SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC/173/2020**
Hearing Date: **4 December - 6 December 2023**
Date of Judgment: **2 February 2024**

Before

THE HONOURABLE MR JUSTICE CHAMBERLAIN
UPPER TRIBUNAL JUDGE RIMINGTON
MR NEIL JACOBSEN

Between

C9

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

EDWARD GRIEVES KC and DAVID SELLWOOD (instructed by **Wilson Solicitors LLP**) appeared on behalf of the Appellant

DAVID BLUNDELL KC and NAOMI PARSONS (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

MARTIN GOUDIE KC and ALEX JAMIESON (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

Introduction

1 The appellant was born in Albania. He entered the UK unlawfully in December 1999. He gave a false name to the police and then claimed asylum in a second false name, falsely claiming to be from Kosovo. His asylum claim was rejected by the Home Office, but his appeal succeeded and he was granted indefinite leave to remain on 5 February 2002. His application for naturalisation, made under his second false name, was successful and he became a British citizen in 2007. He and his wife have a son (23) and three daughters (20, 17 and 10), all of whom were born in the UK and are British citizens.

2 The appellant's true identity came to light when his mother applied for a family visit visa. In 2018, the Home Office wrote to him saying that they were considering depriving him of his British citizenship under s. 40(3) of the British Nationality Act 1981 ("BNA 1981"), on the ground that he had obtained citizenship by concealment of a material fact. He sent a response and no further action was taken.

3 On 23 September 2020, while the appellant was to the knowledge of the Home Secretary in Albania, the Home Secretary sent the appellant notice of a decision to deprive him of his British citizenship under s. 40(2) BNA 1981 on the ground that deprivation was conducive to the public good. The reason for the decision was that "it is assessed that you are a British/Albanian dual national who is involved in serious and organised crime, operating from within the UK". The Home Secretary certified that the decision had been taken in part in reliance on information which should not be made public in the interest of national security and because disclosure would be contrary to the public interest. That meant that the appeal lay to this Commission ("SIAC"). A deprivation order was made and served on the same day.

The basis for the decision

4 The Home Secretary's decision was based on a submission from the National Crime Agency ("NCA") dated 21 August 2020. The OPEN version of this submission says that Albanian organised criminals operate highly efficient, reliable and ruthless cooperative "cells", which are involved in a range of criminal activities including organised immigration crime ("OIC") and class A drug trafficking. These generate considerable cash proceeds which are smuggled or transferred out of the UK.

5 It was assessed that the appellant was involved in arranging and facilitating OIC from the near continent to the UK via heavy good vehicles ("HGVs") and small boats. In particular, it was said that he took control of planned crossings, working with his contacts to ensure that there was available transport to facilitate the movement of groups of migrants. It was also assessed that he was involved in money laundering, dealing and brokering deals for illegal drugs and that he may have access to firearms. In 2015 he was convicted in Germany of causing grievous bodily harm to an unknown individual in 2014, for which he was sentenced to eight months' imprisonment, suspended for three years.

6 The NCA assessed that the appellant was "a significant criminal facilitator with access to a range of criminal associates". He had "a wide reach across a number of serious organised crime areas" and was "known to use violence". By facilitating the entry of illegal migrants into the UK, he "exploits the vulnerabilities of illegal migrants, risking their lives for his own profit, undermining the UK's immigration laws and policy and threatening national security".

7 On 24 August 2020, the NCA wrote to the Home Secretary inviting her to wait until the appellant had left the UK before depriving him of his British citizenship "to ensure maximum operational effectiveness is achieved from the immigration disruption".

The grounds of appeal

8 At the hearing before us, Edward Grieves KC for the appellant advanced four grounds of appeal, with the detail on each set out in a skeleton argument. These were that the Home Secretary:

(a) acted unfairly and unreasonably in failing to provide the appellant with an opportunity to make representations in advance of the decision to deprive him of his citizenship (**Ground 1**);

(b) failed to publish and/or apply a relevant policy in the form of a recommendation dated 13 May 2020 to the Home Secretary in respect of the use of s. 40(2) BNA 1981 in cases of serious organised crime (**Ground 2**);

(c) took into account irrelevant matters (**Ground 3**); and

(d) reached a decision that was unreasonable, irrational, disproportionate, arbitrary and contrary to Articles 6, 8 and Article 1 of Protocol 1 to the ECHR and/or s. 55 of the Borders, Citizenship and Immigration Act 2009 and/or the BNA 1981, the common law and/or any deprivation policy (**Ground 4**).

9 At the hearing Mr Grieves sought to supplement these grounds with two additional points. They were not framed as separate grounds of appeal, but we have identified them as such. They are that the Home Secretary:

(a) unlawfully failed to consider whether the allegations against the appellant were established on the balance of probabilities (**Ground 5**); and

(b) failed to take into account two relevant matters, namely, (i) the possibility of proceeding against the appellant by way of a serious crime prevention order ("SCPO") under the Serious Crime Act 2007 ("SCA 2007") rather than by way of deprivation and (ii) the reasons for Kent Police's decision, following a 15 month investigation, not to take action in respect of cash seized at Dover in May 2020 (**Ground 6**).

10 David Blundell KC for the Home Secretary did not object to our considering these Grounds 5 and 6 (as we have called them), but pointed out that neither had been pleaded and submitted that this should be borne in mind in assessing the cogency of the NCA witness's evidence on these new grounds.

The hearing

11 The hearing before us took place over three days from Monday 4 to Wednesday 6 December 2023. Chamberlain J made a direction before the hearing permitting the appellant to give evidence by video-link from Albania. The appellant also relied on witness statements from his wife, son and eldest daughter and from an associate. On 4 December 2023, the first day of the hearing, the appellant's solicitors wrote to SIAC indicating that none of these would be giving oral evidence. They did not feel able to do so, for medical reasons. In those circumstances, we read the statements, but the weight that we could attach to them was inevitably reduced by the fact that none of these witnesses had been cross-examined.

12 The appellant himself did give evidence and was cross-examined at some length. We accept Mr Blundell's submission that he was an unimpressive witness whose evidence could not be regarded as reliable. As Mr Blundell submitted, he repeatedly avoided giving a straight answer to questions (particularly when asked whether things he had said were lies). He implausibly distanced himself from events that appeared adverse to his case (for example, saying that he had no idea that those with whom he was stopped when travelling to Albania in a Bentley Continental GT car were carrying £15,000 between them). He gave evidence in witness statements that was diametrically at odds with what he had said in correspondence (saying that he had not told his daughters of his real identity, when he had said the contrary in a letter to the Home Office in 2018). He blamed others for untruths for which he was apparently responsible (for example, the application for a Covid Bounce Back Loan, which was made in his name and which overstated the turnover of his was said to have been completed by someone else and the false statements made in support of his asylum claim were blamed on interpreters). We formed the clear impression that the appellant was someone who would say whatever he thought would be most immediately useful to him. Having observed and assessed the appellant's answers in cross-examination, we concluded that we should place no weight at all on the appellant's evidence save where it was corroborated by other reliable evidence.

13 The Home Secretary's evidence was given by Joanne Wentworth, Head of the Deprivation and War Crimes Casework Teams at the Home Office, and by an NCA witness, XZ. Mr Grieves indicated that he did not wish to cross-examine Ms Wentworth and we accordingly took her statement as read. XZ was cross-examined, both in OPEN and in CLOSED. She gave detailed and helpful answers, properly indicating the extent of the NCA's confidence on particular points. We formed the view that she had a very good understanding of the evidence and that the conclusions she drew from it were balanced, well-reasoned and fully supported by the OPEN and CLOSED documents.

The scope of the deprivation power and SIAC's function

14 Section 40(2) does not, on its face, require the Home Secretary to make specific findings of fact before depriving a person of his British nationality. Rather, it confers a power to deprive in any case where the Home Secretary is satisfied that deprivation is conducive to the public good. In *Rehman v Secretary of State for the Home Department* [2001] UKHL 47, [2003] 1 AC 153, Lord Slynn noted at [8] that in the absence of any definition of what is "conducive to the public good" the question is, in the first instance, one for the Home Secretary. The Home Secretary's policy document *Deprivation and nullity of British citizenship: caseworker guidance* says that the power will be used in cases of "terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours".

15 There is now an extensive body of case law considering the approach which SIAC should take when considering an appeal against a decision to deprive under s. 40(2) BNA 1981. In *U3 v Secretary of State for the Home Department* (SC/153/2018 and 153/2021), SIAC set out at some length its understanding of the proper approach when considering a challenge to the national security assessment on which a deprivation decision is based: see at [22]-[43]. SIAC's understanding was that the approach there set out (based on the reasoning of the Supreme Court in *R (Begum) v Secretary of State for the Home Department* [2021] UKSC 7, [2021] AC 765 and the Court of Appeal in *Secretary of State for the Home Department v P3* [2021] EWCA Civ 1642, [2022] 1 WLR 2869) was "driven by constitutional and institutional considerations specific to national security assessments": [24]. See also [25]-[26]. That case did not, however, concern assessments about involvement in serious organised crime, so we doubt that anything can be drawn from it – one way or the other – about whether the same approach applies to such assessments.

16 The Court of Appeal upheld SIAC's decision in *U3*: [2023] EWCA Civ 811. However, Elisabeth Laing LJ (with whom the other members of the court agreed) set out the proper approach by SIAC to challenges to the national security assessment in slightly different terms. In particular, the Court of Appeal held that SIAC "if it considers that it can, and that they are appropriate… may make findings of fact which may be relevant to the national security assessment, as long as it does not use those findings of fact as a platform for substituting its view of the risk to national security for that of the Secretary of State". Such findings of fact are "the material to which SIAC must apply the tests set out in *Rehman* and *Begum* when it considers a challenge to the Secretary of State's assessment of national security": [174]. Where SIAC makes such findings of fact, its task is "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": [175]. Again, we do not think anything can be drawn from the repeated reference to national security assessments about whether a similar approach applies to assessments of involvement in serious organised crime.

17 In the present case, there was a dispute between the parties about whether the *Rehman* approach is confined to cases involving assessments about national security *stricto sensu*. Mr Grieves submitted that this approach does not apply to cases where deprivation is based on involvement in serious organised crime, because the constitutional and

institutional considerations which drove the reasoning in *Rehman* (and *Begum* and *U3*) do not apply to the assessments in such cases. Mr Blundell says that the same approach applies, because the statute draws no distinction between the various grounds upon which deprivation may be ordered.

18 This dispute has been resolved in Mr Blundell's favour, at least at this level, by SIAC in *D5-D7 v Secretary of State for the Home Department* (SC/176-178/2020). At [67], SIAC gave comprehensive reasons for concluding that the *Rehman* approach applies to assessments about involvement in serious organised crime just as it applies to assessments about conduct which damages national security. We consider that we should follow that reasoning unless and until a higher court disagrees. In any event, we agree with it.

19 In the present case, however, the dispute about whether the *Rehman* approach applies does not matter, because – applying the guidance of the Court of Appeal at [174]-[175] of its judgment in *U3* – we consider that we are able to make findings of fact on the balance of probabilities as to the key elements of the Home Secretary's case and that it is appropriate for us to do so. Those findings confirm the assessments made by the Home Secretary. It follows that the challenge to the Home Secretary's assessment that the appellant was involved in serious organised crime would have failed even if, contrary to our view of the law, it were for us to decide for ourselves whether that assessment is correct.

Our findings of fact

20 It is important to emphasise that in this case, unlike some others, the appellant knows from the OPEN materials the broad thrust of the case against him. Even without taking into account the CLOSED materials, his answer to that case is, in our view, implausible in the extreme.

21 In his three witness statements, the appellant provides details of his work since he arrived in this country. This was cash in hand manual work (1999-2006), work as a security guard (2005-2016), cash in hand work delivering cars to Albania (from 2007), cash in hand building jobs (from 2016), employed work at a bar (2017-2018), employed work as a labourer with a construction firm (2018-2019) and work through his own construction company from April 2019. HMRC records show that, for the years 2016 to 2020, the appellant's average gross income was £17,400. Between 2013 and 2019 he was claiming an average of £9,500 annually in working tax credits and child tax credits. In his evidence before us, the appellant said that he was "a simple worker who leaves at 6am and comes back at 7pm that works in construction". We found this account of modest earnings very hard to square with the OPEN evidence of the cash and assets to which the appellant appears to have access – in particular, the facts that (i) when his house was burgled on 13 February 2019, on his own case, some £19,000 in cash was stolen; and (ii) when stopped at Folkestone on 31 May 2020, he was driving a Bentley Continental GT (a very expensive luxury vehicle) and he and his two companions were between them carrying some £16,000 in cash.

22 The appellant gave conflicting, inconsistent and implausible explanations of the circumstances of the latter stop. At first, the documentary evidence suggests that he told

the officer who stopped him, PC Stride, that the Bentley was his and he had owned it for a few months. He now says that this must have been a misunderstanding. In interview, and in his statements before us, he said that the car belonged to one of the associates with whom he was travelling, who also worked in construction. Both the Bentley and another luxury vehicle, a Mercedes, were registered to this associate, who did not hold a driving licence. We find, on the balance of probabilities, that what the appellant first said to PC Stride, before he had had a chance to fabricate an account, was true: the Bentley did belong to him. So, in our view, did the cash. It is consistent with the general practice of organised criminal groups that cash is carried by and assets registered to more junior members of the group.

23 These findings on the OPEN evidence are bolstered by material we have seen in CLOSED. Conclusions based on CLOSED evidence are necessarily made without the opportunity for direct challenge by the excluded party. This feature, taken together with the nature of the CLOSED evidence generally deployed in cases such as these, means that it is sometimes not possible to make any substantive findings on the balance of probabilities. In this case, however, the evidence does enable us to make such findings. On the totality of the evidence, OPEN and CLOSED, and on the balance of probabilities, we find as follows:

(a) The appellant was head of his own discrete crime group.

(b) The primary focus of this group was organised immigration crime involving the transport of migrants to from the near continent to the UK using HGVs and small boats.

(c) The appellant was personally responsible for planning crossings and ensuring transport for illegal migrants.

(d) The appellant was also personally involved in dealing and brokering deals for class A and B drugs.

(e) The appellant generated significant sums of money from his involvement in serious organised crime.

(f) The appellant laundered the proceeds of his criminality through various businesses.

(g) The appellant had access to firearms.

(h) The appellant has used violence in the past and is prepared to do so in the context of serious organised crime.

24 The detail of the evidence which underpins these findings is set out in our CLOSED judgment. Each of the above findings is made with a high degree of confidence.

Ground 1

25 The question whether the Home Secretary is required to afford an opportunity to make representations before depriving a person of his British citizenship has been considered by SIAC on several occasions. No doubt for this reason, Mr Grieves made no oral submissions in respect of ground 1, but reserved his position in case the existing authorities were shown in another court to be wrong. This means we can deal with the point briefly.

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26 In *Al Jedda v Secretary of State for the Home Department* (SC/66/2008), 18 July 2014, SIAC held that there was no duty to afford an opportunity to make representations. This was because s. 40(5) was exhaustive as to the procedural preconditions for a deprivation order (see [156]-[158]) and because in cases where Parliament had provided for a "full merits appeal" the absence of a right to make representations did not render a decision procedurally unfair (see [159]).

27 In *B4 v Secretary of State for the Home Department* (SC/159/2018), 1 November 2022, SIAC held that "the general rule in national security cases is that there is no duty to seek representations before making the deprivation order" (see [138]) and there was no feature of B4's case indicating that this general rule should not apply (see [141]).

28 In *Begum v Secretary of State for the Home Department (No. 2)* (SC/163/2019), 22 February 2023, SIAC pointed out at [331] that the second reason given in *Al Jedda* could not withstand the Supreme Court's decision in *Begum*. On balance, SIAC concluded at [337] that, in the absence of a full merits appeal, it could not be said that common law fairness has been impliedly excluded by s. 40(5) BNA 1981. Thus, fairness required an opportunity to make representations prior to the decision, save in cases where that would be impossible, impractical or pointless. One situation in which there was no requirement to afford a right to make representations was where that would be contrary to national security. This would usually be so if the individual is outside the country, not least because prior notification runs an unacceptable risk of precipitating an early return: [340]-[341].

29 In *D5-7 v Secretary of State for the Home Department* (SC/176-178/2020), 13 October 2023, SIAC considered an argument very similar to the one now being pursued in a serious organised crime case. It held at [88]-[94] that affording such a right would directly increase the risk that deprivation was designed to reduce, namely that the appellant would return to the UK and continue his involvement in serious organised crime. On the facts of the case, it would also be pointless to afford a right to make representations because the basis for the main case against the appellant could only be stated in CLOSED.

30 In the present case, we conclude as follows:

(a) SIAC's decision in *Begum (No. 2)* holds that the common law right to make representations is not in principle excluded by s. 40(5) BNA 1981. We consider that we should follow that decision unless convinced that it is wrong. We are not convinced that it is wrong.

(b) However, the Home Secretary is entitled to wait until the subject is outside the UK before exercising the power to deprive, provided that this is done for national security reasons rather than to impair the effectiveness of the subject's procedural rights: *L1 v Secretary of State for the Home Department* [2015] EWCA Civ 1410.

(c) Where the subject is outside the UK at the time of deprivation, it will generally, or at least often, be contrary to national security to afford a right to make representations, because doing so may precipitate return to the UK: *B4*, [138]; *Begum (No. 2)*, [340]-[341].

(d) There is no reason of principle why the requirements of natural justice should apply differently depending on whether the basis for the deprivation decision is national security *stricto sensu* or involvement in serious organised crime. In both cases, the decision will likely have been made on the basis that deprivation will promote the public interest by making it more difficult for the subject to enter or remain in the United Kingdom: see *D5-7*, [88]-[94].

(e) The present case is not distinguishable from *D5-7*. The Home Secretary was specifically advised to wait until the appellant was out of the country before taking the deprivation decision. Giving the appellant prior notice of her intention to make it would likely have meant that he did not travel, or that he returned to the UK. That would have defeated one of the objects of the decision, which was to facilitate his exclusion from the UK. There was accordingly a public interest reason for not affording a right to make representations. That being so, natural justice did not require such a right to be given.

31 Ground 1 therefore fails.

Ground 2

32 Ground 2 is based on a submission to the Home Secretary in May 2020 (which is said to record a policy) that deprivation action should be taken on the basis of involvement in serious organised crime only in "the most serious and high-profile cases". There is later advice that the deprivation power should be used only in cases where "high harm criminals… are truly disrupted". The complaint is that the Home Secretary erred by not taking this policy into account and also by failing to investigate and/or obtain and/or consider any exculpatory material or material in mitigation, failing to seek a decision from the Crown Prosecution Service as to whether a prosecution could be brought and by failing to analyse whether the evidence showed that the elements of particular offences had been demonstrated to the criminal or civil standard.

33 A challenge in materially similar terms was made, on the basis of the same ministerial submission, in *D5-7*. It was rejected there because the submission is not itself a formal policy document capable of giving rise to rights: see [98]. That seems to us to be correct and consistent with the Divisional Court's decision in *R (All the Citizens) v Secretary of State for Culture, Media and Sport* [2022] EWHC 960 (Admin), [2022] 1 WLR 3748, at

[115], where the court referred to "formal written statements of established policy" and other statements which are clear, unambiguous and devoid of relevant qualification.

34 The May 2020 ministerial submission is not a document which satisfies these requirements. Even if it were, the main respect in which Mr Grieves submits that the decision to deprive the appellant of his citizenship contravened it was that the appellant was not a "serious" or "high-profile" or "high harm" criminal. These descriptors seem to us to leave a great deal to the discretion of the decision-maker. We do not find this surprising, since it would be difficult – and almost certainly undesirable – to state in advance the precise circumstances in which the deprivation power might be used. Nonetheless, on the findings we have made on the basis of the OPEN and CLOSED evidence, we consider that the appellant was a serious and high-profile criminal; and the May 2020 submission does not purport to limit the exercise of the power to cases where the individual has been convicted. Any such limit would be an unlawful fetter on the power conferred by s. 40(2) BNA 1981, at least if applied in a rigid way.

35 There is therefore nothing in ground 2.

Grounds 3 and 4

36 We take these two grounds together, as both Mr Grieves and Mr Blundell did. In short, we consider that the OPEN and CLOSED evidence, taken together, shows not only that there was an adequate factual basis for the conclusions reached by the Home Secretary, but also that those conclusions were correct on the balance of probabilities. We have summarised above our findings of fact. Taken together, these findings supply a strongly compelling public interest reason for depriving the appellant of his citizenship. In the light of our findings, deprivation was in line with the Home Secretary's published policy. There is no common law requirement that the decision be "proportionate": see SIAC's decisions in *B4* at [81] and *Begum (No. 2)* at [72]. Even if there were, the decision in this case would comfortably meet that requirement.

37 The submission to the Home Secretary said that, although s. 55 BCIA 2009 did not apply outside of the UK, regard had been had to the spirit of that provision. It is true that the submission to the Home Secretary was made on the basis that the appellant had only two children (a son then aged 20 and a daughter then aged 7). It therefore omitted reference to the two middle daughters. This was an error, but Ms Wentworth says that it would have made no difference. We do not consider that to be determinative, because the question is whether it could have made a difference to the Home Secretary, who was the decision-maker in this case. But we can nonetheless safely conclude that the result would inevitably have been the same, for three reasons.

38 First, the impact of deprivation on the appellant's wife, son and youngest daughter were considered and did not outweigh the public interest reasons for deprivation. There are no special circumstances which suggest that the impact on the older daughters is likely to be any greater than the impact on the youngest daughter.

39 Second, even in a case where rights under Article 8 ECHR are in play (because the decision challenged includes a refusal of entry clearance), as SIAC noted in *U3* at [40]-

[42], a conclusion that there are national security reasons for refusing entry clearance is likely to outweigh the interests of the subject's family. Although this is a serious organised crime case, rather than a national security case, the public interest justification for deprivation on the facts of this case is as compelling as it was in U3's case. It is vanishingly unlikely that the Home Secretary would regard the interests of two additional children as tipping the balance against deprivation in such a case.

40 Thirdly, in U3's case, the refusal of entry clearance meant that the family members could not physically meet for the foreseeable future. Here, assuming entry clearance is refused, there is nothing stopping the two elder daughters from travelling to Albania (with or without their mother and sister) to visit the appellant.

41 As to the ECHR, the approach to jurisdiction is now settled by the Court of Appeal's decision in *R3 v Secretary of State for the Home Department* [2023] EWCA Civ 169, [103]-[105]: because the appellant was not in the UK when the decision was made, he cannot rely on any rights under the ECHR. See also *D5-7,* at [71]. It does not matter that the Home Secretary deliberately waited until the appellant had left the jurisdiction: see the Court of Appeal's judgment in *L1*. Nor did the deprivation decision determine the Article 8 rights of the appellant's family members in the UK, because deprivation does not (strictly) prevent the appellant from returning here; it simply prevents him from doing so without leave: see *E5 v Secretary of State for the Home Department* (S/184/2021), [58]-[59]; *R3,* [106]; *D5-7,* [72].

42 Grounds 3 and 4 therefore fail.

Ground 5

43 Under this ground, Mr Grieves complained that the Home Secretary had to be satisfied at least on the balance of probabilities that the core allegations underlying the serious organised crime case against the appellant were made out. But, he submitted, the documents before her were unspecific as to the standard to which those allegations were considered to have been established. The notice sent to the appellant said simply that it was "assessed" that he was involved in serious and organised crime. The word "assess" was also used in the submission to the Home Secretary. Other similarly non-specific cognates such as "believed" and "suspected" were also used.

44 In our view, there is nothing in this point, for four reasons.

45 First, the power to deprive a person who has obtained citizenship by registration or naturalisation under s. 40(3) BNA 1981 is conditional on the Home Secretary's satisfaction that the registration or naturalisation was obtained by means of fraud, false representation or concealment of a material fact. Parliament could have made the power to deprive on non-conducive grounds under s. 40(2) conditional on satisfaction that some equivalent factual state of affairs exists. It did not. The broad terms of the power conferred by s. 40(2) are inconsistent with the suggestion that the Home Secretary must satisfy himself of something on the balance of probabilities.

46 Second, although it is true that the language used in the submission is not specific in this regard, on a natural reading of that language, a reader would assume that the NCA was saying that they considered it more likely than not that the matters presented there as assessments were true. See e.g. para. 4 of the OPEN version of the initial NCA submission: "The NCA assess that [the appellant] is [not "may be"] the head of his own discrete crime group…" (emphasis added).

47 Third, witness XZ confirmed in answer to questions in cross-examination that she understood that the allegations did have to be, and were in fact, proved on the balance of probabilities. That being so, nothing would be gained by quashing the decision and remitting it to the Home Secretary. On the basis of the evidence we have heard, the NCA would inevitably clarify that in their view the allegations were proved on the balance of probabilities. And if that clarification were given the Home Secretary would inevitably take the same decision again.

48 Fourth, we have been able to reach our own findings on the balance of probabilities. It is not realistic to suppose that the Home Secretary would reach a different view in the light of those findings. In those circumstances, we can see no proper basis for allowing the appeal on the basis that the NCA or the Home Secretary failed properly to enunciate the standard of proof to which the key facts were established.

Ground 6

49 Under this ground, Mr Grieves submitted that the Home Secretary failed to take into account two relevant matters, namely, (i) the possibility of proceeding against the appellant by way of a serious crime prevention order ("SCPO") under the Serious Crime Act 2007 ("SCA 2007") rather than by way of deprivation and (ii) the reasons for Kent Police's decision, following a 15 month investigation, not to take action in respect of cash seized at Dover in May 2020.

50 As to the first, witness XZ was cross-examined about whether consideration had been given to an SCPO, as an alternative to deprivation. She was not entirely clear about the circumstances in which an SCPO would be available, though in fairness this point had not been pleaded or even mentioned in the appellant's skeleton argument. Mr Grieves submitted that the failure to consider an SCPO was particularly significant because an SCPO might have been a more effective method of containing any risk posed by the appellant. Deprivation leaves him free on the Home Secretary's case to continue to direct serious organised crime from Albania, whereas an SCPO could have included a range of targeted restrictions akin to those available under Terrorism Prevention and Investigation Measures.

51 Mr Blundell responded by reference to authority. In *Begum* at [108], Lord Reed cited with approval SIAC's observation in *U2 v Secretary of State for the Home Department* (SC/130/2016), 19 December 2019, that it was "obvious that no amount of conditions, or careful watching of a person who is in the United Kingdom, can achieve the assurance of knowing that they are outside the UK permanently". Lord Reed said that this observation was "not confined to the individual known as U2, or people presenting identical levels of risk to that person". In *B4,* SIAC said this at [81]:

> "...there may be circumstances 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."

This was cited with approval by SIAC in *K3 v Secretary of State for the Home Department* (SC/143/2017), 30 June 2023, at [54].

52 Mr Blundell added that, on the facts of this case, an SCPO would not adequately address the risk posed by the appellant; and no decision-maker can be required as a matter of rationality to consider measures that will not meet the primary objective.

53 We begin by noting that a challenge that a decision-maker has failed to take account of a relevant consideration will succeed only if the consideration in question is expressly identified as a mandatory relevant consideration by or under statute or is "so obviously material to the decision... that anything short of direct consideration of [it]... would not be in accordance with the intention of the Act": *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190, [117]-[118], approving the statement of Cooke J in the New Zealand Court of Appeal in *CREEDNZ Inc. v Governor General* [1984] NZLR 172, 183. As the Supreme Court made clear in *Friends of the Earth* at [119]-[120], a consideration will meet this latter condition only if it would be *Wednesbury* irrational to fail to take it into account; and there is "no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion".

54 When the judgment of the Supreme Court in *Begum* and the decision of SIAC in *B4* are applied to this legal framework, it is unlikely that the possibility of action in the UK short of criminal prosecution will fall into the category of considerations "so obviously material" that a failure to have regard to them will render the decision unlawful. The passage from *U2* which the Supreme Court approved in *Begum* comes from a national security case, but we find it difficult to see why the position should be categorically different in a serious organised crime case. The imposition of restrictions under an SCPO (as under a TPIM) would require highly resource-intensive monitoring and would in general not provide the same level of assurance as permanent exclusion from the UK. In addition, it is at minimum unclear whether the statutory regime under the Serious Crime Act 2007 would accommodate an application based on CLOSED material. Certainly, there is nothing akin to the bespoke closed material procedure contained in the Terrorism Prevention and Investigation Measures Act 2011. It is possible that the Justice and Security Act 2013 would supply the ability to rely on CLOSED material, but the

application of that Act to SCPOs would be novel and might be expected to raise a range of difficult legal and practical questions.

55 We do not, however, need to decide whether there could ever be a case in which the possibility of imposing an SCPO could be a mandatory relevant consideration. It is sufficient to say that this is not such a case. Here, the OPEN assessment contained in the NCA's letter of 24 August 2020 to the Home Secretary was that, if permitted to remain a British citizen and reside in the UK, the appellant "will continue to facilitate illegal immigration, profiting from this and from his engagement in other associated criminality" and that "[d]eprivation of his citizenship would be a visible disruption, which will discredit his position and provide a clear message to his criminal associates that the UK will not tolerate serious and organised crime and will use immigration disruption measures to prevent further harm to the UK". These passages, taken together with the advice that the decision be taken while he was outside the UK to maximise the operational effectiveness of the decision, make it clear that, in the absence of a realistic prospect of prosecution, the NCA regarded exclusion from the UK as necessary to achieve their primary aims. In those circumstances, rationality did not require them – or the Home Secretary – expressly to consider an option which would fail to achieve that result, even if (contrary to the fact) that option were straightforward in legal and practical terms.

56 Nor do we accept that the Home Secretary acted unlawfully by failing to take into account the outcome of Kent Police's investigation into the appellant's alleged money laundering. In the first place, the investigation had not concluded by the time of the deprivation decision, so it could not have been taken into account at that time. In any event, an investigation into a specific criminal offence involves consideration of whether there is adequate admissible evidence to establish the elements of the offence to the criminal standard. A decision that there is not will rarely undermine conclusions reached on a lower standard of proof and on the basis of a wider range of evidence, some of it inadmissible in criminal proceedings. In this case, for reasons we explain in CLOSED, we are satisfied that there was no failure to take into account any material consideration. We are also satisfied that Kent Police's decision not to prosecute does not affect our own factual finding that the appellant was involved in money laundering on a significant scale.

Conclusion

57 For these reasons, and those contained in our CLOSED judgment, we dismiss this appeal.