national security, her right to a fair hearing must prevail. As I have explained, if a vital public interest - in this case, the safety of the public - makes it impossible for a case to be fairly heard, then the courts cannot ordinarily hear it. The appropriate response to the problem in the present case is for the appeal to be stayed until Ms Begum is in a position to play an effective part in it without the safety of the public being compromised. That is not a perfect solution, as it is not known how long it may be before that is possible. But there is no perfect solution to a dilemma of the present kind.

136. Fourthly, the Court of Appeal mistakenly treated the Home Secretary's policy, intended for his own guidance in the exercise of the discretion conferred on him by Parliament, as if it were a rule of law which he must obey. As a result, it

applied the wrong approach to considering whether the Home Secretary had acted lawfully.

137. For these reasons, and those more fully set out above, I would allow the Secretary of State's appeals in each of the proceedings before the court, and dismiss Ms Begum's cross-appeal. The result is that (1) Ms Begum's LTE appeal is dismissed, (2) her application for judicial review of the LTE decision is dismissed, and (3) her application for judicial review of SIAC's preliminary decision in the deprivation appeal is dismissed.