SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC/159/2018**
Hearing Date: **21st, 22nd & 23rd June 2022**
Date of Judgment: **1st November 2022**

Before:

THE HONOURABLE MR JUSTICE JAY
UPPER TRIBUNAL JUDGE MACLEMAN
MR R GOLLAND

Between

B4

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Simon Cox and **Julianne Kerr Morrison** (instructed by **Birnberg Peirce**) appeared on behalf of the Appellant

Jonathan Glasson KC and **James Stansfeld** (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Angus McCullough KC and **Rachel Toney** (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

Introduction

1. B4, a national of a non-European country[1], was deprived of his British citizenship by order of the Secretary of State for the Home Department ("SSHD") on 26th October 2018. He appeals against the decision to deprive pursuant to s. 40 of the British Nationality Act 1981 ("the BNA 1981"). The OPEN basis of the deprivation order, made on conducive grounds, is that B4 engaged in fighting with and on behalf of an Al-Qaeda ("AQ") aligned group whilst in Syria. It is the assessment of the Security Service that "anyone who has travelled voluntarily to align with AQ is aware of the ideology and aims of AQ, the attacks that AQ-aligned individuals have carried out" and that such a person would be "subject to radicalisation and desensitisation to violence". It was therefore assessed that B4 presented a risk to the national security of the United Kingdom.

2. B4's evidence is that he arrived in Syria in late 2014 and left in mid-2015. B4's skeleton argument states that he left in the summer of 2015. At some point B4 returned to the non-European country, where he had been for a period of time before travelling to Syria via Turkey, and that is where he remains.

3. B4 has been seriously hampered in giving instructions to his legal team by the circumstances surrounding his present whereabouts and the fears he harbours for his personal safety. The SSHD maintains that these difficulties have been exaggerated, but for present purposes we accept the evidence of Gareth Peirce, B4's solicitor, on this topic. B4 has not filed a witness statement and we accept that he would have done had that been possible. B4 and those advising him perceive that he would be at personal risk were confidential instructions sought to be given by him to his legal team, and the SSHD's submissions did not serve to undermine that perception. Whether that perception has an objective basis is not the point. Furthermore, we accept the evidence filed on B4's behalf that he cannot travel to a safe European country for any purpose (although it may be the case that he could travel to Turkey on the passport of the non-European country for a temporary purpose). Overall, although B4 has clearly been able to give certain instructions to his lawyers (e.g. he has provided the emails relating to alleged contact between him and the FCO), he has not been able to advance the full case he might have wished to.

4. B4 also maintains that the SSHD has not given proper disclosure and that the case against him is vague and unparticularised. For example, the "AQ-aligned group" has never been identified in OPEN.

5. We are satisfied that the rule 38 procedure has been properly undertaken in this case, and that the Special Advocates have worked diligently and assiduously in the advancement of B4's interests. The SSHD cannot give further details of the "AQ-aligned group" without damaging national security. B4's interests in this appeal have been safeguarded and advanced in line with the procedures developed and refined by this Commission in the 25 years that have succeeded the coming into force of the SIAC Act 1997.

6. The evidence relied on by B4 is to be found at section G of the OPEN bundle. The SSHD has not asked that any witness be tendered for cross-examination, and we bear that in mind. The Commission accepts the gravamen of the evidence from B4's family

[1] Given the anonymity order in this case, and the risk of "jigsaw" identification, no further details can be given.

as to the personal difficulties he has faced and is facing. A major part of the difficulty, however, is that the SSHD would not have been able to challenge any key averment of fact without bringing matters which should remain in CLOSED into OPEN. On the other hand, and as we have already said, to the extent that Gareth Peirce gives admissible evidence (and much of her evidence is no more than a commentary and critique of material in the public domain), the Commission will accept it as true.

7. The material on which the SSHD relies in OPEN has been summarised at para 17 of her skeleton argument. We will be referring to this material only to the extent necessary during the course of this OPEN judgment.

B4's Six Grounds of Appeal

8. B4 advances the following six grounds of appeal:

GROUND 1: the SSHD made an error of law and/or of fact.
GROUND 2: the SSHD failed to take account of relevant considerations and/or failed to comply with the *Tameside* duty of relevant inquiry in respect of national security assessments.
GROUND 3: the SSHD failed to comply with the *Tameside* duty of relevant inquiry in respect of the Article 2/3 policy and/or failed to take account of relevant considerations in respect of the Article 2/3 breach.
GROUND 4: the decision was unreasonable, disproportionate and in breach of the SSHD's obligations under the ECHR and the Article 2/3 policy.
GROUND 5: the decision was arbitrary and/or an abuse of process and/or vitiated by improper purpose.
GROUND 6: the decision was procedurally unfair because there was a failure to provide an adequate opportunity for prior representations.

Overarching Legal Principles

9. There is a broad measure of agreement between the parties about these.

10. The relevant law is set out in *R (Begum) v SSHD* [2021] UKSC 7; [2021] 2 WLR 556, *SSHD v P3* [2021] EWCA Civ 1642; [2022] INLR 88, and the Commission's decision in *U3 v SSHD* (Appeal No: SC/153/2018 and SC/153/2021). *U3* is now before the Court of Appeal, permission to appeal having been granted by the Commission on the issue of the correct legal approach to be applied to s. 2B appeals. The parties are agreed that the Commission should apply the law as set forth in *U3*, with B4 reserving his position in the event that the Court of Appeal were to allow U3's appeal.

11. The Commission proposes to summarise the "key propositions" set out in B4's skeleton argument, noting where appropriate the SSHD's contextual additions, as well as to outline its own analysis. These propositions are relevant to an appeal, such as the present, where Convention rights are not directly in play.

12. First, although s. 2B of the 1997 Act confers a right of appeal, as opposed to a right to a review, the principles to be applied by SIAC in reviewing the SSHD's exercise of discretion are largely the same as those applicable to judicial review. To the extent that matters in issue are justiciable (see the second proposition below), this entails an

application of the familiar principles enunciated in *Wednesbury* and *Edwards v Bairstow* [1956] AC 14.

13. Secondly, certain national security questions are simply not justiciable (e.g. whether the promotion of terrorism in a foreign country by a UK resident would be contrary to national security); others entail an evaluative judgment which are incapable of objective assessment. In relation to such questions (e.g. the level and nature of the risk posed by an appellant, the effectiveness of the means available to address that risk, and the acceptability or otherwise of the consequent danger), the Commission *is* able to investigate them but must apply familiar public law principles. The Commission's approach, which falls short of applying the principles ordinarily germane to a full merits appeal, reflects the axioms of institutional competence and democratic accountability.

14. Thirdly, the full gamut of public law grounds is available to an appellant, including failure without good reason to apply an established policy, failure to take into account relevant considerations (a sub-set of *Wednesbury*), breach of the *Tameside* duty to make adequate inquiry (to which *Wednesbury* principles apply, because it is not for the Commission to decide for itself what constitutes adequate inquiry), failure to provide the decision-maker with adequate information and a fair and balanced account of the case as a whole, and error of established fact.

15. Fourthly, the public law error must be material in the sense that it would be open to the SSHD to show that the outcome would have been the same irrespective of the error. Contrary to the assumptions made by B4 in open argument, the SSHD has not – save in one minor respect which in the event proved unnecessary for the Commission to determine – sought to persuade the Commission in CLOSED that any public law error it might have made is saved by the "defence" that the outcome would have been the same. The SSHD's case has been that it made no public law errors.

16. Fifthly, evidence post-dating the deprivation decision is admissible in the appeal, but only insofar as it relates to matters occurring before the decision.

17. Sixthly, although the Commission applies public law principles, it is not confined to the materials that were before the SSHD. As the Commission explained at para 31 of its judgment in *U3*:

> "Even though it applies a public law standard of review to the national security assessment, SIAC is not simply the alter ego of the Administrative Court. Its constitution gives it special expertise both in immigration law and, pertinently here, in the assessment of intelligence. Its procedures allow for a detailed consideration of evidence, OPEN and CLOSED, including exculpatory evidence. It can and very often does hear oral evidence from a Security Service witness about the national security assessment … In this respect, the tools available to SIAC [Sc. the "more powerful microscope"] go beyond those which would be available in the Administrative Court, even in a case where closed material procedures apply."

18. Seventhly, the fifth proposition set out above should be refined to this extent. During the course of the appellate process, which involves the supply of evidence from an appellant and the carrying out of an exculpatory review, material may come to light which warrants further consideration by those advising the SSHD. As the Commission

explained in *U3*, it is incumbent on the Respondent (the Commission uses this term to identify the department as a whole, and those advising it) to keep the decision under review. We accept the SSHD's qualification that this does not entail the re-making of the national security assessment on a rolling basis, including whether the appellant constitutes the same risk to national security as he did when the decision was originally made. Rather, the correct analysis is that, in the event that exculpatory material should demonstrate that a particular piece of evidence or intelligence may now bear a different interpretation, the Respondent must consider whether the original decision can still be supported. It will be a matter of judgment for the Respondent whether the case should be returned to the SSHD personally for further consideration.

19. Eighthly, the Commission's role is limited to allowing or dismissing an appeal. The response of the SSHD to a decision allowing an appeal would be for him[2] to decide in the light of all relevant factors. If the Commission were to decide that the national security assessment was *Wednesbury* unreasonable, the SSHD could not properly make the same assessment unless further evidence and/or intelligence has come to light. Upon a reconsideration following a successful appeal, the SSHD would of course be looking at the matter as at the current date, not as at the date on which the original decision was made.

Essential Factual Background

20. B4 was born in the non-European country in 1988. He came to the UK with his parents and was registered as a British citizen in 2004. He retains his first nationality.

21. B4 has a close-knit family. His father is MX[3]. There are other children including R, A and M.

22. B4 travelled to the non-European country in spring 2014. In winter 2014 he travelled to Turkey where he spent two weeks before crossing the border into Syria slightly later. It is his case that he was in Turkey for one week in late spring 2015, returned to Syria and then left there for good later in the summer of that year. He met his brother M in Istanbul on that date, and the rest of the family came to Turkey for Ramadan a few days later The evidence in OPEN is that in early autumn 2015 B4 left Turkey and travelled to the non-European country.

23. The circumstances surrounding B4's travels are set out in the witness statements of MX and M. We have carefully considered this evidence.

24. According to MX's evidence, B4 told him that he travelled to Syria close to the Turkish border where "they could see the lights of Turkish cities". MX did not want to talk about politics. B4 did not tell his father that he had been injured. On the other hand, B4 provided more information to his brother, M. He told his brother that in Syria he had been giving aid to civilians. He had a 4 x 4 pick up vehicle. B4 did not mention having a gun; "nothing he said suggested that he had been fighting". B4 did tell his brother that he had been wounded by shrapnel in the spring of 2015 whilst aiding civilians who

[2] At the time the decision was made in this case on [REDACTED], the Secretary of State for the Home Department was the Rt Hon Sajid Javid MP. It is for this reason only that the personal pronoun "he" will be used throughout this judgment.

[3] The Commission will use ciphers throughout to protect the anonymity of B4.

were leaving on foot from a city under fire from anti-Assad forces. B4 did not want to worry his parents about this.

25. B4's case is that he travelled to Syria in order to join his fellow nationals in the fight against Assad. It is accepted on his behalf that he may have been co-located with, or even fought alongside, those ideologically committed to AQ, but it is stringently denied that he was aligned with AQ. It is pointed out on his behalf that the evidence demonstrates that the vast majority of the armed opposition to Assad were diametrically opposed in ideological terms to AQ's interpretation of Islam.

26. It is also said on behalf of B4 that for part of the time he sojourned in Syria he was with a friend. That individual is now back in the UK and we will be referring to him throughout as "the friend".

27. The Commission has concluded that important aspects of the account B4 gave his family are not correct. These are identified in the Commission's CLOSED judgment.

28. On returning to the non-European country in the autumn of 2015, B4 obtained employment there. On our understanding, this was in the west of the country and the work included providing translation services.

29. It is B4's case that in spring 2018 B4 and the friend went to European country A to meet someone who was well known to the UK security services. The meeting had been arranged by the friend's father. The purpose of the meeting was to seek help and guidance from that person as to how B4 and the friend might return to the UK. Of course, at that stage there was nothing to stop their travelling to this country, but it is to be inferred that they feared that they might face problems with the authorities were they to return without the ground having been prepared. It is also to be inferred that it was the perception of B4 and the friend that in order to prepare that ground the person to whom we are referring would have to be made aware that they could give assistance of some practical value to the authorities.

30. The Security Service can neither confirm nor deny ("NCND") that any such meeting took place, let alone its possible purpose.

31. B4 and the friend returned to the non-European country. Later, they were refused entry to the second non-European country. It is argued that HMG must have brought about that state of affairs by alerting the authorities of the second non-European country.

32. It is B4's case that in the late spring of 2018 there began a series of email exchanges between him and an FCO official, Daniel Lockwood. We have seen copies of the relevant emails which are NCND'd by the Security Service. Approximately three weeks later B4 travelled to the capital of European country A and it is claimed that there followed a series of meetings between him and Mr Lockwood, who was now saying that he worked for British Intelligence. Again, all of that is NCND'd by the Security Service.

33. After B4's return to the non-European country, he says that there were further email exchanges between him and Mr Lockwood. B4 told him that "nowhere here is safe". Mr Lockwood said that he had some "initially positive news" for B4, which was that another meeting would be organised; at that meeting "we can discuss our options".

34. It is said on behalf of B4 that one of the options under consideration was that MI6 would recruit him as an agent or human source, in which circumstances he might at some point be able to return to the UK. It is also said that B4 must have been aware of this.

35. At the same time, the NCND'd material illustrates, if it be true, that the friend was in parallel contact with the FCO on the same basis and with the same mutual objectives. B4's case is that the friend met with FCO representatives in European Country B in the autumn of 2018 and then, somewhat unexpectedly, flew to the UK a few days later. He was arrested on arrival in the UK (again, an assertion NCND'd by the SSHD in these proceedings), interviewed by the police at the airport, released on the same day and bailed to return. It is Ms Peirce's evidence – almost certainly multiple hearsay with the sources being unidentified, but the Commission will consider it nonetheless – that the friend was later notified by the police that it was not intended to take further action against him, and his passport was returned. The friend has refused to give evidence in these proceedings, perhaps for obvious reasons. B4 points to the "stark contrast" between the treatment accorded to the friend and that meted out to him.

The Deprivation Decision

36. B4 submits that it is an irresistible inference that the decision to deprive in his case was precipitated by the friend's unwelcome return to the UK, and that had that not occurred the engagement with MI6 would have continued, with a likely different outcome. The submission to the SSHD is dated [REDACTED] and everything points to, so it is said, a rushed and "knee-jerk" decision-making process.

37. Even on the premise that the evidence in relation to the friend's return to the UK on [REDACTED] is correct, the Commission observes that it does not follow that just because the decision would not have been made on this particular date but for the friend's return that this was the primary reason for it, and that grounds did not separately exist to justify deprivation.

38. B4 further submits that it would have been obvious to the SSHD that the deprivation decision would have very serious implications for him and would cause him very considerable personal distress. B4 was with his father in the non-European country when an official telephoned him with news that the deprivation decision had been made. The father's evidence was that B4 was devastated and that there came a point when he could no longer continue the conversation. That account is supported by the gisted statement of Mr Larkin. MX now fears for his son's mental health.

39. There is no medical evidence supporting the contention that B4 has suffered clinical depression or anxiety as a result of the SSHD's action, but it must be obvious to anyone that to deprive a man of his citizenship in these circumstances would cause him very considerable distress. The Commission does not, however, accept that considerations such as this were not taken into account.

40. According to the OPEN summary of the deprivation decision, B4 is assessed to have travelled to Syria "where he aligned himself with, and engaged in fighting with, an AQ-aligned group". He poses a threat to national security were he return to the UK, and the concern of the Security Service was that he may attempt to do so. It was considered

that depriving B4 of his citizenship would not result in a real risk of mistreatment in the non-European country. Article 8 of the Convention was not, strictly speaking, in play; "however, the rights of family members in the UK may be engaged". B4's father, mother and siblings were not mentioned in terms. It was pointed out that B4 did not have a wife and children, and that he had travelled freely to the non-European country Thus:

> "… we assess any interference in his right to personal and family life in the UK as a result of a decision to deprive him of his citizenship is both necessary and proportionate in the interests of national security."

Proportionality was, therefore, taken into consideration.

41. The Ministerial Submission further stated that deprivation was the most effective way to mitigate the risk; but, in the event that the SSHD did not decide to make the s. 40 order, a temporary exclusion order ("TEO") should be imposed.

42. In Annex A to the submission, setting out the national security case in relation to B4, the following assessments were made:

> "… anyone who has travelled voluntarily to align with AQ is aware of the ideology and aims of AQ and the attacks that AQ-aligned individuals have carried out. Furthermore, we assess that an individual aligning with AQ will be subject to radicalisation and desensitisation to violence, so the ideological commitment is likely to remain, or even grow stronger.
> …
> … there is a risk that, once back in the UK, B4 may seek to engage in terrorism related activities, including radicalisation, provision of assistance to Islamist extremist groups located in the UK and overseas, and could potentially aid the facilitation of UK-based individuals overseas, for example in the non-European country, for the purposes of aligning with an Islamist extremist group."

43. The bundle also contains the Security Service OPEN statement on the threat to national security from individuals with UK links who have aligned with an AQ-aligned group in Syria ("the AQ statement"). Most of this document is not capable of being gainsaid, not least because it is obvious that anyone with a continuing ideological commitment to AQ represents a threat to the national security of this country. B4's argument does not seek to assail that proposition. Rather, he focuses on Annex A to the AQ statement (for the avoidance of any confusion, pages 59 and 105 of the OPEN bundle). This acknowledges that the status of AQ in Syria is "complex", with "the structures, allegiances and co-operation between fighters and groups fluctuat[ing] regularly and at short notice". However:

> "… despite changing allegiances on the ground, we assess that foreign fighters in these areas will continue to identify with AQ regardless of the group they are in at any one time."

44. In July 2016, which was after B4 left Syria, an AQ-group known as the Al-Nusrah front ("the ANF") proclaimed that it was splitting from AQ and rebranding itself as Jabhat Fatah al-Sham ("JFS"). In the re-amended AQ statement, the assessment was made that

JFS remained aligned with AQ. Annex A also referred to a group bearing the acronym "JAF", and then stated:

> "Jaysh al Fatah ("JAF"), or "Army of Conquest", is a coalition of groups primarily founded and led by JFS that continues to work with JFS to govern territory and to mount military offensives".

45. It is said on behalf of B4 that this is a misleading statement. The OPEN version of Annex A footnotes an article in the New York Times dated 2nd October 2015. Footnote 13 at page 51 of the OPEN bundle informs the reader that OPEN source material is used throughout the AQ statement, and that, whilst the Security Service does not necessarily agree with all of it, "it is broadly consistent with what is known by SYS".

46. The article in the New York Times states the following:

> "The alliance [JAF] consists of a number of mostly Islamist factions, including the ANF, AQ's Syrian affiliate, Ahrar-al-Sham, another large group, and more moderate rebel factions that have received covert arms support from the intelligence services of the US and its allies.
> ...
> Some of its fighters want to found an Islamist government in Syria, while others want a secular state. But they are united in opposing both the Assad government and the Islamic State, the jihadist group that holds large areas of Syria and Iraq and has declared a caliphate there."

47. The article also points out that JAF has "racked up" a victory over Assad's forces in the strategic town of City A.

48. The point is made on behalf of B4, and the Commission will be returning to it, that he could well have been fighting with fellow nationals, without any ideological commitment to AQ, within the ambit of the "more moderate rebel factions" that have been supported by the US and its allies. Thus, the fact that B4 may have been involved in military action in and around City A proves nothing.

49. There was much focus during the hearing on the re-amended AQ Statement which first came into being in 2017. B4 advances two points. First, that he does not fall within the category of person said to constitute a risk:

> "If military action were to result in significant defeats for AQ in Syria and displacement of UK-linked SOIs who were currently linked with AQ-aligned groups, SYS assessed that this could prompt them to return to the UK. MI5's[4] assessment was that individuals returning to the UK who had aligned with AQ-aligned groups could become involved in attack planning. The longer the delay in taking disruptive action against those SOIs who could be prevented from returning to the UK, the more likely it was that some would return after their time with AQ in Syria. MI5 assessed that this would present an increased risk to national security ..."

[4] We are referring throughout this judgment to "MI5" and "MI6" rather than the more formal acronyms, SyS and SIS, save where direct citations are made from documents.

50. The Commission would point out that this assessment needs to be read in context. Assad's regime had been at risk of collapse in 2015. That brought about a massive shoring-up effort by Russia, Iran and the latter's proxies in the region. The tide was turning against AQ in 2017. British citizens who had travelled to Syria to fight Assad with an ideological commitment to AQ would constitute a particularly grave risk to the national security of this country were they to return, of which there was now an enhanced possibility. Such persons had not achieved their objectives in Syria, had suffered military defeat there, and might be even more aggrieved and dangerous. It by no means follows, however, that because B4 did not fall within this category of individual, for the obvious reason that he left Syria in 2015, he could not be regarded as a threat to national security. This paragraph of the re-amended AQ Statement was addressing an especially concerning class of person, not all those who were or might have been a threat to national security.

51. The second point taken on the Statement focuses on para 7, which states:

> "... For the avoidance of doubt, "alignment with" was a term deliberately chosen by MI5, which is and was used to denote the adoption and mental positioning alongside AQ ideology, *which may be coupled with a physical joining or co-location with an AQ-aligned group*."

52. The highlighted clause had previously read:

> "... and/or physical joining or co-location with an AQ-aligned group."

53. The earlier wording, which came about as a result of imperfect gisting, was problematic, because it encompassed those who happened to be in the same place as AQ-fighters but did not necessarily share their ideological commitment. The revised wording does not generate the same issue, and in the Commission's view any concerns have been assuaged.

54. The AQ statement has been both amended and re-amended. The evidence about this was that many of the amendments reflected the gisting into OPEN although the CLOSED document may also have been amended.

55. The amended version of the AQ statement dealt specifically with UK citizens who aligned with ISIL in Syria and Iraq. Although some reference has been made to this aspect, the Commission considers that it is not directly relevant to the instant case, which is not concerned with alignment to or with ISIL.

56. In the re-amended version of the AQ statement, the following statement appears:

> "Over 850 UK linked individuals of national security concern have travelled to engage with the Syria conflict. Of total travellers from the UK, approximately 15% are deceased and just under half have returned to the UK."

57. It follows that on this OPEN material about 350 individuals have returned to the UK.

58. The re-amended AQ statement also refers in general terms to the fact that "most UK-linked individuals will have spent a considerable amount of time in theatre, in some cases up to four years". It is obvious that such individuals, were they to return to the

UK, would represent a national security threat. The Commission observes that it by no means follows that someone who has not been in theatre for four years would not constitute a threat, although it may be fair to say that, as a matter of broad generality, he might be a lesser one.

59. The Commission does not consider that it is necessary to set out in this judgment all potentially germane OPEN material. The Commission has considered it all carefully in the light of the parties' submissions, and will be re-examining the material to the extent necessary during the course of examining the grounds of appeal.

The Evidence of MM

60. The Security Service witness has been anonymised as MM. Some of his evidence has already been touched on, in particular that para 7 of the Amended Security Service Note was imperfectly gisted, and there had been no change in the definition itself.

61. MM explained in his evidence in chief that if a person takes the momentous decision to travel to a war zone and align with an AQ-aligned group, that person is an extremist and a threat to national security. That person will, in Syria, be subject to further radicalisation and desensitisation to violence. The risk to the national security of the UK would range across the scale of gravity from attack planning to fund-raising. Although remaining in the non-European country would not altogether negate the risk to national security, the level of risk would be much lower than if B4 were to return to the UK.

62. MM accepted in cross-examination that he came to know about B4 approximately 1½ months ago in preparation for this appeal. That has been the sole focus of his time since then, getting to grips with all the available material. MM may, therefore, be fairly described as a "corporate" witness.

63. MM confirmed the OPEN assessment that B4 left Syria in mid-2015. He would not say in OPEN when it was assessed that B4 had returned to the non-European country.

64. MM accepted that no assessment was made of the threat to national security constituted by B4's presence in European Country B and European Country A.

65. MM said in cross-examination that, although a person who travelled to Syria etc. to align with AQ etc. would almost by definition constitute a threat to national security, an examination of his individual circumstances was still required. That was in order to assess the current threat. MM agreed that the length of time the person was in Syria was always a relevant consideration but it was not decisive in determining risk. He elaborated on that by saying that he would be uncomfortable with the notion that there was some sort of correlation between the length of time and the level of the risk: that would always depend on what he did out there, and what he has done thereafter.

66. MM was asked about the fluidity of the AQ-aligned groups. He agreed that these groups often rebranded or merged. He accepted that there were foreign fighters who went to Syria to fight against Assad who were not aligned to AQ. MM also accepted that the assessment of risk went beyond the bare fact of fighting against Assad, and had to focus on alignment with AQ.

67. MM was asked about the New York Times article in the context of JAF. He agreed with what the article said about more moderate rebel factions and that some fighters wanted to establish a secular state in Syria. In relation to the taking of City A, MM said this:

> "I agree that JAF seized the strategic town of City A. It was a mixture of extremists and moderate groups, the latter being mostly composed of local Syrians. The more moderate groups were not AQ-aligned. They were wary of association."

68. MM told the Commission that he did not believe that the SSHD himself saw the footnoted documents, including the New York Times report.

69. MM said that the Assad opposition saw JFS as a useful fighting force and tolerated their presence. He also said that there was a period in time when ANF sought to pause its anti-Western activity in order to relieve pressure from the international coalition in Syria. However, the long-term objectives and intentions of the leaders of ANF did not deviate from the goal – to establish AQ rule in that country.

70. It was put to MM that ANF would not necessarily be perceived by combatants as AQ aligned, given its relinquishment of an anti-Western position. The Commission's overall interpretation of MM's evidence was that he did not accept that. MM adhered to the twin propositions that ANF was aligned with AQ, and that taking up arms for ANF was a strong indicator of alignment with AQ ideology. MM continued to emphasise that the assessment of risk would depend on other evidence about that individual, which evidence might include: pledging allegiance; the level of commitment to the group; and all available information.

71. MM stated that the Security Service assessment in 2017 was that B4 would not likely return to the UK.

72. MM was asked whether the primary reason for the decision made on [REDACTED] was to prevent B4 returning to the UK. MM's answer was that the primary reason was to safeguard the national security of the UK.

73. MM was asked a number of questions about his understanding of the TEO regime. It was suggested to him that a TEO could have been put in place not merely to manage his return but also, and separately, to provide a safe window of opportunity for representations to be solicited by the SSHD from B4. In the Commission's view, MM could not provide useful answers to these questions. They related in the main to matters of law which were outside his remit.

74. MM was asked whether there were any relevant factors of which the SSHD was unaware and now accepts. MM's answer was that "we" assess all relevant information.

75. MM was asked other questions which he either could or would not answer in OPEN.

B4's Grounds of Appeal: General Observations

76. Before addressing each of B4's grounds in turn, it is convenient to make a number of observations of a general nature.

77. First, reliance is placed by B4 on the error of fact doctrine. The Commission considers that this has no application to the instant case, and would be unlikely to be applicable to any SIAC appeal. In *E v SSHD* [2004] EWCA Civ 49; [2004] QB 1044, the Court of Appeal (Carnwath LJ as he then was giving the judgment of the court) placed specific limitations on the application of this principle, not least that the mistake had to be as to an established fact that was uncontentious and objectively verifiable. Barring the theoretical but frankly completely unrealistic possibility that the Security Service could make such an error, and it would have to be an entirely egregious, proven mistake, the Commission reminds B4 of Lord Reed PSC's observation at para 70 of *Begum* that national security assessments are not objectively verifiable. They are evaluative, inferential and judgmental, and cannot in any meaningful sense be said to rely on established facts. Instead, the challenge for appellants is to demonstrate some public law error: see para 71 of *Begum*.

78. Secondly, reliance is properly placed by B4 on the *Tameside* duty of making proper inquiry. However, the parameters of that principle need to be restated. In *R (oao CAAT) v Secretary of State for International Trade* [2017] EWHC 1754 (Admin), it was reiterated – with reference to the *Plantagenet Alliance* case – that, subject to *Wednesbury*, it was for the public body to decide on the manner and intensity of the inquiry to be undertaken (see para 37). This aspect of the Divisional Court's decision was not upset on appeal. It is not for the court to decide for itself whether the inquiry was appropriate.

79. Thirdly, the Commission cannot accept the submission that the SSHD was given a misleading picture as to the fluid groups operating in Syria at the material time, some of whom may not have been aligned with AQ. It was scarcely incumbent on the Security Service to provide the SSHD with footnoted material such as the New York Times article. The Commission cannot properly go further in OPEN, save to repeat paras 67, 69 and 70 above. If B4 had been part of a "more moderate faction", and MM's evidence was that these were largely composed of Syrians not foreign fighters, the Commission is satisfied that he would not have been assessed as ideologically committed to AQ.

80. Fourthly, B4 submits that the Security Service was under an obligation to provide a fair and balanced assessment of the position in relation both to national security (error 3, grounds 1 and 2) and the article 2/3 risk. Given that this is a situation where *Carltona* does not apply and the decision must be taken by the Secretary of State personally, the principles set out by the Divisional Court (Elias LJ and Simon J) in *R (oao Khatib) v SSJ* [2015] EWHC 606 (Admin), paras 49 ff are apposite. These may be enumerated as follows:

    (1) The decision-maker must be given "the salient facts which give shape and substance to the matter, the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered." (see *R (National Association of Health Stores) v DoH* [2005] EWCA Civ 154, paras 60-64)).
    (2) Given that the statute does not itemise or indicate the factors relevant to the exercise of the discretion, it is for the decision-maker, and those briefing him, to decide what these are, subject to *Wednesbury*.
    (3) It is for the decision-maker, and those briefing and/or advising him, to decide what is relevant or not, subject to *Wednesbury*. But the decision-maker etc. must have regard to the nature of the decision at issue, and where individual rights and liberties

are in play any exculpatory matters must be fairly summarised. Ultimately, though, it is not for the court to decide for itself whether the summary was fair and balanced: the role of the court is confined to satisfying itself that the decision-maker and those advising him have diligently assessed those matters and have not committed any *Wednesbury* error in performing that assessment.

81. Fifthly, B4 submitted that the power/discretion under s. 40 is extremely wide and that the discretion was "unfettered". If B4 were intending to submit that the SSHD would not be *required* to make an order even if the individual were assessed to be a threat to national security, the Commission would naturally agree. However, the point has been made time and again by those representing appellants that the power is draconian, and the Commission would point out that this is what Parliament has conferred. Parliament also intended that the SSHD should have regard to all the considerations of the case, and there may be situations where personal and/or compassionate considerations weigh against the making of the order. However, the Commission does not think that the SSHD is required to perform some sort of overarching proportionality assessment beyond this: the making of the order will, almost by definition, have extremely serious consequences for appellants in the vast majority of cases, save perhaps where an individual has another nationality the rights and benefits flowing from which he is happy to enjoy. The making of the order, by keeping the deprived person outside the UK, is more effective than any other option. Generally speaking, therefore, the making of the order in such circumstances will be necessary and proportionate.

82. If authority were required for these propositions, the Commission would refer to *S1 v SSHD* [2016] EWCA Civ 560, paras 44-45, *U2 v SSHD* (SC/130/2016), para 144 (which deals explicitly with the issue of equally effective measures, the point being made by this Commission that deprivation is more effective than anything else) and *R3 v SSHD* (SC/150/2018), para 136.

83. Sixthly, B4 should be aware that the Special Advocates advanced 11 short points by way of setting the scene for some of their submissions. A gisted summary may be provided in this OPEN judgment (not all 11 points can be referred to here):

- it was accepted that the SSHD is entitled to err on the side of caution in making any assessment of risk. The Commission agrees, and reminds itself that this point is vouched by authority at the highest level.
- it was submitted that travel to Syria and alignment with AQ does not automatically lead to the conclusion that deprivation is conducive to the public good. It was necessary to consider all relevant evidence bearing on the issue of risk. The Commission accepts the broad generality of that proposition, and has added to this topic in CLOSED.
- it was submitted that it was for the SSHD and not for MI5 to perform the final assessment, and to make his decision based on that assessment. The Commission agrees, because that is what s. 40(2) says. However, in the real world the SSHD is entitled to act on expert advice, and one would not expect the SSHD to disagree with that advice without testing it with relevant officials. This is a practical, common sense observation, not the utterance of a strict legal requirement. If the SSHD makes the deprivation order, it is to be inferred that he has accepted that expert advice and the key reasoning underpinning it.
- it was submitted that it was the role and function of the Security Service to evaluate the material, using its expertise, and to summarise it to the SSHD in a fair and balanced way, so that he can reach a proper decision on a fully informed basis. The

Commission agrees, although this submission says nothing about the test that should be applied by the Commission itself to the exercise of determining whether the Security Service has discharged its role and functions. The Commission has already dealt with that question in this OPEN judgment.

- it was submitted that it was not necessary for the Security Service to present the SSHD with the raw intelligence material, and that a summary would suffice. The Commission agrees.
- it was submitted that the national security assessment was not likely to be based on any single item of intelligence but would represent a composite. Any significant item should be identified, fairly summarised and placed before the SSHD. The Commission considers, subject always to the caveat mentioned in connection with the nature of the review function it undertakes, that the obligation fairly to brief the SSHD should be expressed in more general terms: that the overall intelligence should be presented fairly and in a balanced way. Whether a particular item of intelligence needs to be mentioned or referred to is very much a matter for the overall judgment of the Security Service, and generally speaking there is no need to be prescriptive. There may be cases where something is so obviously important that no reasonable MI5 officer could fail to draw attention to it, but subject to these plain and obvious cases the amount of detail to be provided involves an expert, evaluative assessment for the Security Service itself.
- it was submitted that there was no obligation to provide every piece of exculpatory material to the SSHD, but there *was* an obligation to place before him any significant item so that the SSHD might form his or her own view. The Commission would repeat what it has just said.
- it was submitted that the failure to present a fair and balanced assessment to the SSHD was a public law error which could not be cured without reconsideration by the SSHD personally. The Commission agrees, subject to two important qualifications. The first is that the Commission does not accept that a public law approach enables it to decide for itself whether the SSHD was presented with a fair and balanced assessment. Ultimately, this is a *Wednesbury* question where the Security Service are the experts. The Special Advocates probably accepted this when the matter was pressed in oral argument, whereupon the submission was made that this was not a case of "heightened" *Wednesbury*. Insofar as there is any inherent flexibility in the *Wednesbury* principle itself, the Commission's understanding of *Begum* is that some national security questions are not justiciable at all, and others are subject to review on a *Wednesbury* basis. The present case falls into the second category.

The Approach of the Special Advocates to MM's Evidence

84. In relation to witness MM, the Special Advocates largely limited the cross-examination to an area of factual clarification, MM having indicated in OPEN that he had had no personal involvement in the decision-making process. Thus, the Special Advocates did not seek to deploy MM as a form of sounding-board for later submissions on the public law grounds. They took the view that it was not necessary, appropriate or desirable in the interests of B4 to cross-examine MM on any of the assessments contained in the CLOSED material because the documents, as it were, spoke for themselves. The viewpoint of the Special Advocates was that a witness should only be cross-examined as to factual matters which are disputed; he or she should not be asked questions which invite comment or travel into matters of opinion.

85. In closing argument in CLOSED, it was submitted on behalf of the SSHD that the Special Advocates failed to cross-examine MI5's "corporate" witness, MM, on matters which should have been tested. Given the importance of the issue, it is necessary to cover this topic in OPEN at a high level of generality.

86. The Commission of course understands that MM had no personal involvement in B4's case in 2018 and before. It is not the practice of the Security Service in SIAC appeals to call those with direct knowledge of the case at the material time. Ideally, the Security Service should do that, but people move on and the practicalities should be borne in mind. The Commission does not necessarily favour the terminology, "corporate witness", because the use of jargon may have the tendency to obscure the underlying reality. A better description of MM is that he was a hybrid witness of fact (admittedly hearsay, but admissible nonetheless), opinion (because national security and other assessments are a combination of fact, inference and expert judgment) and practice.

87. Having mastered the material (as he obviously had), and having said on oath that he agreed with the assessments made by those in situ in 2018, MM was in a position to be asked questions about those assessments. That was the main reason he was being put forward as a witness: for all relevant issues to which he could speak to be explored.

88. The Commission does not consider that the explicit statements of principle in *Begum* to the effect that administrative law principles govern the exercise under s. 2B of the 1997 Act material alters the role of the hybrid witness, or the approach the Special Advocates should be adopting in cross-examination. The Commission says this for four reasons. First, whatever Flaux LJ meant by the term "full merits appeal", it has always been the practice of the Commission to accord deference to the expert assessments of the Security Service. Secondly, the Court of Appeal in *P3* and the Commission in *U3* made it clear that live evidence remains admissible in SIAC proceedings. Whatever may be the Commission's approach to it, that evidence must be considered and weighed. On ordinary principles, this process of evaluation, circumscribed as it is following *Begum*, predicates that it be tested. Thirdly, it is still open to the Special Advocates to contend that a particular assessment, or even the overall assessment as to the nature and level of risk, is *Wednesbury* unreasonable. In the event that the Special Advocates were to advance such a submission in any individual case, the Commission considers that the MI5 witness should be cross-examined on any key matters. It might be said, for example, that a particular assessment was based on no evidence/intelligence and/or was plainly wrong, or it might be said that the inference that has been drawn is without foundation. The point that the Commission is making is that these matters should be explored. To continue with the metaphor of *U3*, this is in aid of the Commission's forensic microscope and enables the power of that notional device to be turned up to the maximum possible level. Fourthly, and finally, the interests of an Appellant are better served by the SSHD calling a Security Service witness in this way rather than by refraining from doing so altogether.

89. It will be a matter of professional judgment for the Special Advocates how far to go in cross-examination with a Security Service witness. As a general rule, however, the Commission's expectation will be that no exhaustive trawling over the issues is required. Many of the documents may speak for themselves, and the Commission itself is an expert tribunal. The focus should be on the key or headline points. It would be open to the Special Advocates to decide that the interests of the appellant would not in fact be advanced by pursuing pointless lines of cross-examination, or the Commission

might indicate that any further evidential exploration is not required in the particular circumstances of the appeal.

90. That the Security Service will have chosen to put forward a hybrid witness is not something that could possibly avail them should the Special Advocates make headway in cross-examination. Nor, in a hypothetical case, would the Commission be particularly impressed by any answer along the lines, "I wasn't there at the time, so I cannot comment".

91. It is possible to imagine situations where the CLOSED material reveals an apparent *Wednesbury* error and the Special Advocates fear that by asking questions about it the SSHD's case may be shored up. That apparent error will already have been identified in the Special Advocates' skeleton argument which the hybrid witness will have read. As a general rule, there should be cross-examination on the topic, not least because the CLOSED material may have been misinterpreted. There may, therefore, be a forensic risk to the Appellant but it is not a high one. The Commission will always be astute to differentiate between genuine clarification and disambiguation, and *ex post facto* rationalisations.

92. In the particular circumstances of this appeal, the Commission considers that it can proceed to determine the merits of the Special Advocates' core arguments (the Commission does not believe that these can properly be identified in OPEN) in the overall interests of justice notwithstanding the absence of cross-examination of MM about it. Had the Commission been of the preliminary view that the interests of justice demanded a different approach, it would have relisted this appeal for MM to be cross-examined in CLOSED. The fact remains that the Commission is able in these circumstances to take a sensible and realistic approach to the rationality of the decision-making process as it related to the arguments advanced in CLOSED.

93. The Commission should not be understood as criticising the Special Advocates in any way. In *U3* the observation was made that the Security Service witness was not cross-examined at all, but each case turns on its own facts. In any case, the Commission agrees with the sentiment that the full ramifications of *Begum* in the Supreme Court have not been completely expounded.

94. The Commission now addresses B4's individual grounds of challenge.

Grounds 1 and 2

Error 1

95. The first error is that the Home Office submission relied expressly on the AQ Statement as a core basis for the national security assessment, and that on analysis it does not apply to B4. This is because the AQ Statement was prepared in 2017, after B4 left Syria, and was dealing expressly with those who had been in theatre for a considerable period and might now be seeking to return to the UK following AQ's military defeats. B4 left Syria in 2015 and voluntarily.

96. The Commission agrees with the SSHD that the AQ Statement is not limited to those who might be leaving Syria under compulsion following military defeats in theatre. Read as a whole, the AQ Statement was also dealing in more general terms with those

who had aligned with an AQ-aligned group, and referred in that context to earlier events. More importantly, however, it is clear from OPEN Annex A to the Home Office submission, paras 8, 9 and 11 in particular, that the national security assessment in relation to B4 was based on his individual circumstances. It was not a generic assessment, still less one tied to those who were still in Syria in 2017.

97. For these reasons, and others set out in CLOSED, the Commission cannot accept that the SSHD erred in this respect.

Error 2

98. The second error is that the SSHD's definition of "alignment" is irrationally inadequate and directly contradicted by the SSHD's evidence and assessments made at the time of the decision.

99. The SSHD relied on the assessment of the Security Service that B4 fought in Syria and was aligned with an AQ-aligned group. There is nothing to indicate that the Security Service might have been advising the SSHD that the national security risk could be constituted by the mere fact that B4 was co-located with such groups and nothing more. As MM said in evidence, an earlier iteration of the Security Service Note contained a gisting error, and that has now been ironed out.

100. In oral argument B4 changed tack and relied on the cross-examination of MM directed to JAF, the article in the New York Times, and the possibility that ANF might not have been perceived by combatants as AQ-aligned.

101. The Commission has already been over most of the relevant ground, and addresses these arguments further in its CLOSED judgment. In addition, the Commission points out that MM did not accept in evidence that combatants might not have perceived ANF as AQ-aligned. The fact that for tactical and instrumental reasons ANF and/or AQ toned down its anti-Western stance does not indicate that its long-term ideological aims were somehow diluted or that an ingenuous fighter might have been misled.

Error 3

102. The third error is that the material presented to the SSHD was one-sided.

103. This error cannot be addressed in the OPEN judgment. For the reasons given in the CLOSED judgment, the Commission does not accept that the material presented to the SSHD was one-sided.

Error 4

104. The fourth error is that the material before the SSHD was materially one-sided, and failed to take into account relevant considerations, instead considering merely "numerical" information about returnees from Syria to the UK before 2017, without any assessment of the facts of such cases in comparison with B4. Further, it is said that the material was deficient in failing to undertake a proper analysis of the numerical

information there was, and to consider whether B4 fell within the risk or the no-risk sub-cohort.

105. It is clear to the Commission that the material before the SSHD did address the individual risk constituted by B4. This was sufficient to determine that B4 did not fall within the no-risk sub-cohort. To the extent that B4's submission suggests that there should be some sort of methodological or algorithmic approach to the exercise of the ascertainment of risk, with reference to numerical information that is in the public domain and other information that may not be, the Commission agrees with the SSHD's submission that "this proposed paradigm for assessing the risk of AQ-aligned individuals is flawed". The nature of the flaw is explained in the CLOSED judgment and cannot be addressed in OPEN without misleading B4.

Error 5

106. The fifth error is that the assessment that B4 was a risk to the national security of the UK was flawed in fact and in law. Three contentions are put forward. First, that it is to be inferred from the interactions between B4 and MI6/the FCO/others in European Country A that B4 was not assessed to be a risk to national security at that time. In any event, he was engaging with the authorities and the risk was being managed. Secondly, it is said that B4 did not align himself with AQ in an ideological sense. He was in Syria for a relatively brief period and did not return. He then spent three years in the non-European country with no allegation of terrorism-related activity. Thirdly, it is complained that no revised national security assessment was put before the SSHD.

107. As for the first contention, the Security Service has NCND'd that these interactions took place. It follows that the first contention cannot be addressed in this OPEN judgment.

108. As for the second contention, it goes to the very heart of the national security case against B4. It is addressed in the CLOSED judgment.

109. As for the third contention, the position here is that the national security case was kept under review as this litigation progressed. The Security Service did not deem it necessary to take B4's case back to the SSHD, an approach which is supported by the Commission in *U3*, at para 36:

> "... 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 Minister."

110. The Commission would add that the risk posed by B4 to the national security of the UK was inherently incapable of being quantified, and that those advising the SSHD did not attempt to do so. This is an important factor in the assessment of the overall proportionality of the deprivation decision. In saying this, the Commission is not laying down a statement of overarching principle because it recognises that there may be cases where the level and gravity of the risk is capable of being assessed. The present case is not one of them.

Error 6

111. The submission that B4 advances in writing is that the SSHD should have given consideration to a less intrusive and draconian measure, for example a TEO. That contention has already been addressed above. However, in oral argument B4 advanced a subtly different, ingenious submission which requires some attention.

112. The essence of the submission was that the SSHD could and should have put in place a TEO pending the making of any deprivation order, for the specific purpose of enabling B4 to advance representations as to why such an order should not be made in his case.

113. The regime for the making of TEOs is set out in the Counter-Terrorism and Security Act 2015. It is a regime for managing a person's return to the UK. In order for a TEO to be made, five conditions must be met. For present purposes, two of these are relevant:

> "CONDITION A is that the Secretary of State reasonably suspects that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom. [s. 2(3)]
>
> CONDITION B is that the Secretary of State reasonably considers that it is necessary, for purposes connected with protecting members of the public in the United Kingdom from the risk of terrorism, for a temporary exclusion order to be imposed on the individual." [s. 2(4)].

114. By s. 6 of the 2015 Act:

> "(1) If an individual applies to the Secretary of State for a permit to return, the Secretary of State must issue a permit within a reasonable period after the application is made.
> (2) But the Secretary of State may refuse to issue a permit if-
> (a) the Secretary of State requires the individual to attend an interview with a constable or immigration officer at a time and at a place specified by the Secretary of State, and
> (b) the individual fails to attend for interview.
> (3) Where a permit of return is issued under this section, the relevant return time must fall within a reasonable period after the application is made."

115. B4 did not advance any submissions on s. 6(2). Plainly, the sub-section is not contemplating an interview in a country such as the non-European country. On the other hand, it probably is not contemplating an interview "airside" in the UK (i.e. before the individual enters the UK), for the simple reason that once a person is physically here subsequent removal in the event of refusal would generate almost insuperable practical difficulties. What it is probably contemplating is the quite rare situation where the constable or immigration officer will travel to a safe third country. Be that as it may, the Commission strongly doubts whether sub-section (2) could be deployed for the purpose of determining whether or not to make a deprivation order. The sub-section contemplates that it is appropriate to make a TEO.

116. B4's primary case, therefore, was (correctly) not directed to sub-section (2), but focused on s. 6(1). It was his contention that the "reasonable period" could properly take into account such time as was reasonably necessary to solicit representations from B4 and then consider them.

117. The Commission simply cannot accept this argument. Condition B would not be satisfied in a case where the SSHD is minded to make a deprivation order rather than a TEO: in such circumstances, the SSHD does not consider that it is necessary to make a TEO. The greater does not include the lesser. Thus, the SSHD would not properly be exercising his discretion under this regime to make a TEO if his intention were, in fact, to make an order under a different legislative framework. He would be waiting longer than was necessary and appropriate for the purpose of issuing a permit under s. 6(1) - for a collateral purpose altogether, viz. to receive representations in connection with a different type of order. This state of affairs would be all the more surprising in a context where it has been consistently held that the SSHD is not required in the context of s. 40 of the 1981 Act to seek representations from the individual concerned.

118. In the event that the SSHD makes a TEO, informs the target of the TEO that he is minded to make a deprivation order and that representations should be received by date X, can the SSHD reasonably refuse to issue a permit pending the completion of that process? The SSHD can hardly be expected to ascertain in advance what the target's reaction might be to the making of a TEO for this purpose. The SSHD would probably find that the target, on advice, applies immediately to the on-duty judge for a mandatory injunction requiring the SSHD to issue a permit much sooner than he would wish. The SSHD's collateral purpose would have been both rumbled and derailed.

119. Finally, it is clear from the OPEN materials that at the time the deprivation decision was under consideration by the SSHD a TEO was suggested as a possible alternative, but only on the premise that the SSHD decided not to make a deprivation order. It was not considered as being suitable on any free-standing basis. The Commission has decided more than once (see, for example, *U2* at paras 142-144) that the SSHD is not in fact required to consider alternative measures.

120. The Commission has no hesitation in rejecting B4's ingenious submission.

Grounds 3 and 4

121. It is convenient to take these grounds together.

122. By ground 3, it is submitted that the SSHD failed to equip himself with sufficient information to determine whether there was an article 2/3 risk to B4 arising from the deprivation decision.

123. First, it is said that nothing in the OPEN material relating to the mistreatment risk (in particular, Annex B) makes any reference to the unusual circumstances of this case. Secondly, it is argued that there is nothing in the OPEN material suggesting the carrying out of an assessment of the impact of taking B4's British passport away, as a consequence of the deprivation decision, in combination with barring him from the second non-European country, on his ability to escape the non-European country.

124. By ground 4, it is submitted that the SSHD's application of his article 2/3 policy to the facts and circumstances of B4's case was unreasonable, disproportionate and wrong in law. Four specific errors are put forward. The first error is that there is no evidence that the SSHD made any or any proper assessment of the article 2/3 risk in the context of the dire conditions in the non-European country, what B4 for example told the UK authorities in European Country A, and in the various emails the Commission has seen (NCND'd by the SSHD). The second error is that the SSHD applied his own policy too narrowly, according inapposite emphasis to the adverb "directly", and erroneously concluded that travel to a safe third country could be achieved. The third error is that the SSHD ignored "an extreme and dangerous deleterious impact on B4's private life" caused by the deprivation order. The fourth error is that the UK has aggravated the risk to B4 flowing from the deprivation decision by engaging with him in European Country A (generating the risk that the authorities of the non-European country might conclude that he was a spy). That risk would be greater if the UK authorities provided B4's name to a recipient in the non-European country.

125. These grounds were developed in oral argument but it is unnecessary to go further than the foregoing.

126. The SSHD has published a supplementary ECHR memorandum which covers articles 2/3 risks outwith the jurisdiction of the ECHR. The policy makes it clear that:

> "The Secretary of State will consider whether, as a direct consequence of the deprivation decision there are substantial grounds for believing that there is a real risk of mistreatment or unlawful killing that would constitute a breach of Articles 2 and/or 3 (if it occurred in this jurisdiction)."

127. As the Supreme Court explained in *Begum*, the question how the policy applies to the facts of a particular case is for the SSHD to determine, subject always to *Wednesbury* (para 124). In the Commission's view, it is incumbent on the SSHD to undertake a reasonable enquiry and for those advising him to present a fair and balanced picture, but that is subject to the clear caveat that these are not matters for the Commission to determine for itself but for the Commission to review on a *Wednesbury* basis. As Lord Reed PSC explained at para 129 of *Begum*:

> "In order to comply with his policy, the Secretary of State therefore had to make a judgment as to the degree of risk of such treatment to which Ms Begum would be exposed, on the basis of a body of material which enabled him to make such an assessment, and to decide whether he was satisfied that Ms Begum would be exposed to a real risk of such treatment."

128. The meaning of the adverb "directly" needs to be considered within the factual structure of the instant case. B4 had been voluntarily in the non-European country for a considerable period of time before autumn 2018. The Commission cannot accept that B4 was exposed to article 2/3 risks during that period, and in any event the SSHD's evaluation that he was not cannot be impugned. So, the issue that fell to be addressed is whether the deprivation order would increase what might be described as an ambient or prevailing risk (*ex hypothesi*, below the article 2/3 threshold) to one which now met that standard. This is because the making of the deprivation order would have led *directly* to the creation of an unacceptable risk. Provided that the SSHD addressed that issue, his decision could only be challenged on a *Wednesbury* basis.

129. For the reasons that are set out in the companion CLOSED judgment, the position is that the SSHD asked himself the correct question. It is also the Commission's conclusion in CLOSED that the *Wednesbury* arguments directed to the discharge of the *Tameside* duty and the obligation on the Security Service to advise the SSHD in a fair and balanced fashion cannot be sustained.

130. In this OPEN judgment, the Commission is able to address two further matters.

131. First, the Commission has noted para 82 of the OPEN skeleton argument of the SSHD that "B4 has not established that he is unable to travel to other countries on his non-European passport". This issue is developed in para 85. On whom the burden of proof lies may be open to some debate, and the quality of the evidence bearing on this topic is somewhat unsatisfactory. The Commission does not doubt that there are a number of countries outside the EU to which B4 may travel on his non-European passport for a temporary purpose. However, the Commission is far from satisfied that B4 could stay anywhere for an indefinite period. In the circumstances, it is safer to proceed on the basis that the present focus must be on the article 2/3 risk to B4 on the hypothesis that he remains in the non-European country rather than on the hypothesis that he could leave that country. It has not been demonstrated that the SSHD's conclusion about this was *Wednesbury* unreasonable.

132. Secondly, the impact the deprivation decision has had on B4's private life cannot be addressed within the matrix of article 8, because that does not apply to him. The Commission has also addressed wider issues of proportionality and reasonableness, and has noted that, although it can take judicial notice of the obvious distress anyone would feel in consequence of losing something as precious as British citizenship, there is no medical evidence that takes the matter any further.

133. B4's remaining arguments are addressed to the extent necessary in the CLOSED judgment.

Ground 5

134. By the fifth ground it is said that the decision was arbitrary, an abuse of process and vitiated by an improper purpose. It is submitted that B4 was in contact with MI6 etc. and co-operating with them. It is further submitted that a stark contrast exists between the treatment of B4 and that of the friend.

135. Most of Ground 5 simply cannot be addressed in OPEN.

136. What the Commission can say is that the comparison between B4 and the friend is not apposite. Assuming always that B4's understanding is correct (NCND'd by the SSHD), the friend returned unexpectedly to the UK and B4 did not. What would or might have happened had the friend remained in the non-European country entails an exercise in pure speculation.

Ground 6

137. By the sixth ground it is said that the SSHD's failure to accord to B4 the opportunity to make representations against the making of the deprivation order amounted to a public law error.

138. The general rule in national security cases is that there is no duty to seek representations before making the deprivation order. This is because the very act of seeking representations would be contrary to the national security of the UK: the individual would take immediate steps to return, in the knowledge of what was about to happen.

139. The Commission addressed this point in *U3*, paras 35 and 38. The appropriate course is for the Security Service to consider post-decision evidence and representations as part and parcel of its general obligation to address anything new. The Security Service has done that in the instant case.

140. Having set out the general rule, the Commission should also state its conclusion that it considers that there is no feature of B4's case indicating that the general rule should not apply. As a matter of common sense, given that – on B4's version of events - the friend returned to the UK unexpectedly, so might have B4.

141. The argument that the SSHD might have deployed the TEO procedures as a mechanism for soliciting and receiving representations in the context of a proposed deprivation decision has already been addressed.

Disposal

142. For the reasons set out in this OPEN judgment, and in the Commission's CLOSED judgment which is being handed down at the same time, this appeal under s. 2B of the SIAC Act 1997 must be dismissed.

Mr Justice Jay

1st November 2022