THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or any member of her family in connection with these proceedings.

Easter Term
[2025] UKSC 19
On appeal from: [2023] EWCA Civ 811

JUDGMENT

U3 (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Stephens

JUDGMENT GIVEN ON
12 May 2025

Heard on 20 and 21 November 2024

Appellant
Stephanie Harrison KC
Edward Grieves KC
Ronan Toal
Emma Fitzsimons
(Instructed by Wilson Solicitors LLP)

Respondent
Sir James Eadie KC
Neil Sheldon KC
Jennifer Thelen
(Instructed by Government Legal Department)

Intervener – JUSTICE
Tom Hickman KC
George Molyneaux
Rayan Fakhoury
(Instructed by Freshfields LLP)

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

1. Introduction

1. This appeal is concerned with the approach that the Special Immigration Appeals Commission ("SIAC") should take to disputes about matters which are relevant to the assessment of national security, in appeals concerned with the deprivation of British citizenship and the refusal of leave to enter the UK. More specifically, it raises questions concerning the effect of this court's judgment in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765 ("*Begum*"), and the earlier decision of the House of Lords in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153 ("*Rehman*").

2. The appellant, who has been given the designation U3 in these proceedings, was a British citizen until the events in issue in these proceedings. She has three children, who are also British citizens. She and her children, and her then husband, who has been given the designation O, lived in ISIL-controlled territory in Syria between August 2014 and October or November 2017.

3. On 18 April 2017 the respondent, the Secretary of State for the Home Department, gave the appellant notice under section 40(5) of the British Nationality Act 1981 as amended ("the 1981 Act") that she had decided to make an order under section 40(2) of that Act depriving the appellant of her citizenship on the ground that she was satisfied that deprivation was conducive to the public good. The notice said that "it is assessed that you are a British/Moroccan dual national who has travelled to Syria and is aligned with ISIL. It is assessed that your return to the UK would present a risk to the national security of the United Kingdom". That assessment was based on advice which the Secretary of State had received from the Security Service and from the Special Cases Unit of the Home Office. The Secretary of State also certified, pursuant to section 40A(2) of the 1981 Act, that her decision was taken partly in reliance on information which in her opinion should not be made public in the interests of national security and in the public interest. That certificate had the consequence that any appeal against the deprivation decision would lie to SIAC rather than to the First-tier Tribunal. The deprivation order was made on 22 April 2017. On 31 May 2018 the appellant appealed against the deprivation decision to SIAC under section 2B of the Special Immigration Appeals Commission Act 1997 as amended ("the 1997 Act").

4. In 2019 the children were repatriated to the UK. They have subsequently been cared for by members of the appellant's family. The appellant remains in Syria with her present husband.

5. On 11 August 2020 the appellant applied to the Secretary of State for entry clearance granting her leave to enter the UK. On 18 December 2020 that application was refused. The Secretary of State issued a national security certificate under section 97 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), similar to that previously issued in relation to the deprivation decision, with the consequence that any appeal against the entry clearance decision would also lie to SIAC rather than to the First-tier Tribunal. On 15 January 2021 the appellant appealed against the entry clearance decision to SIAC under section 2 of the 1997 Act, on the ground that since the decision prevented her from rejoining her children, it was an unjustified interference with the right to respect for family life under article 8 of the European Convention on Human Rights ("the Convention"), and was therefore unlawful under section 6(1) of the Human Rights Act 1998. That appeal was subsequently heard by SIAC together with the appeal against the deprivation decision.

6. On 4 March 2022 SIAC dismissed both appeals. Applying the principles set out in *Begum* as it understood them, it identified no basis under public law for interfering with the Secretary of State's assessment that the appellant posed a threat to national security. The deprivation decision was therefore upheld. Furthermore, in the light of that assessment, the interference with the children's rights under article 8, and with the appellant's own rights if those were engaged, which resulted from the refusal of entry clearance, was considered to be proportionate.

7. A further appeal to the Court of Appeal was dismissed: [2023] EWCA Civ 811; [2024] KB 433. It endorsed SIAC's approach of carefully evaluating all the evidence in the case, applying public law principles to the appellant's challenge to the Secretary of State's assessment of the threat she posed to national security, and refraining from substituting its own national security assessment for that of the Secretary of State.

8. The appellant now appeals to this court on the ground that the Court of Appeal erred in law in treating SIAC's fact-finding function as relevant only to the application of public law grounds of review to the decision-making of the Secretary of State. The essential proposition for which the appellant contends is that SIAC should reach its own findings of fact on the central "building blocks" of the Secretary of State's national security assessment (including the assessment that the appellant had aligned with ISIL), and, if it considers in the light of its own findings of fact that a different assessment of the threat posed by the appellant to national security is possible, then the appeal should be allowed and the case remitted to the Secretary of State for reconsideration on the basis of SIAC's assessment of the evidence.

2. The legislation

(1) Deprivation of citizenship

9. Section 40(2) of the 1981 Act provides:

> "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."

Under section 40(3), the Secretary of State may also deprive a person of a citizenship status which results from registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of fraud, false representation or concealment of a material fact. Subject to an exception described in section 40(4A), section 40(4) prevents the Secretary of State from making a deprivation order if he or she is satisfied that the order would make a person stateless. Before making an order under section 40, the Secretary of State must give the person concerned written notice complying with the requirements set out in section 40(5). One of those requirements is that the person must be told of the right of appeal to the First-tier Tribunal under section 40A(1) of the 1981 Act, or to SIAC under section 2B of the 1997 Act.

(2) Entry clearance

10. Under section 3(1) of the Immigration Act 1971 as amended ("the 1971 Act"), a person who is not a British citizen may be given leave to enter the UK, either for a limited or for an indefinite period, but shall not enter the UK unless given leave to do so in accordance with the provisions of, or made under, that Act. That provision applied to the appellant as a result of the deprivation decision. Section 3(2) of the 1971 Act provides for the Secretary of State to make rules, known as immigration rules, regulating the entry into the UK of persons who are required by the Act to have leave to enter. Under section 3A, the Secretary of State can make orders providing for an entry visa or other form of entry clearance to have effect as leave to enter the UK. The expression "entry clearance" is defined by section 33(1) as meaning a visa, entry certificate or other document which, in accordance with the immigration rules, is to be taken as evidence or the requisite evidence of a person's eligibility, though not a British citizen, for entry into the UK. As envisaged by those provisions, the immigration rules made under section 3(1) provide for persons seeking entry to the UK to apply in advance for entry clearance.

(3) SIAC's jurisdiction

11. Under section 2(1)(a) of the 1997 Act, a person may appeal to SIAC against a decision if he would be able to appeal against the decision under (among other provisions) section 82(1) of the 2002 Act but for a certificate issued under section 97 of that Act. In the absence of such a certificate, there is a right of appeal to the First-tier Tribunal under section 82(1)(b) of the 2002 Act where the Secretary of State has decided to refuse a human rights claim. Accordingly, where such a certificate has been issued, the refusal of a human rights claim can be the subject of an appeal to SIAC.

12. Under section 84(2) of the 2002 Act, the only ground on which an appeal under section 82(1)(b) may be brought is that the decision is unlawful under section 6 of the Human Rights Act. That provision also applies where an appeal against the refusal of a human rights claim lies to SIAC, by virtue of section 2(2)(e) of the 1997 Act.

13. Section 2B of the 1997 Act 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)."

The reference in that provision to section 40A(3) of the 1981 Act is of no effect, as section 40A(3) has been repealed. An amendment to section 2B which would remove that reference was enacted in 2014 but has not been brought into force.

3. The proceedings before SIAC

14. The focus of both appeals before SIAC was on the Secretary of State's assessment that the appellant poses a risk to national security. It was the appellant's case that she posed no such risk and that the Secretary of State's assessment was wrong.

15. Evidence relating to national security was given on behalf of the Secretary of State by a member of the Security Service. On behalf of the appellant, reliance was placed on evidence given by the appellant and other witnesses which was said to show that when she travelled first to Turkey, and then to Syria, she was in an abusive, coercive and controlling relationship with her first husband, O. Her travel there was, it was submitted,

to be seen in the context of that relationship. She did not then know about ISIL's ideology or about the atrocities it had committed. She was not at that time or subsequently ideologically aligned with ISIL. She did not become radicalised in Syria, and did not support ISIL or extremism more generally.

16. In its impressive judgment, SIAC considered in relation to each appeal, before assessing the evidence, on what grounds it could interfere with the decision under challenge, and what evidence was relevant and admissible. The material aspects of its reasoning for present purposes are those concerned with the Secretary of State's national security assessment, which SIAC considered first in relation to the deprivation decision.

17. In the light of *Begum,* SIAC considered that the Secretary of State's national security assessment could be challenged on any public law ground, ie any ground which would be available in an application for judicial review. If the national security assessment was shown to be flawed by a material public law error, and the Secretary of State was unable to show that the outcome would inevitably have been the same irrespective of the error, the proper course would be to set the decision aside so that the assessment could be conducted again by the Secretary of State. SIAC's special constitution and unique procedure might enable it to discern a flaw which would not have been apparent in ordinary judicial review proceedings, but it would do so by applying the same legal standards as would have applied in those proceedings. Another consequence of SIAC's specialised constitution and unique procedure was that it might be better placed to conclude that a flaw was not material or that the outcome would inevitably have been the same in any event; but the same high test would apply as in judicial review proceedings.

18. Unlike in most judicial review proceedings, however, SIAC was not confined to considering the evidence which was before the decision-maker at the time when the decision under challenge was taken. Deprivation decisions were frequently taken, as in the appellant's case, without giving the affected person any opportunity to make representations. Given that Parliament had conferred a right of appeal against deprivation decisions, SIAC could not be precluded from taking into account the appellant's evidence that she was not a threat to national security. Applying the public law approach required by *Begum,* the appellant's evidence could be taken into account in a number of ways, two of which are material for present purposes.

19. First, evidence relating to events occurring prior to the deprivation decision might identify the significance of a matter which the Secretary of State did not consider but ought to have considered. That might be relevant to a conventional public law ground of challenge, such as a failure to take account of a relevant consideration or a failure to undertake sufficient enquiries.

20. Secondly, if an individual appealed against a deprivation decision, the national security assessment would invariably be updated during the appeal proceedings to take account of the appellant's evidence and any material uncovered by the review. As SIAC explained (para 38), those advising the Secretary of State keep the basis for the deprivation decision under review during the appeal. If the appeal generates evidence which undermines or materially alters the original national security assessment, officials are obliged to bring that evidence to the attention of the Secretary of State. If the national security assessment is maintained, the updated assessment will in practice take the place of the original one for the purposes of the appeal, even though the updated assessment will not necessarily have been placed before the Secretary of State. In this respect, the procedure before SIAC is different from the procedure followed in judicial review proceedings. Where what is at stake is citizenship, it would be undesirable to proceed in a piecemeal fashion, with the decision being quashed and remitted potentially more than once. Accordingly, the appeal is designed to be a "one-stop" procedure in which the appellant either wins, with the result that his or her citizenship is restored, or loses, in which case it is not. SIAC observed (ibid) that this can be reconciled with the public law approach set out in *Begum* if the Secretary of State keeps the challenged decision under review during the appeal and SIAC treats the Secretary of State's updated national security assessment as superseding the original one.

21. Turning to the evidence, SIAC noted that the appellant's case in relation to national security rested on the proposition that she did not go to Syria with the intention of aligning with ISIL, and was not subsequently radicalised. In the course of her evidence, she accepted that she had tweeted or retweeted the following message on her Twitter account:

> "Whoever dies without having fought or having resolved to fight has died following one of the branches of hypocrisy."

She accepted that she had "liked" the following messages:

> "And whoever his sins are plenty then his greatest remedy is Jihad."

> "When liberating your land, store ten bullets into your gun, one for the enemy and nine for the traitors."

She accepted that she remained in contact with two individuals whom she identified as "Dawlah fanatics".

22. Broadly speaking, SIAC considered the evidence in a series of chapters corresponding to questions posed on behalf of the appellant, although SIAC did not

always accept the terms in which the questions were put. The first matter it was asked to consider was the impact of O's behaviour upon the appellant. SIAC found that she had been subjected to serious and sustained violence, and coercive control. However, although she was undoubtedly affected by her experience of mistreatment by O, she was still able to make reasoned decisions for herself and her children.

23. Most of the remaining questions concerned the appellant's state of mind at different stages in the chronology. The first of those questions concerned her motivation for leaving the UK. SIAC commented that the way in which the question was framed on behalf of the appellant was flawed in so far as it posited a binary choice between two possible explanations for the appellant's behaviour: the abusive relationship with her husband, or an ideological alignment with ISIL. Those explanations were not mutually exclusive. SIAC found that when she left the UK with her children to travel initially to Turkey, she had the intention to travel onwards to Syria, provided O also managed to enter Turkey, from which he had been banned. There was no doubt that she knew that O's intention in travelling to Syria was to align with ISIL. She therefore intended, contingently, to offer support to him in that end, at least as his wife and as the mother of his children. Even given the evidence about the violence, coercion and control in her relationship with O, it remained possible that an ideological commitment to ISIL played a part in her decision to leave the UK for Turkey. Deciding whether it did or not required the Secretary of State to make an assessment taking into account the whole of the evidence. The relevant judgment was in the first instance for the Secretary of State. Applying the principles which it understood to be laid down in *Begum,* SIAC considered that it could only interfere with that judgment if it was shown to be vitiated by a public law error.

24. The next question concerned the appellant's knowledge about ISIL when she left the UK. SIAC found that it was unlikely that she would have conducted no research into the activities or ideology of ISIL before leaving the UK.

25. The next question concerned the appellant's motivation for leaving Turkey for Syria. SIAC found that the evidence included a number of elements which could suggest that the appellant was ideologically aligned with ISIL when she did so. First, her evidence that she "went to Syria without being forced to do so" was an important starting point for any analysis of the degree of risk which she posed to the UK's national security. Secondly, she accepted that she had made social media posts which included quotations from extremists and supporters of ISIL. SIAC did not accept that she knew as little as she said about the ideology and activities of ISIL at that time. It considered that the Secretary of State could properly take the social media posts into account, together with the other evidence in the case, as suggesting an ideological commitment to ISIL. Thirdly, closed evidence which SIAC had received could also properly be regarded as containing elements of alignment with ISIL at the time when the appellant left Turkey for Syria.

26. The next question which SIAC was asked to consider was whether the appellant had remained voluntarily in ISIL territory. Her own evidence provided a strong basis for her case that she was very quickly disillusioned with ISIL and would have left its territory if she could. However, the closed evidence contained elements which could properly be considered to cast doubt on that evidence.

27. In the light of its conclusions in relation to those matters, and on the basis of the evidence as a whole, SIAC concluded that the Secretary of State could rationally assess, as at the date of the deprivation decision, that the appellant was ideologically aligned with ISIL when she left for Turkey, and continued to be so aligned thereafter. On that basis, the Secretary of State could rationally assess that the appellant posed a risk to the national security of the UK. In those circumstances, it did not matter whether SIAC agreed with that view. The deprivation decision was not vitiated by any public law flaw. The deprivation appeal was therefore dismissed.

28. SIAC was also asked to consider matters arising after the deprivation decision had been taken, as bearing on the entry clearance appeal. The first of those matters concerned the question whether the appellant was radicalised at the time when she left ISIL territory. The Secretary of State's view that the appellant remained ideologically aligned with ISIL at that time was based on a number of cumulative strands of reasoning, including an assessment, based on evidence submitted at the closed hearing, that she had sought to minimise her involvement with ISIL while in Syria. SIAC considered that the relevant question was whether these strands supplied a rational basis for concluding that the appellant remained ideologically aligned when she left ISIL-controlled territory. In SIAC's view, they did.

29. The next matter SIAC considered was whether, as at the date of the appeal hearing, the Secretary of State was entitled to reach the view, as she had done in her updated assessment, that the appellant remained aligned with Islamist extremism. SIAC concluded that the Secretary of State's assessment could not be regarded as irrational or otherwise flawed in the public law sense.

30. Accordingly, SIAC concluded that it was rationally open to the Secretary of State to assess that the appellant continued to pose a danger to national security at the date of the entry clearance decision and at the date of the appeal hearing. It was necessary to balance that assessment, rather than any that SIAC might itself undertake, against the article 8 rights of the appellant's children (the appellant herself being outside the jurisdictional scope of the Convention), giving appropriate weight to the Secretary of State's own view about where the balance lay.

31. SIAC carried out a careful assessment of the children's best interests. It found that the children were currently well cared for and thriving. The appellant played an important

part in their lives. They were likely to be anxious about the appellant if she could not return to the UK. However, if she returned to the UK she might face criminal prosecution, with the possibility of a substantial period on remand and a custodial sentence. If she did, the level and quality of contact with the children might well decrease, rather than increase, and that would itself be likely to generate anxiety on the part of the children. In any event, it could not be assumed that the appellant would simply resume her role as primary carer on return. There would have to be further family proceedings to determine the kind and degree of contact that was appropriate. Those proceedings would have to take all the circumstances into account, including the fact that the appellant had chosen to take the older children abroad into a situation of great peril, where they suffered significant harm. SIAC concluded that, on balance, the appellant's return to the UK would be in the best interests of the children. However, under the current arrangements, the children were well cared for and maintained contact with their mother, which might decrease in frequency and intensity over time. This situation, while not optimal, did provide a substantial degree of protection for the interests of the children.

32. SIAC bore the children's best interests in mind as a primary consideration. However, it concluded that their rights under article 8 were firmly outweighed by the Secretary of State's assessment that the appellant posed a risk to national security: an assessment which SIAC had found to have a reasonable basis in the evidence. It decided that its conclusion would be the same even if, contrary to its view, the appellant's own article 8 rights were also engaged (it concluded that her rights were not engaged because she was not in the territory of the UK at the time of either of the Secretary of State's decisions, nor did she fall within any of the categories of non-territorial jurisdiction). It was fortified in that conclusion by its assessment that the current arrangements for the care of the children, although not optimal from their perspective, nonetheless provided a substantial degree of protection for their interests. The entry clearance appeal was therefore dismissed.

4. The proceedings before the Court of Appeal

33. Before the Court of Appeal, it was argued on behalf of the appellant, and on behalf of JUSTICE as an intervener, that SIAC had taken too narrow a view of its powers by limiting itself to asking whether, in making her assessments of the risk posed by the appellant to national security, the Secretary of State had made a public law error. It should, it was argued, have made its own findings of fact, and would or might then have allowed the appeal.

34. The Court of Appeal agreed with SIAC that an appeal under section 2 or 2B of the 1997 Act was not equivalent to an application for judicial review. However, the court took a different view from SIAC as to SIAC's functions on an appeal. Its view is encapsulated in two passages, to which it will be necessary to return, in the judgment of

Elisabeth Laing LJ, with which Peter Jackson and Carr LJJ agreed. First, at para 174 she said, in relation to SIAC:

> "…one of SIAC's tasks is to allow the appeal if there is no factual basis for the assessment. That would mean, in my judgment, that if there were evidence, which SIAC accepted, which showed, for example, that, on the balance of probabilities, [the appellant] had never been to Syria, and that the Secretary of State had mistaken someone else for her, SIAC's duty would be to make that finding and to allow the appeal."

35. Elisabeth Laing LJ developed this approach in the next paragraph, explaining that a finding of fact made by SIAC could contradict and displace a finding made by the Secretary of State, but only where that finding was "pivotal" (para 175):

> "There is a wide area in which it is for SIAC, as the specialist court, to judge whether it can, and whether it is appropriate for it to, make a particular finding of fact … SIAC's task is then to see whether the Secretary of State's assessment can withstand its view of the evidence, provided that it remembers that the Secretary of State's assessment is frequently not solely or even primarily based on specific findings of fact made on the balance of probabilities, but is an evaluation, based on a range of different types of material, many of which are not evidence for the purposes of litigation. Sometimes, as in the example I have just given, there will be a pivotal finding, such as that the appellant travelled or stayed somewhere, which SIAC is in position to contradict."

36. Applying the approach laid down in the paragraphs cited above, the Court of Appeal identified one error in SIAC's judgment, which, however, it did not regard as material (para 186):

> "SIAC accepted that [the appellant's] evidence was a strong basis for her case that she was disillusioned with ISIL and would have left its territory if she had been able to. SIAC did not make a finding about that, instead relying on elements of the closed evidence which the Secretary of State could properly consider cast doubt on that. The question was not what SIAC concluded, but whether it was open to the Secretary of State to conclude that [the appellant] stayed of her own free will. I

> consider that SIAC could have made a finding of fact on this question, if it had thought it appropriate to do so. If and to the extent that it considered that it could not, in principle, make such a finding, it erred in law. But I also consider that any such error of law was immaterial … This question was part of the Secretary of State's overall assessment of risk, and even if SIAC had found that [the appellant] had not freely stayed in Syria, it could not lawfully have overset the Secretary of State's assessment on the basis of such a finding, either on its own, or in combination with others. On the authorities, the question it had to ask, and did ask, was whether there was material which rationally supported the Secretary of State's assessment to the contrary."

5. The present appeal

37. On behalf of the appellant, it is argued that SIAC should decide disputed facts concerning the allegations relevant to the national security assessment for itself, on the balance of probabilities. If it concludes that the decision under appeal was taken on the basis of a factual assessment that was materially incorrect, then it should allow the appeal and remit the case to the Secretary of State for reconsideration on the basis of SIAC's assessment of the evidence. The question whether the assessment was materially incorrect is not judged, it is submitted, by reference to whether the Secretary of State's decision was nevertheless a rational one: it is judged by whether the facts as found by SIAC are material to the Secretary of State's national security assessment such that a different outcome is possible if the decision is re-taken on the correct factual basis as determined by SIAC.

38. In relation to the circumstances of the present case, in particular, it is submitted that whether or not the appellant was aligned with ISIL was a precedent fact underpinning the Secretary of State's assessment, and should have been decided by SIAC. The matter should accordingly be remitted to SIAC for it to make findings of fact on all of the evidence relevant to the national security assessment. Furthermore, it was submitted, the approach adopted by SIAC and the Court of Appeal was incompatible with Convention rights where those were engaged, as in the entry clearance appeal in the present case.

39. Submissions were also made on behalf of JUSTICE, which was permitted to intervene in the appeal. Counsel for JUSTICE subjected the Court of Appeal's reasoning (particularly in paras 174, 175 and 186) to close and critical analysis. The reasoning was supported in so far as it held that SIAC could make such findings of fact as it considered appropriate. It was submitted to be unprincipled and illogical in distinguishing between pivotal and non-pivotal facts, and in holding that, except where the finding concerned a pivotal fact, SIAC should dismiss the appeal unless the Secretary of State's decision was

shown to be irrational. In JUSTICE's submission, if material findings of fact were made in relation to matters which had not been considered by the Secretary of State at the time when the decision was made, then the appeal should be allowed, unless the decision would inevitably have been the same even if those matters had been taken into account. That was essential in order to ensure that the appellant was treated fairly, given that she had no opportunity to make representations to the Secretary of State before the deprivation decision was taken.

6. SIAC's functions in relation to a national security assessment

(1) The nature of SIAC's functions under sections 2 and 2B of the 1997 Act in general

40. As explained above, the appellant appealed against the deprivation decision under section 2B of the 1997 Act. The decision was expressly based on the Secretary of State's assessment that the appellant had travelled to Syria and was aligned with ISIL, and that her return to the UK would present a risk to the UK's national security. The appellant accepted that she had travelled to Syria, but challenged the assessment that she was aligned with ISIL and presented a risk to national security.

41. The same assessment was also in question in the appellant's appeal against the refusal of entry clearance under section 2 of the 1997 Act. Her appeal was brought on the ground that the decision was incompatible with the right to respect for family life guaranteed by article 8 of the Convention, and was therefore unlawful under section 6 of the Human Rights Act. As this court explained in *Begum,* para 37, in deciding an appeal on that ground SIAC must determine for itself whether the impugned decision is compatible with the relevant Convention rights. In the circumstances of the present case, that task required SIAC to consider whether the interference with the rights of the appellant's children to respect for their family life was, in the language of article 8, "in accordance with the law and … necessary in a democratic society in the interests of national security". There was no dispute that the interference was in accordance with the law, and that it pursued a legitimate aim. The issue in dispute was whether it was proportionate. That question turned on the assessment that the appellant's return to the UK would present a risk to national security. If that assessment stood, then SIAC was satisfied that the interests of national security outweighed the impact on the children, who were thriving in the care of the appellant's family. SIAC recorded that counsel for the appellant conceded that he was unlikely to succeed unless he could successfully challenge the Secretary of State's assessment of the risk which the appellant posed to national security.

42. Accordingly, a critical issue in both the appeals to SIAC, and the central question in the appeal to this court, concerns SIAC's role in relation to the Secretary of State's assessment of the risk posed by the appellant to national security.

43. In considering that issue, it is important to understand at the outset that an appeal to SIAC, whether under section 2 or section 2B of the 1997 Act, is an appeal in reality as well as in form, and is not equivalent to an application for judicial review. Equally, in determining the issues raised by an appeal under those provisions, SIAC is not necessarily confined to the application of administrative law principles. Those points are apparent from the contrast between sections 2 and 2B, on the one hand, and sections 2C, 2D, 2E and 2F, on the other hand. The latter provisions provide for the "review" of the decisions to which they apply, and expressly require SIAC, in determining whether the decision in question should be set aside, to apply the principles which would be applied in judicial review proceedings. No such provisions appear in sections 2 or 2B.

44. Furthermore, section 5 of the 1997 Act provides for rules to be made in connection with appeals under sections 2 and 2B, "including the mode and burden of proof and admissibility of evidence on such appeals". That provision implies that appeals under those provisions can raise questions of fact as well as points of law. That is reflected in the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034), made under section 5. Rules 10 and 10A, in particular, make provision for the parties to rely on evidence at the hearing of appeals under sections 2 and 2B.

45. The fact that an appeal to SIAC is different from an application for judicial review is also illustrated by three aspects of the procedure. First, as appears from the provisions mentioned in the previous paragraph, SIAC is not confined to considering material which was or ought to have been available to the Secretary of State at the time when the decision under appeal was taken. It can consider other material, including evidence which has only subsequently come into existence.

46. Secondly, where the decision is based on the Secretary of State's national security assessment, that assessment is kept under review by the Secretary of State throughout the appellate proceedings, in the light of the evidence and submissions put forward on behalf of the appellant, as explained at para 20 above. An updated assessment is normally prepared and placed before SIAC, as occurred in the present case. As a result, evidence which becomes available after the decision was taken, including the evidence of the appellant, can be, and is, taken into account by the Secretary of State during the appeal. Accordingly, unlike in judicial review proceedings, it is not necessary for the decision to be set aside and taken afresh in order for new material to be taken into account. Counsel for the intervener submitted that, since the original decision was made by the Secretary of State in person, it was also necessary for it to be kept under review by the Secretary of State in person, rather than the review being undertaken by departmental officials acting on his or her behalf. However, it was not submitted that the statutory context excluded the operation of the ordinary *Carltona* principle (*Carltona Ltd v Comrs of Works* [1943] 2 All ER 560). Applying that principle, the review carried out by the Secretary of State's departmental officials is, in law, a review carried out by the Secretary of State.

47. It follows that SIAC only gets to the point of carrying out its own assessment of the evidence if the Secretary of State has decided to maintain his or her decision, having reviewed and updated the national security assessment in the light of the evidence and submissions advanced on behalf of the appellant during the appellate proceedings. This is a very different form of procedure from an application for judicial review. Having regard to that procedure, it is impossible to accept the submission, made on behalf of the appellant and the intervener, that it is necessary for the decision to be set aside whenever evidence is adduced on behalf of the appellant which is material to the Secretary of State's decision, in order for that evidence to be taken into account.

48. Thirdly, it follows from the fact that the procedure allows for the admission of evidence that it must be within SIAC's jurisdiction to make findings of fact. It does so on the balance of probabilities, in accordance with the general rule governing civil proceedings. SIAC made numerous findings of fact in the present proceedings, as it was entitled to do. However, as explained below, not every issue which SIAC may have to decide in an appeal can be determined by making findings of fact on a balance of probabilities.

49. It follows from the foregoing that, in an appeal under section 2 or 2B, SIAC can allow an appeal without there being any implication that the Secretary of State was not entitled to take the decision on the basis of the material then before him or her. This is a further difference from judicial review proceedings.

50. The next point that it is important to understand is that appeals under sections 2 or 2B can raise different issues, to which different legal principles apply. Accordingly, the nature of the issue raised in an appeal can affect the approach which SIAC is required to adopt when deciding that issue. Where an appeal raises a number of issues, different approaches may have to be taken to the different issues in the appeal.

51. For example, where an appeal is brought against a deprivation decision on the ground that the deprivation order would render the affected person stateless, contrary to section 40(4) of the 1981 Act, then the issue which SIAC has to determine is whether the order would render the person stateless: *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, para 101; *N3 v Secretary of State for the Home Department* [2025] UKSC 6; [2025] 2 WLR 386 ("*N3*"), para 44. That is a different question from whether the Secretary of State's decision was lawfully made in the first place, as it could have been if the Secretary of State was reasonably, albeit mistakenly, satisfied that the order would not have the effect of rendering the person stateless. As this court explained in *N3*, para 38, in the context of an appeal under section 2B against a deprivation decision on the ground that it would render the appellant stateless:

> "… the appellate body is not given the task of fulfilling a judicial review function. It does not examine the lawfulness of the Secretary of State's deprivation decision on public law grounds. For instance, it cannot and does not determine whether the Secretary of State's deprivation decision or order was *Wednesbury* irrational (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) or whether it was flawed in any other public law sense. The task given to the appellate body is different … the decision of the appellate body does not speak to whether the Secretary of State's deprivation decision was unlawful in public law terms and indeed there was no suggestion in this appeal that the Secretary of State was not entitled in public law terms to make the deprivation decision."

52. In an appeal of that kind, SIAC determines the issue in question by making a finding as to statelessness on the basis of all the evidence before it, which will commonly include expert evidence as to the relevant foreign law. In deciding that issue, SIAC is evidently not confined to administrative law grounds of review of the Secretary of State's decision. The nature of the issue that it has to determine requires it to find the facts for itself, on a balance of probabilities, and then to apply the law, as was explained in *N3* at paras 36-38.

53. Deciding issues concerned with human rights also commonly requires SIAC to make findings in fact, as it did in the present case in relation to the appeal brought under section 2 of the 1997 Act on the ground that the refusal of entry clearance was unlawful because it was incompatible with the article 8 rights of the appellant's children. In order to decide such an appeal, SIAC has to determine for itself the impact of the decision on the children, and consider for itself the best interests of the children, as a matter of fact, before going on to decide for itself whether the resultant interference with the children's right to respect for their family life is prescribed by law, has a legitimate aim, and satisfies the test of proportionality. That is what SIAC did in the present case, making findings, for example, in relation to the arrangements for the care of the appellant's children, the extent of her contact with them, and the potential effect upon them of the decision under challenge.

54. However, not every issue which SIAC may be required to decide on an appeal under sections 2 or 2B of the 1997 Act is of a kind which can be determined by making findings of fact on a balance of probabilities. In particular, where an appeal is brought against a decision on a ground which challenges the Secretary of State's assessment that the decision is justified because the affected person poses an unacceptable risk to national security, the nature of that issue requires SIAC to adopt a different approach. That is so for two reasons.

55. In the first place, the question whether a decision is justified on the ground of a risk to national security is a different kind of question from whether a decision will render a person stateless. A decision of the former kind is based on an evaluative judgement or assessment that an unacceptable risk exists, not on the existence of a particular fact or the occurrence of a particular event. An understanding that a particular fact exists or that a particular event has occurred may form part of the basis of the assessment, but such assessments commonly refer, as in the present case, to suspicions or likelihoods; and, as explained below, even where the assessment is based on an understanding that a particular fact exists or that a particular event has occurred, whether or not that can be proved on a balance of probabilities will not be determinative.

56. The reasoning process which is appropriate to evaluating a risk is different from the reasoning process which is appropriate to deciding the facts in issue in civil litigation. In civil litigation conducted in accordance with common law principles, judges establish the facts in issue – that is to say, the facts which are required by the law to be proved, usually in order to establish a claim or a defence – by deciding whether it is more likely than not that the fact in question is true. That is called finding facts on the balance of probabilities. But even the facts in issue do not need to be established by facts that have themselves been proved on a balance of probabilities. It is possible for them to be inferred from pieces of evidence, not themselves necessarily proved to be true, which make the fact in issue more or less probable. Once the facts in issue have been established on that basis, the judge then applies the law to the facts as so established in order to arrive at a conclusion. There may be a real doubt as to whether a fact in issue which is found to be established on a balance of probabilities is actually true, but that doubt must be suppressed or ignored.

57. This aspect of judicial reasoning was explained by Lord Hoffmann in *In re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35; [2009] AC 11, para 2:

> "If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

58. But not all the issues which courts and tribunals have to decide require facts to be proved in this binary way. In particular, where the issue to be decided is concerned with the evaluation of a risk, then the material circumstances are not limited to facts which have been proved to the civil standard of proof. A risk is a possibility. The existence of a risk can therefore arise from evidence which is sufficient to establish a possibility but falls short of proof on a balance of probabilities. The evaluation of the risk then depends on such factors as the degree of risk, the possible methods of addressing the risk, and the gravity of the consequences if the risk eventuates.

59. Lord Browne-Wilkinson illustrated that point by an apt example in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 572-573:

> "Say that in 1940 those responsible for giving air-raid warnings had received five unconfirmed sightings of approaching aircraft which might be enemy bombers. They could not, on balance of probabilities, have reached a conclusion that any one of those sightings was of an enemy aircraft: nor could they logically have put together five non-proven sightings so as to be satisfied that enemy aircraft were in fact approaching. But their task was not simply to decide whether enemy aircraft were approaching but whether there was a risk of an air-raid. The facts relevant to the assessment of such risk were the reports that unconfirmed sightings had been made, not the truth of such reports. They could well, on the basis of those unconfirmed reports, have been satisfied that there was a real possibility of an air-raid and given warning accordingly."

The real possibility of an air raid could be inferred from unconfirmed sightings; and the serious consequences of a raid made it necessary to give a warning without requiring proof on a balance of probabilities.

60. A similar approach was taken in *R (Pearce) v Parole Board* [2023] UKSC 13; [2023] AC 807 to the role of the Parole Board when assessing whether the release of a prisoner on licence would present an unacceptable risk to public safety. As Lord Hodge and Lord Hughes stated (p 844):

> "In the assessment of risk of future behaviour – an inherently imprecise exercise – it is not necessary to consider each allegation of past behaviour individually and decide whether it is established on the balance of probabilities. Depending upon the legal context, the court can assess risk by weighing up the

> possibility that an allegation or several allegations may be true having regard to the whole material before it".

See also *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3; [2016] AC 1457, concerned with the designation of a person as being associated with a terrorist group, and *Shagang Shipping Co Ltd v HNA Group Co Ltd* [2020] UKSC 34; [2020] 1 WLR 3549, concerned with the risk that evidence had been obtained by means of torture.

61. In practice, the assessment of risk, in the context of national security, will often be based on a number of items of information or intelligence, individually disputable or inconclusive, but cumulatively giving rise to reasonable grounds for an apprehension that, for example, the person in question has been in contact with terrorists and has aligned with their objectives. Those possibilities do not have to be proved to have occurred on a balance of probabilities in order for it to be reasonable to conclude that the person would present a risk to public safety if he or she returned to the UK, or that the risk is sufficiently serious to justify a deprivation decision. Seen in the context of the attacks that have taken place in the UK and elsewhere in Europe in recent years, such as the Bataclan attack in Paris and the Manchester Arena bombing, a precautionary approach is necessary in the interests of public safety. An error in judgement could have catastrophic consequences.

62. That is not by any means to say that an assessment of risk need have no basis in objective evidence, or that the question whether the risk can justify such a serious measure as the deprivation of citizenship is beyond judicial consideration. But it does mean that the task of SIAC in addressing those questions is not the usual judicial function of applying the law to facts found on a balance of probabilities.

63. There is a second reason why SIAC's function, in this context, differs from the usual judicial function. The assessment of a risk to national security, and a decision that it is sufficient to justify a deprivation decision or the refusal of leave to enter the UK, involve the exercise of judgment. Unlike the Parole Board assessing the risk of a prisoner's re-offending, SIAC is not the primary decision-maker. Responsibility for assessing whether a person presents such a risk to national security that a deprivation decision or the refusal of entry clearance is justified has been given by Parliament to the Secretary of State, subject to a right of appeal to SIAC. Furthermore, the Secretary of State is also exercising a discretion. Under section 40(2) of the 1981 Act, the Secretary of State "may" deprive a person of citizenship if satisfied that deprivation is conducive to the public good. Similarly, under section 3 of the 1971 Act, the decision whether to grant leave to enter the UK to a person who is not a British citizen is likewise discretionary. SIAC's role in this context is therefore to review the Secretary of State's exercise of his or her discretion, based on an evaluative judgement of the risk to national security.

64. The grounds on which the exercise of discretion is reviewed under English law are those established in administrative or public law. That is not to say that an appeal to SIAC is equivalent to an application for judicial review: there are important differences, as was explained at paras 43-49 above. It is merely to identify the legal principles which are relevant to the review of a discretionary decision. They include the general principle that the court will not interfere with a decision merely because it might itself have decided the matter differently, provided the decision is one that could reasonably be taken.

65. One further factor is also important. In carrying out a review of a discretionary decision by the person entrusted by Parliament to take that decision, and in particular when assessing the reasonableness of a decision, a court or tribunal will always attach weight to the assessment made by the primary decision-maker. That is a matter of particular significance in the present context, for two reasons, which might be described as institutional and constitutional.

66. Institutionally, the Secretary of State acts on the basis of expert advice, including advice from the Security Service. The assessment of intelligence depends on an expertise which serving intelligence officers possess, but judges do not: expertise, for example, in assessing the reliability of information received from covert sources, based on such matters as the past record of informants, their motivation and their current circumstances, or the likelihood that the breaking of codes or encryptions has been detected, or that the presence of listening devices has been suspected; and expertise in the interpretation of a mosaic of individual items of information. Even persons formerly involved in intelligence work, such as some of the members of SIAC, are unlikely to be as well placed to assess such information as serving officers, because they will have no close or current involvement with the sources of that information and the factors bearing on its reliability.

67. There are in addition constitutional reasons why public safety should be primarily the responsibility of a member of the government who is accountable to Parliament, and ultimately to the electorate, rather than the responsibility of the members of a judicial tribunal, however eminent and experienced they may be. As Lord Hoffmann said in *Rehman,* in a postscript to his speech written after the 9/11 attacks on the United States, "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" (para 62).

68. Accordingly, there are both institutional and constitutional reasons why, in carrying out its function of reviewing decisions taken on grounds of national security, SIAC should attach very considerable weight to the Secretary of State's evaluation.

69. The foregoing discussion of the nature of SIAC's role in relation to appeals of the present kind has been conducted on the basis of general legal principles. The conclusions

reached – in particular, that an appeal is not equivalent to an application for judicial review; that different issues that may arise in an appeal require to be approached in different ways; that SIAC conducts a review of the Secretary of State's assessment of the risk to national security based on the application of principles of administrative law; that this is a different exercise from fact-finding on a balance of probabilities; and that in carrying out the review, and especially when considering the reasonableness of the Secretary of State's decision, it should attach very considerable weight to the Secretary of State's evaluation – are not based on any special rules, but follow from the application of familiar legal principles to this particular context. As will appear, they are also confirmed by authorities decided at the highest level. It is necessary to turn to those next.

(2) The authorities

70. The question whether a risk to national security, or the evidential basis of an assessment of risk, require to be established to a given standard of proof was considered by the House of Lords in *Rehman*. The case was concerned with an appeal to SIAC under section 2 of the 1997 Act (as it then stood) against a deportation decision made on the basis that the Secretary of State deemed the affected person's deportation to be conducive to the public good. In forming that view, the Secretary of State relied on interests of national security. On appeal, it was argued that the Secretary of State had to establish "to a high civil balance of probabilities" that the appellant had engaged in conduct that endangered the security of the UK and, unless deported, was likely to continue to do so.

71. That contention was rejected by the House of Lords. Lord Slynn of Hadley, with whose reasoning Lord Steyn agreed, considered that "when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof" (para 22). But he added that that was not the whole exercise (ibid):

> "The Secretary of State, in deciding whether it is conducive to the public good that a person should be deported, is entitled to have regard to all the information in his possession about the actual and potential activities and the connections of the person concerned. He is entitled to have regard to precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he 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 a deportation for the public good."

That passage is consistent with the analysis set out at paras 43-63 above.

72. Lord Hoffmann, with whose reasoning Lord Clyde agreed, rejected the idea that even specific factual allegations had to be proved. He stated at para 48:

> "… it was wrong to treat the Home Secretary's reasons as counts in an indictment and to ask whether each had been established to an appropriate standard of proof. The question was not simply what the appellant had done but whether the Home Secretary was entitled to consider, on the basis of the case against him as a whole, that his presence in the United Kingdom was a danger to national security. When one is concerned simply with a fact-finding exercise concerning past conduct such as might be undertaken by a jury, the notion of a standard of proof is appropriate. But the Home Secretary and the Commission do not only have to form a view about what the appellant has been doing. The final decision is evaluative, looking at the evidence as a whole, and predictive, looking to future danger. As Lord Woolf MR said, ante, p 168, para 44:
>
> > 'the cumulative effect may establish that the individual is to be treated as a danger, although it cannot be proved to a high degree of probability that he has performed any individual act which would justify this conclusion.'"

73. Lord Hoffmann expanded on this explanation later in his judgment (para 56):

> "… the whole concept of a standard of proof is not particularly helpful in a case such as the present. In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has 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."

74. Lord Hoffmann also considered the implications of the fact that SIAC was reviewing an evaluative judgement, made by a person to whom that judgement was entrusted by Parliament, with the benefit of expert advice (para 57):

> "First, the Commission is not the primary decision-maker. 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. Secondly, as I have just been saying, the question at issue in this case does not involve a yes or no answer as to whether it is more likely than not that someone has 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."

75. Lord Hoffmann added that such restraint might not be necessary in relation to every issue which the Commission had to decide: for example, the approach to whether the rights of an appellant under article 3 of the Convention were likely to be infringed might be very different. But such restraint was required in relation to the question of whether a deportation was in the interests of national security. Lord Hoffmann also made clear (para 58) that "the need for restraint is not based upon any limit to the Commission's appellate jurisdiction", but "flows from a common-sense recognition of the nature of the issue and the differences in the decision-making processes and responsibilities of the Home Secretary and the Commission".

76. The approach adopted by Lord Hoffmann is consistent with the analysis set out above. That approach was also followed by Lord Bingham of Cornhill in the case of *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68 ("*A*"), which was concerned with a measure taken to counter the threat of terrorism. Citing Lord Hoffmann's speech in *Rehman,* he said (para 29):

> "I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise a pre-eminently political judgment. It involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did. Any prediction about the future behaviour of human beings (as opposed to the phases of the moon or high water at London Bridge) is necessarily problematical. Reasonable and informed minds may differ, and a judgment is not shown to be wrong or unreasonable because that which is thought likely to happen does not happen. It would have been irresponsible not to err, if at all, on the side of safety."

77. It is also pertinent to cite Lord Bingham's observation in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167*,* para 16, that giving weight to the Secretary of State's assessment of matters falling within his or her responsibility is an ordinary aspect of judicial decision-making: "it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed."

78. In *Begum,* this court returned to the issues considered in *Rehman* and *A.* In so far as Lord Hoffmann's approach in *Rehman* differed from that of Lord Slynn, this court followed Lord Hoffmann's approach. It did so partly in the light of the repeal, subsequent to *Rehman,* of section 4 of the 1997 Act, which formerly enabled SIAC to allow an appeal if it considered that the Secretary of State's discretion should have been exercised differently. Lord Reed, with whom the other members of the court agreed, said (para 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 ... 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."

79. Lord Reed also followed Lord Hoffmann's approach in linking the approach which SIAC should adopt in an appeal against a deprivation decision to the nature of the issue or issues which it has to decide, stating (para 70):

> "Some aspects of the Secretary of State's assessment may not be justiciable, as Lord Hoffmann explained in *Rehman* [2003] 1 AC 153. 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* [2005] 2 AC 68, para 29."

80. Lord Reed went on at para 71 to explain some of the functions which SIAC has to perform on an appeal against a deprivation decision:

> "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 … 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."

81. That was not an exhaustive account of SIAC's role on an appeal under sections 2 or 2B. As explained above, the correct approach for SIAC to adopt in an appeal depends on the nature of the issue or issues which it has to decide. There are issues which SIAC will determine by making findings of fact on a balance of probabilities. Some examples, such as statelessness, were mentioned above. But there are other issues which cannot be determined in that way, even if SIAC has heard oral evidence. That will be the case, in particular, where the determination of the issue does not depend on whether, on a balance of probabilities, a specific fact is true or not, but on whether, on an overall assessment of the evidence bearing on the issue, there is a proper basis for a discretionary decision to deprive a person of citizenship or to refuse the person entry clearance because of a risk to national security.

82. In considering an issue of that nature, all the principles of administrative law are potentially relevant, except to the extent that they are inconsistent with the statutory scheme (for example, in relation to deprivation decisions, procedural fairness is secured after the decision has been taken, by means of the right of appeal to SIAC, rather than through the application of common law principles of procedural fairness to the Secretary of State's decision-making process at the time when the decision is taken). In particular, in relation to the evidential basis of discretionary decisions, Lord Bingham made it clear in *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5; [2003] 2 AC 430 ("*Runa Begum*"), para 7, that applying principles of administrative law a court "may not only quash the authority's decision … if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1030, per Scarman LJ) if the decision maker is shown to have misunderstood or been ignorant of an established and relevant fact".

(3) The approach adopted by SIAC and the Court of Appeal in the present case

83. Subject to one qualification, the approach adopted by SIAC in the present case was in accordance with the analysis set out above. The qualification is that SIAC approached the appeal against the deprivation decision on the basis that the issue it had to decide was whether the Secretary of State could rationally assess, as at the date of the decision, that the appellant posed a risk to the national security of the UK: see para 27 above. Consistently with that approach, SIAC considered the evidence relating to matters arising after the deprivation decision had been taken only in relation to the appeal against the entry clearance decision: see paras 28-30 above.

84. As explained above, it is possible for the appeal to be based on evidence which was not before the Secretary of State at the time when the deprivation decision was taken, as SIAC understood. There is nothing in the statutory provisions which restricts the admissible evidence to matters which arose before the decision was taken. The question is therefore whether the evidence in question is relevant to deciding whether the appeal should be allowed. In that regard, it is important that the Secretary of State's decision is reviewed and the national security assessment is updated during the appeal proceedings, in the light of the appellant's evidence and submissions. As a result, the decision before SIAC when it decides the appeal is in reality a decision which has been re-considered and re-affirmed by the Secretary of State at the time of the appeal hearing in the light of the evidence adduced in the appeal. In those circumstances, it is possible that evidence relating to matters post-dating the original decision may have a bearing on whether the deprivation of citizenship remains appropriate. It is accordingly incorrect for SIAC to proceed on the basis that the issue it has to decide is the rationality of the decision at the time it was made, and that it cannot take account of evidence relating to matters arising subsequently.

85. However, in the circumstances of the present case, that misunderstanding had no effect on SIAC's decision. It considered the evidence in question in relation to the appeal against the refusal of entry clearance, and concluded that, even having regard to that evidence, the Secretary of State's assessment of the risk posed by the appellant to national security could not be regarded as irrational or otherwise flawed in any administrative law sense: see paras 28-30 above.

86. Turning to the decision of the Court of Appeal, the problems with paras 174, 175 and 186 of the judgment of Elisabeth Laing LJ can now be explained. Considering first para 174, it was said:

> "…one of SIAC's tasks is to allow the appeal if there is no factual basis for the assessment. That would mean, in my judgment, that if there were evidence, which SIAC accepted, which showed, for example, that, on the balance of probabilities, [the appellant] had never been to Syria, and that the Secretary of State had mistaken someone else for her, SIAC's duty would be to make that finding and to allow the appeal."

87. As explained above, where the assessment of a risk to national security is based on an evaluation of a body of evidence, the issue SIAC has to decide is not whether the assessment is based on facts that have been established on a balance of probabilities. Rather, the central question is whether the evidence, viewed as a whole, provides a rational basis for the Secretary of State's decision, applying principles of administrative law as explained, for example, by Lord Bingham in *Runa Begum* (para 82 above).

88. The point can be illustrated by the example given by Elisabeth Laing LJ in the passage last quoted. If the appellant had denied that she had been in Syria, and if SIAC had considered that there was a greater than 50% probability that she was telling the truth, that would not in itself have implied that the appeal against the Secretary of State's decision should be allowed. The question would have remained whether the evidence as a whole provided a rational basis for the Secretary of State's decision, applying principles of administrative law. It would not do so, if the decision was based on a view of the evidence that could not reasonably be held; but the decision would not be irrational merely because the probability that the appellant had been in Syria was less than 50%. A significant possibility that a person is a terrorist, even if less than a balance of probabilities, when taken together with a consideration of the danger to public safety which the person would present if he or she was indeed a terrorist, and a consideration of the effectiveness of the measures available to combat that danger, might be a reasonable basis for depriving that person of British citizenship; just as a substantial possibility that a prisoner will reoffend, taken together with a consideration of the consequent risk to the public and the measures available to address that risk, may be a reasonable basis for refusing to release that person on licence.

89. On the other hand, the position would be different if, on SIAC's assessment of the evidence, there was no real possibility that the appellant had been in Syria. If her presence in Syria was critical to the Secretary of State's decision, then if SIAC concluded that there was no real possibility that she had been there, it would follow that there was no reasonable basis for the Secretary of State's decision, and the appeal would be allowed. In the language used in *Begum,* para 71, the situation would be one in which the Secretary of State "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". Even if the appellant's presence in Syria was not critical to the Secretary of State's decision, but was one of the pieces of information on which the decision was based, then, if SIAC concluded that there was no real possibility that she had been there, then that element would disappear from the picture. It would be necessary for SIAC to consider whether the Secretary of State's decision – if maintained at the hearing – remained rationally sustainable, applying principles of administrative law.

90. Furthermore, even if the possibility that the appellant had been in Syria could not be excluded, SIAC would properly take account of the strength or weakness of the evidence of her presence there when considering whether the evidence as a whole provided a rational basis for the Secretary of State's decision. In short, although SIAC's determination of an appeal against the Secretary of State's decision that deprivation of citizenship is justified by the risk which the person presents to national security cannot be based on findings of fact made on a balance of probabilities, its scrutiny and assessment of the evidence as a whole is central to its task of determining whether the evidence provides a rational basis for the decision.

91. As explained earlier, the position in proceedings before SIAC accordingly differs from that in judicial review proceedings, where (1) material which was not available to the decision-maker would not generally be relevant to the validity of the decision, but (2) a finding that the decision-maker had taken an irrelevant consideration into account or had failed to take account of a material consideration would result in the decision's being set aside. In an appeal of the present kind, SIAC can take account of material which was not available to the Secretary of State, such as the evidence of the appellant; and, as explained above, the Secretary of State's decision is kept under review during the proceedings before SIAC in the light of the evidence adduced on behalf of the appellant. If the Secretary of State maintains the decision notwithstanding material evidence given in the proceedings which was not taken into account when the decision was originally made, it is possible for SIAC to consider the rationality of the decision in the light of the evidence as a whole, and to allow or dismiss the appeal accordingly.

92. Considering next para 175 of Elisabeth Laing LJ's judgment in the present case (quoted at para 35 above), it follows that SIAC cannot, by making findings of fact on the balance of probabilities, allow an appeal on the basis that there is "a pivotal finding, such as that the appellant travelled or stayed somewhere, which SIAC is in a position to contradict". The relevant question is not whether SIAC considers, on a balance of probabilities, that the appellant travelled or stayed somewhere, but whether the evidence as a whole provides a rational basis for the Secretary of State's decision. The correct approach to critical factual elements of the Secretary of State's assessment is as explained at para 87 above.

93. Turning next to para 186 of Elisabeth Laing LJ's judgment (quoted at para 36 above), she addressed there the fact that "SIAC accepted that [the appellant's] evidence was a strong basis for her case that she was disillusioned with ISIL and would have left its territory if she had been able to", but "SIAC did not make a finding about that, instead relying on elements of the closed evidence which the Secretary of State could properly consider cast doubt on that". Elisabeth Laing LJ considered that "SIAC could have made a finding of fact on this question, if it had thought it appropriate to do so", and that "if and to the extent that it considered that it could not, in principle, make such a finding, it erred in law". However, what she said next explained why SIAC was entitled to proceed as it did:

> "This question was part of the Secretary of State's overall assessment of risk, and even if SIAC had found that [the appellant] had not freely stayed in Syria, it could not lawfully have overset the Secretary of State's assessment on the basis of such a finding, either on its own, or in combination with others. On the authorities, the question it had to ask, and did ask, was whether there was material which rationally supported the Secretary of State's assessment to the contrary."

7. The human rights context

94. The European Court of Human Rights has long accepted that the principles of administrative law can be sufficient to secure procedural fairness in relation to the judicial review of administrative action, depending on such factors as the subject matter of the decision in question, the manner in which that decision was arrived at and the content of the dispute between the parties. An early illustration is the case of *Bryan v United Kingdom* (1996) 21 EHRR 342 ("*Bryan*"), where it was argued that an appeal to the High Court against a planning enforcement notice failed to meet the requirements of article 6(1) of the Convention as the scope of the appeal was confined to points of law. The argument was rejected. The court noted (para 44) that "as is not infrequently the case in relation to administrative law appeals in the Council of Europe member states, there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited". However, "apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural propriety, independence and impartiality), the inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference". The court considered that such an approach by an appeal tribunal to questions of fact could reasonably be expected in specialised areas of the law such as the one at issue, and concluded that the scope of review was sufficient to comply with article 6(1) (para 47).

95. The approach set out in *Bryan* was followed by the European court in many subsequent cases brought against the United Kingdom: see, for example, *X v United Kingdom* (1998) 25 EHRR CD88, concerning a determination by the Secretary of State that the applicant was not a fit and proper person to be the chief executive of an insurance company, and *Kingsley v United Kingdom* (2002) 35 EHRR 10, para 32, concerned with a decision by the Gaming Board that the applicant was not a fit and proper person to hold a gaming licence.

96. *Bryan* was also given careful consideration by the House of Lords in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295 ("*Alconbury*") and *Runa Begum.* Those cases – in particular, the speech of Lord Hoffmann in *Alconbury* and that of Lord Bingham in *Runa Begum* – were considered with equal care by the European court in *Tsfayo v United Kingdom* (2009) 48 EHRR 18, where the important aspect of those cases was said to be that "the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims" (para 46).

97. More recently, the Grand Chamber set out its approach, and reviewed the earlier authorities, in the case of *Ramos Nunes de Carvalho e Sá v Portugal* (Applications Nos 55391/13, 57728/13 and 74041/13) judgment of 6 November 2018 ("*Ramos Nunes de Carvalho*"). It began by stating that, in order for a tribunal to meet the requirements of article 6(1), it "must have jurisdiction to examine all questions of fact and law relevant to the dispute before it" (para 176). However, the requirement that the tribunal should have full jurisdiction is given an autonomous meaning in the light of the object and purpose of the Convention (para 177). In that regard, the court said (para 178):

> "In adopting this approach the Convention organs have had regard to the fact that it is often the case in relation to administrative-law appeals in the member states of the Council of Europe that the extent of judicial review over the facts of a case is limited, and that it is characteristic of review proceedings that the competent authorities review the previous proceedings rather than taking factual decisions. It can be derived from the relevant case-law that it is not the role of article 6, in principle, to guarantee access to a court which can substitute its own assessment or opinion for that of the administrative authorities. In this regard, the court has placed particular emphasis on the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and which often involve specialised areas of law".

98. In relation to the point made in the last sentence of that passage, the court went on to note the importance of a number of factors, including "the subject-matter of the decision appealed against, and in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and, if so, to what extent", and "the content of the dispute, including the desired and actual grounds of appeal" (para 179). In relation to the latter point, the autonomous concept of full jurisdiction implies that it is necessary to consider whether the tribunal may, even with limited competence, adequately review the disputed issues.

99. It appears that neither the deprivation of citizenship nor the refusal of entry clearance involves the determination of a civil right falling within the scope of article 6(1) of the Convention, applying the current case law of the European Court of Human Rights: see, for example, *Smirnov v Russia* (Application No 14085/04) (unreported) 6 July 2006, and the other authorities discussed in *QX v Secretary of State for the Home Department* [2024] UKSC 26; [2024] 3 WLR 547. However, such decisions may engage other Convention rights. In the present case, the refusal of entry clearance constituted an interference with the rights of the appellant's children under article 8 of the Convention; and article 8 contains inherent procedural requirements, as an aspect of the duty to afford due respect to the rights protected by that article: see, for example, *McMichael v United*

Kingdom (1995) 20 EHRR 205. The deprivation of citizenship can also, in certain circumstances, raise an issue under article 8: see, for example, *K2 v United Kingdom* (2017) 64 EHRR SE18 and *Usmanov v Russia* (2021) 72 EHRR 33. Accordingly, it is necessary that the procedure followed by SIAC should comply with the requirements of the Convention.

100. There are several decisions and judgments of the European court which are relevant to this issue, in addition to the authorities on article 6(1) discussed above. The case of *Al-Nashif v Bulgaria* (2003) 36 EHRR 37 concerned the detention and subsequent deportation of a stateless person and his children on grounds of national security. In relation to an alleged violation of article 8, the court stated:

> "123. Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information.
>
> 124. The individual must be able to challenge the executive's assertion that national security is at stake. While the executive's assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary."

That approach was followed in subsequent cases such as *CG v Bulgaria* (2008) 47 EHRR 51 and *Nolan and K v Russia* (2011) 53 EHRR 29.

101. The same approach was also adopted when the procedure followed by SIAC in an appeal under section 2 of the 1997 Act was considered by the European court in *IR v United Kingdom* (2014) 58 EHRR SE14 ("*IR*"). The applicants had been made the subject of exclusion orders on grounds of national security, and complained that they had not been given adequate information to enable them to understand and respond to the allegations against them. Their complaints under articles 8 and 13 were held to be manifestly ill-founded. The court repeated what it had said in the earlier cases. There must be "some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information" (para 57). In such

proceedings, "the executive's assertion that national security is at stake must be open to challenge". Although its assessment of what poses a threat to national security "will naturally be of significant weight", the tribunal "must be able to react in cases where the assessment has no reasonable basis in the facts or reveals an interpretation of 'national security' that is unlawful or contrary to common sense and arbitrary" (ibid).

102. The court held that the procedure before SIAC fulfilled the relevant requirements (para 63, omitting references):

> "First, SIAC is a fully independent court. Secondly, SIAC sees all the evidence upon which the Secretary of State's decision to exclude an individual is based and forms its own, independent view as to whether the Secretary of State reached the correct decision … It is thus competent to examine and, if necessary, to reject the Secretary of State's assertion that the appellant poses a threat to national security. Thirdly, there is some form of adversarial proceedings before SIAC, with appropriate procedural limitations – in the form of the special advocates – on the use of classified information … Fourthly, cases before SIAC are primarily concerned with allegations of terrorist activity: there is no evidence that SIAC has allowed the Secretary of State to adopt an interpretation of 'national security' which is unlawful, contrary to common sense or arbitrary … Fifthly … only parts of SIAC's judgments are classified (or 'closed'). The appellant is provided with an 'open' judgment providing as much information as possible on the reasons for SIAC's decision. Further, the 'closed' parts of the judgment are disclosed to his special advocate. Finally, SIAC has full jurisdiction to determine whether the exclusion interferes with the individual's article 8 rights and, if so, whether a fair balance has been struck between the public interest and the appellant's rights. If it finds that the exclusion is not compatible with article 8, it will quash the exclusion order".

103. The same approach was followed by the European court in *Khan v United Kingdom* (2014) 58 EHRR SE15 ("*Khan*"), issued on the same date as *IR.* The court noted that SIAC had rejected the Secretary of State's assertion that one of the applicants represented a national security risk, and observed (para 33):

> "This demonstrates the rigorous scrutiny given by SIAC to such allegations and shows that it can and will reject them if the

> evidence provided by the Secretary of State is considered insufficient to substantiate them."

The court also noted that SIAC had allowed two of the appeals against deportation on the basis of a risk of ill-treatment contrary to article 3. That was further evidence of SIAC's ability and readiness to ensure that Convention rights were respected.

104. The decision in *IR* has been cited by the European court in a number of more recent cases. The most significant for present purposes is *Mirzoyan v Czech Republic* (Application Nos 15117/21 and 15689/21) (unreported) 16 May 2024, which concerned the refusal of residence permits on grounds of national security. The court stated (para 83) that in cases in which national security is invoked as grounds for the impugned measure, "the aliens concerned must be informed of the relevant factual elements which have led the competent domestic authorities to consider that they represent a threat to national security and must be given access to the content of the documents and the information relied on by the authorities, without prejudice to the possibility of imposing duly justified limitations on such information if necessary". The court added (para 84):

> "The court will also examine whether one or more independent authorities were involved in the proceedings, judicial scrutiny in principle having a greater counterbalancing effect than an administrative form of scrutiny; whether the applicant was able to challenge, in an effective manner and before an independent authority, the allegations against him that he or she represented a danger to national security; whether the independent authority had the power to effectively examine the grounds underlying the impugned decision; and whether it had access to the totality of the file constituted by the relevant national security body to make its case against the alien, including to the classified documents, and to verify the authenticity of the documents in the file, together with the credibility and veracity of the classified information adduced in support".

The court also emphasised the importance of taking account of the best interests of children, where relevant to securing the rights set out in article 8 (para 85).

105. In the present appeal, it was argued that the European court's understanding of SIAC's role, as set out in *IR* and *Khan,* no longer held true, even if it was true at the time, because the decision in *Begum* had restricted SIAC's role in relation to issues of national security. The submission was that the approach adopted in *Begum,* and in the present case, meant that SIAC's procedures no longer met Convention standards.

106. That submission is not persuasive. As explained above, even in relation to issues of national security, SIAC is able to carry out a rigorous scrutiny of the Secretary of State's assessment, as it did in the present case. An appeal can be allowed on any of the grounds on which an administrative decision involving the exercise of discretion can be quashed, including not only a legal misdirection, bias, irrationality or bad faith, but also if the evidence relied on by the Secretary of State is not reasonably capable of supporting his or her assessment, or if the factual basis of his or her decision is plainly untenable, or if he or she is shown to have misunderstood or been ignorant of an established and relevant fact, or if the decision was based on an inference from the evidence which was perverse or irrational. SIAC understood that perfectly well in the present case. However, in the absence of any defects of that kind, SIAC cannot substitute its own evaluation for that of the Secretary of State merely because it would have taken a different view.

107. That approach is not incompatible with the Convention, as it has been interpreted by the European court. As the case law under article 6(1) demonstrates, the procedural requirements of the Convention do not invariably necessitate that an appellate tribunal must have the ability to substitute its own assessment or opinion for that of the administrative authority. On the contrary, as was said in *Ramos Nunes de Carvalho,* para 178 (quoted at para 97 above), the court has placed particular emphasis on the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency – in other words, decisions taken in the public interest – and which involve specialised knowledge and experience. There is, in addition, a democratic principle which underlies the principle that weight should be given to the decisions of authorities entrusted by the legislature with discretionary powers: a principle which, for the reasons explained in *Rehman,* must be accorded particular weight in relation to decisions intended to protect the public against the danger of terrorism. The procedural safeguards provided by SIAC, as described in *Rehman, Begum* and the present judgment, reflect those factors, while also ensuring that the rule of law is fully respected. They continue to meet the requirements set out in *IR* and the later case law. In particular, appeals under sections 2 and 2B of the 1997 Act are adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, in which the appellant can challenge in an effective manner the allegations that he or she represents a danger to national security, and in which SIAC can react in cases where the assessment has no reasonable basis in the facts or is otherwise unlawful or arbitrary.

8. Conclusion

108. As explained earlier, SIAC approached the issues in the present case on the proper basis, subject to one misunderstanding which had no effect on the outcome of the appeal. Having scrutinised the evidence with care, it rejected the challenge to the Secretary of State's assessment that the appellant presented a significant risk to national security. Having reached that conclusion, it was correct to dismiss the appeal against the deprivation decision. It also carefully assessed the best interests of the appellant's children, and concluded that the interference with their article 8 rights which would result

from the refusal of the appellant's application for entry clearance was proportionate. It accordingly dismissed the appeal against that decision too.

109. In relation to both appeals, SIAC was entitled to reach the conclusions it did, and the Court of Appeal was correct to dismiss the appeals against its decisions. I would accordingly dismiss the further appeals to this court.