SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC/211/2023**
Hearing Date: **22-24 October 2024**
Date of Judgment: **21 March 2025**

Before

SIR PETER LANE
UPPER TRIBUNAL JUDGE RIMINGTON
MR ROGER GOLLAND OBE

Between

H12

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Mr D. Chirico KC and Mr B. Bundock (instructed by **OTB Legal**) appeared on behalf of the Appellant.

Mr D. Blundell KC and Mr W. Hays (instructed by **Government Legal Department**) appeared on behalf of the Respondent.

Mr M. Goudie KC and Mr D. Lemer (instructed by Special Advocates' Support Office) appeared as Special Advocates.

Sir Peter Lane :

1. The Appellant, H12, appeals under s.2B of the Special Immigration Appeals Commission Act 1997, ("the 1997 Act") against the decision of the Respondent, dated 6 June 2023, to make an order under s.40 of the British Nationality Act 1981, depriving H12 of his British citizenship, on the ground that it would be conducive to the public good to do so. At the time of the decision, H12 was in Country Z, where he currently remains. H12's wife and three children live in the United Kingdom. Two of the children are under the age of 18.

2. Section 2B of the 1997 Act confers a right of appeal to the Commission if the subject of the deprivation order is not entitled to appeal under s.40A(1) of the British Nationality Act 1981 because of a certificate issued under s.40A(2) of that Act. The Respondent certified that, pursuant to that provision, her decision had been taken in part in reliance on information which, in her opinion, should not be made public because disclosure would be contrary to the public interest.

3. Section 40A(2) provides as follows:

> "(2) Subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public –
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> (a) in the interests of national security,
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> (b) in the interests of the relationship between the United Kingdom and another country, or
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> (c) otherwise in the public interest."

4. Section 40(2) provides that:

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

Section 40(1) defines "citizenship status" as, *inter alia*, a person's status as a British citizen.

5. H12's notice of appeal to the Commission against the deprivation order is dated 12 June 2023. The grounds contend that the Respondent's decision is vitiated by reason of public law errors. The grounds also contend that the decision breaches Articles 8 and 14 of the ECHR.

6. H12 applied for entry clearance to the United Kingdom from Country Z. The Respondent has refused that application and H12 has appealed against that refusal. Following correspondence between the parties and the Commission, it was decided that the entry clearance appeal and the human rights challenge contained in the deprivation appeal should each be stayed.

7. H12 has produced witness statements in connection with the deprivation appeal. It has not been possible to receive oral evidence from H12, since he remains in Country Z and the Government of that country will not permit its citizens to give evidence by electronic means to a foreign tribunal. H12 has responded in writing to written questions put to him by the Respondent on 11 October 2024. H12 has done so in the form of a second witness statement dated 17 October 2024.

8. Efforts were made to enable H12 to observe the hearing on 22 October 2024 by means of an electronic link. Owing to what appear to have been technical difficulties local to H12, he was unable to hear what was being said. As a result, instead of the link, H12's solicitor communicated with H12 to give him the gist of the oral evidence of the respondent's witness, XY, and to ask H12 if he had any points or questions arising therefrom. H12 did not. H12's counsel were content with that approach.

9. In making its findings in this appeal, the Commission has had due regard to the matters just described.

THE RECOMMENDATION TO DEPRIVE

10. The Respondent took the decision to deprive by reference to a Ministerial Submission dated 15 May 2023 and the accompanying National Crime Agency ("NCA") Recommendation for deprivation of H12's citizenship, dated 4 May 2023. It is common ground that the NCA Recommendation drew on a lengthy draft witness statement, prepared by XY, an officer of the NCA who has been involved in the investigation of serious organised crime for (now) some 30 years. Prior to becoming such an officer, XY was with the Serious Organised Crime Agency, before which he was an officer in the Investigation Division of HM Revenue and Customs, where for some six years XY was involved in investigating heroin trafficking from Country Z to the UK, as well as leading investigations into drug trafficking, money laundering, weapons offences, people trafficking, fraud, multi-faceted organised crime groups and serious sexual offences. XY has been both an operational officer, carrying out pro-

active investigations including surveillance in the UK and overseas and the arrest of suspects; and also an intelligence officer, researching and developing intelligence on major organised crime groups ("OCGs"). XY describes himself as an experienced surveillance operative, trained in counter and anti-surveillance measures and weapons identification.

11. XY produced three witness statements in respect of the present appeal, which he adopted in oral evidence, subject to a correction in respect of one of the statements. XY was cross-examined by Mr Chirico KC. We shall return to that evidence in due course.

12. The NCA Recommendation assessed that H12 had a leadership role in the X OCG, described as a notorious group within the Z community in London, responsible for heroin trafficking, extortion and associated violence. H12 was also assessed as having conducted a separate loan-sharking operation.

13. Following an NCA investigation, H12 was convicted in 2014 of blackmail and conspiracy to commit grievous bodily harm. The NCA Recommendation said that these offences mainly arose from H12's money lending activities and attempts to extort repayments from NV, BL and OU. H12 had also commissioned an unrelated assault on a woman, JP, as she walked home from work, at the behest of JP's rejected partner. H12 was sentenced to eight and a half years' imprisonment. He was released on licence in September 2018 but recalled to prison following his arrest in February 2019 for breaching his Serious Crime Prevention Order ("SCPO"). The Parole Board directed H12's release on 14 April 2022 but, owing to non-compliance with his licence conditions, the Probation Service recalled him to prison again on 11 October 2022. H12 was released on completion of his full sentence on 23 December 2022. At the time of the Recommendation, H12 was believed to be abroad.

14. H12 became naturalised as a British citizen on 14 November 2002. H12 had a relationship with a Z national, HT, with whom they had a son, CX, born in 2003. In 2011, H12 was charged and stood trial for arranging HT's murder but was acquitted. In 2009, H12 sponsored a Z national, EX, to join him as his wife in the UK. EX naturalised as a British citizen on 6 December 2012. She and H12 have two children, born in February 2011 and September 2013.

15. The Recommendation describes the X OCG as "particularly notorious, having operated since the 1970s at the very upper levels of serious criminality both in the UK and internationally, primarily in the drugs trade". Additional information about the X OCG is included in the Confidential Annex to this Judgment.

16. The Recommendation then drew on a historical summary of the X OCG by XY. A very similar summary is also to be found in XY's first witness statement, which will be referred to later. Information about the history of the X OCG is contained in the Confidential Annex to this judgment.

17. XY said that NX was now the head of the X OCG in the UK, during which time the X OCG "has at the very least been involved in serious violence, blackmail and money-laundering".

18. The NCA assessed that H12 "had a controlling role within the OCG", subordinate to NX but above all others. This derived from probe evidence comprising recorded conversations obtained during the operation that led to the arrest and conviction of H12. H12 was assessed as NX's principal lieutenant and as being part of a group, sometimes specifically as the X group or family and on one occasion as the "Mafia group". There were said to be numerous conversations between NX and H12 which demonstrated that H12 was a trusted confidante. In February 2014, NX outlined how he wanted the X OCG to be structured so he did not always have to provide direct instructions, thus effectively distancing himself. In February 2014, H12 "unequivocally asserted that he would support [NX] in any power struggle". H12 "had a frank discussion in February 2014" with [BX] regarding the difficulties in owning property or other assets in the absence of an ostensibly legitimate income".

19. The Recommendation referenced witness testimony by TN during his trial in December 2014 in which TN was convicted of possession of a firearm with intent to endanger life. TN stated at trial that the X gang "was notorious within the Z community in London for murder, blackmail, extortion and kidnapping". H12 was named as having been the lieutenant of the Xs for many years.

20. In 2003 and 2010, H12 was "charged with attempted-/murder, and subsequently acquitted". Further details of this incident are contained in the Confidential Annex to this judgment.

21. Under the heading "Links to firearms/weapons", the Recommendation said that H12 "has and/or is alleged to have several historic links to weapons and, specifically, firearms. In 2001, H12 was charged with possessing a firearm but the case was discontinued when the victim withdrew their co-operation with the prosecution. In 2002, H12 was convicted of possession of a telescopic metal baton, which he claimed he carried for his protection. In 2011, H12 was driving a car when body armour was found in the boot of the vehicle. Also in that year, H12 was stopped with a ballistic vest in the boot of the car. H12 said he feared attack by members of Group U. No further action was taken.

22. In 2012, H12's car was damaged by gunfire whilst parked outside his residence. In 2014, H12 was recorded by an NCA probe discussing how best to retaliate against law enforcement if the latter killed "one of us". The tactic said to be advocated by H12 was to arrange for an assailant on a motorbike to spray gunfire at the law enforcement officers, as they exited court.

23. In 2014, H12 was recorded via an NCA probe discussing the armed attack on members of the X OCG. The discussion took place in H12's armoured vehicle, during which he was assessed as displaying a familiarity with firearms, tactics and forensic awareness. H12 stated "If trouble comes, take the machine, put it one (sic) your waist and go". That remark was assessed by the NCA as referring to putting a handgun in one's waistband.

24. In 2014, H12 was recorded via an NCA probe, discussing the importance of contingency plans for when things might have gone adversely, as opposed to the good times "when we have money, when we have weapons".

25. The Recommendation then turned to the assessment of risk to public security said to be posed by H12.

26. Referring to H12's release on licence in September 2018, the Recommendation said that acting on intelligence that H12 had breached the SCPO to which he was subject, H12 was arrested on 22 February 2019 and a search of his property revealed a bulletproof vehicle, body armour, a machete, a radio frequency scanner, £1,400 in cash and 15 electronic communications devices. Also located were a list of names and sums of money owed for amounts varying between £200 and £4,000. H12 pleaded guilty to two breaches of the SCPO. The reference in the Recommendation to three

breaches arose from a mistake on the part of XY, which he recorded in oral evidence. The breaches concerned H12's use of unregistered vehicles. H12 was sentenced to four months' imprisonment and recalled to prison to continue serving his original sentence, having broken the terms of his licence.

THE DECISION OF THE PAROLE BOARD

27. The Recommendation then turned to the decision of the Parole Board on 18 February 2022 to direct H12's release, which took place on 14 April 2022. Since the decision of the Parole Board features strongly in H12's deprivation appeal, it is convenient at this point to refer in some detail to the decision of the Board. The panel comprised Sally Allbeury as the Independent Member and Sir David Calvert-Smith and Jeremy Roberts QC as Judicial Members, with Mr Roberts QC being the Chair. The "test" to be applied by the Board was stated to be that the Board "will direct release if it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined".

28. At paragraph 1.7, the Board noted that, during his sentence, H12 had said on several occasions that he was the "number two" in the X organisation. Although H12 "now disputes having said that", the panel saw "no reason to disbelieve" those who had provided the information. The panel concluded that 'whatever his precise status within the organisation it was clearly a senior one. He appears to have been something of an "enforcer"'.

29. At 1.5, the Board noted that for some months in 2010-11, H12 was held on remand at HMP Belmarsh whilst awaiting trial for his alleged involvement in the murder of his ex-partner. It appears to have been at Belmarsh that H12 made the acquaintance of an individual we shall refer to as SU, who was serving a ten year sentence for possession of a firearm with intent to endanger life.

30. At 2.4, the Board noted that prison records showed that on four occasions during 2016 SU visited H12 at HMP The Mount, each visit lasting for two hours. H12 told the panel that these were just social visits. The Board "doubts whether these were purely social: they had both been involved in serious crime and it would be surprising if their conversations did not turn to criminal matters".

31. Beginning at paragraph 2.4, the Board addressed the receipt in March 2017 and February 2018 by H12 of what it described as "Osman letters". One such letter was from Hertfordshire Constabulary and the other from the Metropolitan Police. The Osman letters warned H12 of threats to his safety. The first letter said that information had been received that on his release from prison H12 would be at risk of an attempt on his life. The second letter stated that the police held intelligence that persons might be seeking to cause him serious harm "because of his association with another". According to the Board, these warnings "certainly indicate that [H12] had been involved in serious crime whilst at liberty". H12 told the Board that by the time he received these letters, he had broken off any association with the Xs. H12 said he had told Andrew Lawrence, a prison psychologist, and Hannah Evans, a Community Offender Manager, that what made him decide to do this was a visit from his wife, who gave H12 an ultimatum that if he did not break off the association, their relationship would be over. H12 told the Board that when he broke off his association, the Xs "were not best pleased and he did not think he would have any threats if he had still been associating with them". H12 and his wife accordingly "decided to acquire an armour-plated BMW car". By the time H12 was released on licence, his wife and children had moved to an address on the outskirts of Town V. H12 told the Board that he and his family wanted to make a fresh start well away from his former associates and anybody who might want to harm them.

32. At paragraph 2.8, the Board noted that after H12 was released on licence on 25 September 2018, H12 was required to attend supervision meetings with Town V Probation. H12 drove to and from the Probation office every week in the armour-plated BMW without having notified the NCA of his possession of that car. At some point, the Board noted that H12 was apparently contemplating moving back to the London area "as that was where all his friends were and he had no friends in the Town V area". Although he discussed the idea with Probation, nothing came of it. H12 spent most of his time with his family in Town V. On 22 February 2019, after five months on licence, H12 was arrested on arrival at the Probation office. The NCA were aware that H12 was using at least one car the details of which he had not disclosed to them. The NCA also had reason to believe, correctly as it turned out, that H12 had also been using another undisclosed car. Following arrest, the Board noted, at 2.12, that officers found four telephones, some body armour and a machete. The Board inferred that if there had been any concerning telephone calls found on

examination of the telephone, the Board would have been informed about them. Charged with three breaches of the licence, concerning the driving of the two BMW cars and failing to provide details of the mobile phone he had been using, the last charge, related to the phone, was dropped because it was accepted that H12 had provided the phone details to V Probation. The Board noted that there were "also no charges in relation to the machete: he told the panel that he had actually bought two machetes some years previously in case he was attacked by intruders and he had never taken them out of the house into a public place" (paragraph 2.14).

33. At paragraph 2.16, the Board said that it had seen no evidence, apart from failing to disclose the details of the cars, that H12 was involved in any criminal activity during his five months on licence. The failure to disclose the car details was, however, a significant matter because it was important for the authorities to be able to track H12's movements. Although it seems the NCA had grounds to suspect that on a number of occasions H12 had made trips to the London area, the Board had not been made aware of what those grounds were and had no means of knowing whether the suspicions were well-founded.

34. At paragraph 2.19, the Board returned to the relationship between H12 and SU. The Board noted that H12 and SU shared a cell between 26 February and 21 March 2019. During the period after SU's release on 21 August 2019, there was telephone contact between the two of them. The Board observed that the calls did not appear to have been monitored or, if they were, that nothing significant was overheard.

35. At paragraph 2.21, the Board noted that there was evidence to show that before his release from prison SU had been planning a trip to Country Z, to which he travelled on 4 September 2019. A large amount of evidence had been added to the Board's dossier, which showed that, between 4 September 2019 and 14 October 2019, SU and a number of other men were involved in a conspiracy to import firearms and drugs from Country Z into the UK. SU later pleaded guilty to his part in that conspiracy. At paragraph 2.22, the Board described a note dated 15 November 2019 which stated that intelligence and information had been received that H12 continued to be involved in organised crime relating to firearms and Class A drugs and to have access to mobile phones to enable this through contact with criminal associates external to the prison. The Board considered that this was a suggestion that H12 was in some way involved with SU in the conspiracy to import firearms and drugs.

36. At paragraph 2.23, the Board recorded that it was aware that the Secretary of State initially wished information relating to that suggestion to be provided to the Board but withheld from H12. The note of 15 November 2019 was apparently intended as a "gist" of the information sought to be withheld. However, the Board noted that the eventual outcome of the non-disclosure process was that nothing was withheld from H12 and that it was the detailed police report which was provided as the evidence relied upon by the Secretary of State in support of the suggestion of H12's involvement.

37. At paragraph 2.24, the Board said that it had carefully considered the police report but that, despite the mass of evidence detailed in it, the Board had seen no evidence to justify it concluding that H12 was involved in any way in the conspiracy. At paragraph 2.26, the Board concluded that "There is naturally room for suspicion that [H12] had some connection with the conspiracy but the panel is a judicial tribunal required to act on evidence and not on suspicion". The Board concluded that the information summarised in the police report "falls well short of being evidence sufficient to implicate [H12] in the conspiracy".

38. At paragraph 2.31, the Board observed that although the NCA had concerns about H12 and his possible involvement in criminal activity, the Board had seen no evidence to substantiate those suspicions.

39. At paragraph 2.32, the Board noted that, on 4 February 2020, H12 was suddenly moved to the segregation unit before being recategorised from category C to category B and transferred to HMP Garth on the following day. This action was a result of new security reports which suggested that H12 had shown support for recent terrorist attacks and had given an order for concerted indiscipline on M wing, with claims of H12 having influence over Muslim individuals involved in the indiscipline.

40. At paragraph 2.35, the Board considered that the assertions made in the disputed security reports were "highly improbable, and the panel cannot properly attach any weight to them".

41. At paragraph 2.46, a security report of 20 December 2021 had been added to the Board's dossier, in which it was stated that intelligence suggested H12 had paid someone to kill his wife. This appeared to be reference to the allegation rejected by the jury in 2011 that H12 was behind the murder of his first wife. The Board

considered there was no suggestion that H12 had any desire to have his present wife killed. The evidence was totally lacking in detail and the Board decided it could not properly attach any weight to it.

42. The Board then turned to its analysis of the manageability of risk. It reminded itself that it needed to assess H12's current risk of serious harm to the public and the likely effectiveness of the proposed risk management plan. At 3.5, it was observed that each of the statistical risk assessment tools predicted a low likelihood of future proven re-offending by H12. Those predictions were, however, of limited value.

43. The Board then turned to the views of the professional witnesses. Mr Lawrence, the psychologist, concluded that although H12 had discussed at length that he was no longer involved in organised crime, views from other agencies called that into question. It was not possible, in Mr Lawrence's view, to ignore those views. This was compounded by H12's "tendency to claim naivety or focus on how he feels he has been treated rather than taking responsibility for his previous choices". Given that the risk of harm was assessed as high in the event that H12 further engaged in criminality of a similar kind, Mr Lawrence was unable to support a decision to progress H12 at that time.

44. At paragraph 3.18, the Board considered the evidence of Samantha Hayfield. It did not share Ms Hayfield's view that there were unanswered questions about H12's recall and its careful consideration of the evidence had not revealed any information concerning the recall which was relevant to H12's current risk to the public: "Whatever suspicions there may be, there is no real evidence to contradict his evidence that he has severed his links with the [Xs] and is no longer involved in serious crime".

45. The Board then turned to the evidence of Ms Evans. She did not consider that the OASys assessment of H12 "accurately measures his risk considering his self-reported involvement with the [X] gang which involved criminal behaviour but did not result in convictions for several years prior to the index offences. This would indicate that he is under-convicted and I am also of the view that he has minimised the seriousness of the offences in his account".

46. At paragraph 3.21, the Board concluded that, whilst Ms Evans' concerns were "understandable", the Board "does not find it surprising that someone who has been

involved with a serious criminal organisation should be reluctant, having disassociated himself from that organisation, to reveal much about its activities and his participation in them. In the panel's view, [H12's] reticence about revealing further information is not due to lack of insight but to understandable and reasonable concerns for his own safety if he were to reveal that information". At 3.23, the Board concluded that Ms Evans' lack of confidence that H12's risk was manageable in the community took little account of the fact that it was certainly manageable for five months after his initial release on licence and there was no evidence of any involvement on his part in criminal activity during that period.

47. At paragraph 3.26, the Board said this:

> "Ms Evans speculates on the possibility of [H12] returning to a criminal lifestyle and/or to associations with the [Xs]. That possibility cannot, of course, be excluded altogether but in the panel's view it is highly unlikely that it will happen during the relatively short period which the panel has to consider, during which he will be residing at Approved Premises under close supervision."

The Board's own assessment was as follows:

> "3.27 The panel's task is to assess [H12's] risk of serious harm to the public during the period between now and 26 December 2022 when his sentence will expire. He will of course be subject to the SCPO for four years after his release from prison, but the panel is not concerned with that period.
>
> 3.28 The panel's clear conclusion is that, with a robust risk management plan in place [H12's] risk of serious harm to the public will be safely manageable on licence in the community during the period under consideration. He has already spent five months on licence in the community without any evidence of a return to criminal activity or a renewal of his association with the [Xs]. Whilst he breached one of the requirements of his SCPO he will be well aware that any similar breach will lead to his recall to prison and an almost inevitable new sentence. He is an intelligent man and is unlikely to make the same mistake again.
>
> 3.29 The panel is conscious that it is differing from the assessments of the professional witnesses (except possibly Ms Borg). It does not do so lightly but it is required by law to make its own analysis of the evidence and of [H12's] risks. It has explained in some detail above the reasons why it is unable to agree with the risk assessments of the professionals."

THE RECOMMENDATION (CONTINUED)

48. We now return to the NCA's recommendation that H12 be deprived of British citizenship. At paragraph 22, the Recommendation noted that the Board had accepted

that 'in the past, [H12] had admitted to being "No. 2" in the [X OCG] and that he was, at the very least, a senior member or "enforcer" for the group. But now, he had broken off his association [with the X OCG]. The Board drew no adverse inference from the fact that [H12] had been tried for [HT's] murder in view of his acquittal'.

49. At paragraph 23, the Recommendation noted that the Board was unable to find that, during his first period of release on licence after September 2018, H12 had engaged in criminal activity over and above his failure to declare his vehicles in accordance with the SCPO, despite the nature of the items recovered following his arrest.

50. At paragraph 24, the Recommendation noted that the Board had also rejected "as unsubstantiated assertions of complicity by [H12] in a conspiracy by his associate [SU] … to import firearms and drugs from Country Z". SU had, according to the Recommendation, been associated with H12 since at least 2010, when SU was serving a ten year sentence for possession of a firearm with intent to endanger life and H12 was on remand in the same prison for the alleged murder of his former partner. In 2016, SU "demonstrated his continuing close association by visiting [H12] in prison on four occasions. Between February-May 2019 the two men were again incarcerated in the same prison, during which time they shared a cell for a month. Following [SU's] release on 21 August 2019, he and [H12] kept in contact by phone. Shortly afterwards, [SU] flew out to Country Z on 4 September 2019 and whilst there negotiated the purchase of firearms, ammunition and heroin. [SU] admitted to this conduct when he made a guilty plea on 17 February 2020 to the offences of conspiracy to sell or transfer firearms, conspiracy to possess ammunition and conspiracy to supply Class A drugs. He was subsequently sentenced to 15 years' imprisonment".

51. In paragraph 25, the Recommendation noted that overall, the Board had found H12's custodial behaviour to be excellent and that he could be safely managed in the community.

52. The Recommendation then turned to the second recall of H12 to prison. In paragraph 26, it was said that since H12 had only been attending his Approved Premises when the evening curfew was in place, in early October 2022 the Probation Service imposed a further requirement on H12 to sign in at additional points during the day. H12 failed

to comply with this requirement and furthermore turned off the box for his electronic tag. For this reason, H12 was recalled to prison again on 11 October 2022.

53. So far as concerned H12's final release from prison, following this on 23 December 2022, H12 said he intended immediately to go to Country Z to visit his grandmother, who was seriously ill. H12 returned to the United Kingdom on 21 February 2023 and went back to Country Z on 22 April 2023.

54. Beginning at paragraph 30, the Recommendation set out the NCA's assessment of the risk posed by H12. At paragraph 30, the NCA respectfully disagreed with the Parole Board's assessment of the risk that H12 posed. The NCA noted the Board's acceptance of H12's role in the X OCG and his place in its hierarchy.

55. At paragraph 32, the NCA gave its assessment of H12's involvement in the firearms importation from Country Z for which SU was convicted. The NCA accepted that the Parole Board "was not presented with direct evidence that demonstrated" H12's complicity in this enterprise. Paragraph 32 continued as follows:

> "However, given that [SU] was born in Guyana and raised in the UK, the NCA assesses that he could not have brokered the deal with the Z OCG without a [Z]-speaking intermediary who was trusted by both sides. In the NCA's assessment, the fact(s) that [SU] had been closely associated with [H12] since 2010; had planned the trip to [Country Z] whilst in prison with [H12] in 2019 (during which time they shared a cell for about a month); and travelled out to Country Z within a couple of weeks of his release, strongly point to [H12] as [SU's] principal intermediary in the enterprise."

56. At paragraph 33, the NCA gave its assessment of the risk posed by H12 in respect of his loan-sharking activities. The NCA noted that the Board had given detailed consideration to the report of Mr Lawrence, the prison psychologist. In the view of the NCA, however, the Board did not appear to have addressed the indication highlighted in that report that H12 still regarded NV, in respect of whom H12 had been convicted of demanding money with menaces, as still being in debt to him. H12 was quoted by Mr Lawrence as saying that "after his licence expires he will talk to [NV's] uncle who will return the money owed". Elsewhere, Mr Lawrence further highlighted how this apparent intention to pursue the illegal debt was, in his view, at odds with H12's professed break with his previous criminal conduct. 'Furthermore, he reported to have committed to breaking ties with previous associates and "changing" for his wife, yet during interview he indicated that he would still collect a debt from [NV] on release'.

57. At paragraph 34, the NCA assessed on the basis of H12's lengthy criminal history and his own conversations obtained via probe, that H12 had led a criminal lifestyle for the majority of his adult life. H12 had actively participated at the highest levels in one of the most prominent OCGs and the activities H12 was believed to have engaged in had been at the highest levels of harm and likely to include extortion, violence, drug dealing and firearms offences. According to what appears to have been probe evidence, H12 was recorded recounting a conversation with another individual who had been told that H12 had hired two men to kill that individual in Country Z. The extortion victim NV told NCA officers that NV was now unwilling to attend court to give evidence as he was living in fear for his life and the lives of his family. H12 was recorded threatening a man believed to be another of the extortion victims that H12 would cut him with a knife. If unable to find the man, H12 threatened to hospitalise the man's son instead. The man concerned was found two months later at a garage owned by an associate of H12 with injuries that required hospital treatment. In the trial of TN, the latter explained how the X OCG was notorious for using violence and murder to extort money and in retribution for co-operation with the police. That reputation "was garnered whilst [H12] was the key lieutenant/enforcer for the OCG". The Recommendation stated that it was of particular concern that H12 was apparently willing to contemplate the murder of a UK firearms officer, in the event that such an officer killed one of H12's OCG members. That conversation took place only a few months before an undercover NCA officer was obliged to exchange fire during an armed attack on the OCG.

58. At paragraph 35, the Recommendation said that the fact that an SCPO was granted against H12 at the time of his original convictions for blackmail and conspiring to use grievous bodily harm, confirmed the sentencing court's finding that H12 represented an ongoing risk and that an order was accordingly required to protect the public. The NCA considered that H12's conduct in the very short time when he was first out on licence demonstrated that, far from being in any way rehabilitated, H12 immediately reverted to his previous mode of existence by loan sharking and preparing for violent retaliation. Following H12's further conviction for breaching the SCPO, a more restrictive order was granted.

59. At paragraph 36, the NCA noted that, although most of the risk of violence from H12 would be against other male criminals, H12 had commissioned violence against an innocent woman, JP. She was left shaken by the incident but the evidence indicated

that H12 had clearly intended that JP should be subjected to much more serious injury and he was incensed to discover that she had managed to escape that fate. He said he would beat JP up himself, in order to demonstrate how such a beating should be administered effectively.

60. At paragraph 37, the NCA gave consideration to Article 8 of the ECHR. At paragraph 38, the NCA considered that there was substantial evidence that H12 "is a violent career criminal. The NCA assesses that, contrary to the Parole Board's determination, [H12] is highly likely to continue to engage in serious criminality and represents a persistent threat to the welfare of others, given his extensive criminal history and clear pattern of behaviour over a very protracted period".

61. At paragraph 39, the NCA observed that H12 had failed to abide by reporting restrictions imposed by the Probation service in early October 2022 and that this breach led to H12's recall to prison on 11 October 2022. Although the SCPO breaches were in themselves not particularly significant, they occurred within a short period of H12's release on licence and, when viewed in the context of his later breach of the reporting restriction just described, the NCA assessed that H12 had demonstrated a pattern of defiance in his recent behaviour. That was, in the NCA's assessment, indicative of H12's overall disregard for the measures that the court put in place to manage his risk of offending.

62. Beginning at paragraph 41, the Recommendation considered the operational effectiveness of deprivation action. H12's criminal activities had been conducted predominantly in and around London. H12's control over subordinates and the fear that he engendered in potential victims required his physical presence in the UK generally and in London specifically. The NCA assessed that H12 was unlikely to have the control or influence that he previously enjoyed in the W community if he was prevented from returning to the UK.

63. At paragraph 44, the Recommendation concluded that, given H12's high level senior involvement in serious organised crime and clear propensity to violence, the NCA recommended that H12 should be deprived of his British citizenship on the basis that this measure would be conducive to the public good.

THE MINISTERIAL SUBMISSION

64. The Ministerial Submission of 15 May 2023 asked the Respondent to consider the information supplied and agree that H12 should be deprived of his British citizenship in accordance with s.40(2) of the 1981 Act. She was also asked to certify the decision so that the CLOSED hearing procedures in the Commission could be utilised, in the event of an appeal.

65. At paragraph 3, the Submission said that the NCA assessed that due to H12's significant involvement in serious and organised crime as a senior member of an organised crime group based in the UK, deprivation of British citizenship is conducive to the public good. "The NCA assess that [H12] is highly likely to continue to engage in serious criminality and represents a persistent threat to the welfare of others in the UK, given his extensive criminal history and clear pattern of behaviour over a protracted period". At paragraph 4, the Respondent was told that the basis for this assessment was set out in the NCA Recommendation which was annexed to the Submission: "The NCA assess that depriving [H12] of his citizenship will serve to protect the UK public from the ongoing threat that his criminal conduct poses".

66. Having explained why it was not considered that depriving H12 of his British citizenship would render him stateless, the Submission referred to H12's criminal convictions, his release from prison on licence in September 2018, his recall and the search made of his property; and his sentence of four months' imprisonment. Under the heading "The case for deprivation", the Submission, at paragraph 9, drew the Respondent's attention to the full NCA assessment in the annex "which we advise you [Home Secretary] to read alongside the summary below".

67. At paragraph 10, the Submission stated that the NCA "assessed that [H12] had a controlling role within the OCG, subordinate to [NX] (head of the OCG), but above all others". The Submission stated that the "NCA assess that [H12] had links to weapons, specifically, firearms".

68. At paragraph 11, it was stated that "The NCA assess that [H12] is a career criminal who has been involved in [serious organised crime] for most of his adult life" and that H12 "has actively participated at the highest levels of one of the most prominent OCGs in the UK". At paragraph 12, the NCA was said to have assessed that if H12 was deprived of his British citizenship whilst in Country Z, such disruption "will make it extremely difficult for him to make alternative arrangements to continue with his

criminality". At paragraph 13, the Submission said that given H12's high level and senior involvement in serious organised crime, the NCA recommended that he should be deprived of his British citizenship. The Submission said 'We agree with the NCA assessment of [H12] and support the recommendation that he should be deprived of his British citizenship on "conducive to the public good" grounds. Do you agree?'

69. Beginning at paragraph 14, there was consideration of the ECHR. Although that Convention did not have extra-territorial effect in this case, it was longstanding practice to consider Articles 2 and 3 ECHR risks associated with deprivation and to recommend deprivation only if it was considered that this would not give rise to a real risk of a breach of Articles 2 or 3. The Submission explained why it was not considered that, in the present case, there was any such risk.

70. Beginning at paragraph 26, the assessment addressed Article 8 ECHR by reference to H12 and his family, including two minor children. Given the nature and seriousness of H12's conduct and the ability to prevent further criminality occurring, the Submission concluded that any interference in the family's right to a personal and family life was necessary and proportionate in the interests of public protection.

71. At paragraph 29, the best interests of the children were addressed, it being considered that the public interest in deprivation outweighed any interest that H12's UK based children might have in him remaining as a British citizen. Under the heading "Home Office Recommendation", paragraph 38 said that the Respondent was recommended to deprive H12 of British citizenship and that "based on the consideration set out above, we recommend you exercise your powers under s.40(2) of the British Nationality Act 1981 … to have an order made depriving [H12] of his British citizenship and to sign the notice at Annex A".

XY'S FIRST WITNESS STATEMENT (22 NOVEMBER 2023)

72. The first witness statement of XY (22 November 2023) begins with a history of the X family and the X OCG (see paragraph 16 above). At paragraph 16 of his first witness statement, XY addresses certain material which was considered by independent counsel to be potentially exculpatory in nature. This followed independent counsel's review in August and September 2023, following H12' s notice of appeal to the Commission.

73. An intelligence report of 20 September 2018, describing a visit to H12 in HMP The Mount in relation to the SCPO, recorded H12 as saying that he was second in command of the Y Group; that he had cut off ties with previous associates and wanted nothing further to do with criminality; that H12 knew that the threat to his life had originated from BX and that H12 was planning to contact BX on his release; and that a man in Country Z who had recently had a high ranking solicitor shot was possibly behind the threat to H12. XY stated that the Y Group is a ruthless crime group involved in heroin importation and racketeering. In the context of XY's professional experience and knowledge of H12 specifically, XY did not feel able to place any weight on H12's claim to have cut ties with criminality. "He is a career criminal. I also consider it to be self-serving. It benefits him to create the impression that he is no longer involved in criminality".

74. Also potentially exculpatory was the record of an outgoing telephone call made by H12 to another individual on 3 February 2014, in which H12 said that the police 'listen to the telephone a lot'. H12 said that he would be an informant for the NCA and would not want anything in return. H12 said that he did not have any business with drugs or weapons and earns a living through buying and selling drinks, clothes and shoes and from borrowing and selling money. Given that the conversation opened with H12 saying that the police listen to the telephone a lot, XY regards the statements as "disingenuous and self-serving".

75. Various material from the NCA Lifetime Offender Management Team concerns the re-categorisation of H12 as a category C prisoner and that an NCA officer stated that they had no intelligence in relation to H12 stating that he would be seeking to be repaid by NV when H12 was released. H12 also expressed a desire to Town V Probation that he wanted to get back into the car business.

76. XY said that the NCA was aware of records which showed that before H12's conviction in 2015, H12 may also have engaged in business which was, on the face of it, legitimate, such as car businesses. It was, however, clearly possible to be both involved in an OCG and in a legitimate business, at the same time.

H12'S FIRST WITNESS STATEMENT (26 MARCH 2024)

77. In his first witness statement dated 26 March 2024, H12 says that, although historically he had been involved in criminal activity, "I am no longer involved in any

criminal activity at all, and I have severed all association with the [X] family". H12 said that he met NX around 2000-2001 and they became friends. NX was much older than H12, who helped NX with his business, salvaging, restoring and selling cars. NX resolved an underlying dispute, which had led to H12 being remanded in custody, following which H12 felt indebted to NX. Over time, H12 came to understand that NX's family was associated with criminality and H12 was himself drawn into crime. After a large street fight in 2002, when H12 attempted to help people who had been hurt, allegations were made that H12 had attempted to kill members of Group U. Fearing retribution, H12 drew closer still to NX, for H12's protection. He also became increasingly involved with NX's criminal activities, but felt that he and his family would be in danger if they attempted to leave. It was during this period that H12's son, CX, was born.

78. H12 contends that he worked only for NX and that the Respondent is wrong to suggest that there was a single X OCG; and that at various stages in the OCG's existence, different members of the X family have been its head. H12 says that "As I understood and experienced it, that is not how it worked". Each of the brothers developed their own network "which ran independently of each other". Further details about the workings of the X OCG are set out in the Confidential Annex to this judgment.

79. H12 says that NX "was not involved in all of the same type of criminal activity as his brothers. In my experience, [NX] has never been involved in selling drugs. If he was involved in this, he never did it in front of me, or told me. Likewise, I was never involved in any crime relating to drugs. I was never involved in murder, and to my knowledge neither was [NX]".

80. H12 says that NX was involved in loan sharking and the illegal importation of alcohol. He was also involved in obtaining false documents and in violence. H12 was involved in loan sharking "in that I would arrange loans for people within the community, and then collect loan repayments with additional interest payments on top. I would receive the loan money and would pass this onto the person who was borrowing the money. I would then collect payments on top of the loan repayments, for my own profit. These arrangements were generally directly under the control of [NX]".

81. Over time, H12 said that he "became comfortable threatening people with terrible things and with using words to frighten people". He learned to make threats in order

to frighten people so that they would pay the money. H12 said that he was "under a lot of pressure to make this happen, because it was not my money, and it was owed to the people who had provided it to me". H12 was always worried about what might happen to him if he was not "effective at getting the money". H12 had seen how quickly things could turn bad for people and he had seen NX and his older friends beat people up. H12 thought that he could easily end up being hurt if he did not play his part as he was expected to: "I could not see any other way out". H12 also "needed to maintain an image of myself as a dangerous person, so that I would be safe in that world". H12 categorises the transcripts of the probe evidence as him "saying things which were not true, which presented me as a more dangerous person, willing to do things that I would not actually have done". H12 admits, however, that he "did also sometimes arrange for actual violence to be inflicted on others, such as [JP] for which I was prosecuted. I did not do this many times". H12 feels "very ashamed that I caused people to be hurt".

82. H12 states that he was not involved in any activities relating to drugs or firearms but he did see others who worked for NX, not in H12's immediate circle, carrying firearms. H12 never carried a gun or shot any weapons in the UK illegally. Although H12 sometimes talked as if he was comfortable with guns, that was an example of the things he would say in order to maintain an image and reputation among others. With regard to the anger H12 expressed that the attack on JP did not result in more serious injury to her, H12 says that he feels ashamed about how he talked and that he was angry with his interlocutor about how the attack had not been serious enough. As part of his anger, H12 told the individual that H12 had other jobs lined up that had been jeopardised. However, H12 contends that this was not true and that he was trying to express that the individual's actions had negatively impacted on H12 "and so had exaggerated this as part of my anger".

83. As for the threats to NV, H12 was conscious of the pressure that was on him to pass the money back to the person who had provided the funds. Although H12 does not use this as an excuse, he considers it explains his state of mind "until I broke free from my criminal activity".

84. H12 addresses the conviction of blackmail and conspiracy to commit grievous bodily harm against BL in Bournemouth. H12 says this came about as a result of a falling out between NX and BL, who had been business partners. NX asked H12 to attack

BL, who felt he had no option but to do this. H12 told others that he had decided to attack BL independently. This was to protect NX.

85. In early 2015, H12 says that he completely broke ties with NX. This was for two main reasons. First, H12 had been given an ultimatum by his wife. Secondly, H12 was ashamed of what he had become involved in. Whilst in prison, H12 understood that he had caused pain to people and had become blind to the harm that was causing to others. H12 says he has "changed as a person as I have grown older – I believe that prison is like a university if you know how to use it". Whilst in prison, H12 became more religious and spent a lot of time praying and reflecting on his past life.

86. H12's first witness statement then turns to the consequences of cutting ties with NX, the risk to his life and to those of his family. H12 says he knew there would be consequences as a result of cutting ties with NX, who was already unhappy with H12 because he had pleaded guilty. Even now it makes H12 "very anxious to talk about the things I know about him. I am worried that, if I say things about his activities and he or his associates get into trouble because of it, then harm will come to my family". H12 says that he knew NX and others would be very unhappy about his cutting ties "and I was expecting there to be repercussions for me. My fears were confirmed when police officers came to the prison in 2017 to say that there was a plan to shoot me when I came out of prison". In March 2017, H12 was given a formal "Notice of threat to personal safety" (the "Osman notice"), in which it was said that the police had received information suggesting H12 was in danger. He received another notice on 9 February 2018, confirming that a threat existed to his personal safety on release. On 16 February 2018, the police issued a letter saying the occupants of H12's home address in London were at risk of serious harm and on the same day a further Notice of threats to life was issued, according to H12, to the entire family. As a result, H12's wife and children left the London address and found a place to live in Town V. At the same time, with the help of a friend, the wife obtained an armour-plated car as a result of the threats that had been made against H12. The work to armour plate the vehicle was carried out in Country Z and the car was then brought back to the UK. H12 says that at least one of these threats is connected with someone who was a co-defendant of BX; a person known as his "hit man". H12 says that the "threat to me is very real and the reason for this threat is, to my understanding, because I have broken ties with [NX]".

87. H12 accepts that he breached the SCPO by not notifying the NCA of two cars that he was using, when released on licence. H12 says, however, that he was not hiding the cars and that they were registered to his address and were insured. He forgot to notify the authorities without realising how serious the consequences would be. Since that conviction, H12 says that he has been 'very, very careful' and continues to co-operate with the authorities whilst in Country Z.

88. After his release as a result of the decision of the Parole Board, H12 seeks to explain the circumstances that led to his recall to prison. The Parole Board had decided that a curfew between 9pm and 7am was proportionate, but when H12 moved to Town V the Probation officer introduced a requirement that he should be subject to an additional curfew and signing. He also had a live monitoring GPS tag on his leg. The reason given was that H12 was spending too much time outside his Approved Premises, which were a Probation hostel. H12 says that he was spending his time at the family home. He told the Probation officers that he was not willing to co-operate with what H12 regarded as additional unjustified curfews which made it impossible for him and his family to spend time together. After the decision was made to increase the curfew, H12 collected his belongings and went home to his family and called the Probation officer and the police, telling them he was at the house and that he was not going to obey the new licence conditions. H12 asked them not to come to the house to arrest him but rather to call him and he would hand himself in. This is what he did.

89. H12 states that other than breaching the terms of his SCPO, he has not committed any criminal offences since he broke ties with NX and broke any connections to organised criminal activity. By the time H12 learned about certain matters concerning NX, it was too late to cut ties with him and H12 feared what NX would do to him or his family if NX realised what H12 knew.

90. H12 then addresses a draft witness statement of XY, which served to inform the NCA recommendation on deprivation (see paragraph 16 above). The draft also contained details of monitored telephone conversations, which featured in the Recommendation. So far as the transcripts of the conversations were concerned, H12 agrees that much of what is in them reflects the way he spoke at the time. Although it was a vile thing to suggest that H12 would take retribution on an NCA officer as he exited court by shooting him, H12 says this was the sort of topic of conversations that he would

sometimes have but H12 never harboured an intention to do anything like that. It was all part of appearing to be tough in front of others.

91. Concerning a reference in the draft statement to H12 making the decision to beat up BL himself, H12 said he would often refer to decisions as having come from him when in fact they did not. This was a way of protecting NX.

92. As for the statements made by TN at his trial, H12 considers that TN was trying to say that the reason he shot at the police officer was that he had misunderstood the officer was from the X Group and that TN was in fear of his life. TN clearly benefited, according to H12, from making out that those connected with NX presented more of a threat to him than they actually did. That was the basis of his defence.

93. H12 accepts that he was stopped twice by the police and found to have body armour in his car. This was because after 2002 there was an ongoing threat to his life from members of Group U and because of his association with NX.

94. So far as the evidence of the psychologist, Mr Lawrence, was concerned, after H12 was first released from prison in 2018, he was contacted by a member of NV's family; his uncle. The uncle was aware that NV had incurred a debt with H12 and he offered to make payment of it. When this happened, H12 considered whether to take the payment in order to pay it to the person who had initially provided H12 with the money to make the relevant loan. When H12 spoke to Mr Lawrence in 2021, he was still considering whether to do this. However, after thinking about it further, he decided he did not want to have anything to do with the matter.

95. The witness statement then turns to H12's association with NX's group. Describing H12 as the No. 2 in NX's group "overlooks the fact that each of the different [X] Siblings had their own separate criminal networks". H12 also states that it is not the case that he was NX's "principal lieutenant" or 'second in command". That is not a term he would ever use or know anyone else to have used about him and did not reflect the way things worked. NX was at the top of the group and everyone else was under him. It was, however, correct that NX was the only person who ever gave H12 orders. But he was not the only person to whom NX gave orders. All that said, H12 accepts that he "had a senior role within [NX's] group, that I was close to him, and that some of the others respected me due to my age". H12 never told his Probation officer that he was No. 2 in the X organisation. This was a mistake on the part of the

Probation officer. Asked what his role was, H12 said "The CPS says that I was second in command". The Probation officer wrote that down and from then it was written in all the papers relating to H12's case.

96. H12 also denies telling NCA officers that he was second in command of the Y Group. H12 was trying to explain that the prosecution in his criminal trial had tried to portray him as being second in command after NX. H12 was not No. 2 of any organisation; nor was he ever part of the Y gang. That gang was a group that had connections with NX but was separate.

97. H12's witness statement addresses the connection between him and SU. H12 states that he had nothing to do with SU's attempt to traffic weapons into the UK. H12 was never arrested or charged with offences relating to that matter. H12 and SU were friends and SU visited H12 after SU had been released. H12 did not, however, make any introductions for SU or get involved in any attempt to traffic weapons into the UK. The police prosecuted those who were involved, but H12 was not prosecuted and was not involved. The only evidence of involvement appears, according to H12, to be because SU was not from Country Z and he had travelled to Country Z. However, to H12's knowledge, SU had many Z friends apart from H12 who were involved with criminal activities. H12 should not be blamed just because SU was doing business with people in Country Z.

H12'S WIFE'S WITNESS STATEMENT (27 MARCH 2024)

98. H12's wife signed a witness statement on 27 March 2024. She described H12 as a good man. He never told her that he had been involved in criminal activities but she was concerned about H12 spending time with people who looked as if they were not good characters. H12 has developed since he has been in prison. To her, H12 has always been kind and caring but she knows that he has changed "in that he no longer spends time with those other people". She confirmed that she helped to make arrangements to obtain the armoured plating for the car and this was because the police had told the family that their lives were in danger. It was done purely for defensive purposes.

H12'S SON'S WITNESS STATEMENT (27 MARCH 2024)

99. The adult son of H12, CX, produced a witness statement, also dated 27 March 2024. He states that H12 has always set him high standards and wanted him to go to university. The first time he had been aware of H12's involvement in criminality was when he was arrested in 2014 and went to prison. When told that there was a threat to life against them, the son says that the person it came from was in Country Z. Since H12 is prevented from returning to the UK, the son says that he is stuck in Country Z "where the threat to him is. There is a danger to him there".

XY'S SECOND WITNESS STATEMENT (21 MAY 2024)

100. On 21 May 2024, XY filed a second witness statement, dealing with certain matters raised by H12 in his first witness statement. In the light of that statement, the NCA's central assessments remain unchanged. XY's noted H12's admission that, historically, he had been involved in criminal activity and that he had a criminal connection to NX.

101. XY considered that the method described by H12, whereby he collected payments on top of the loan repayments, for his own profit, was supportive of the NCA's overall assessment that H12 enjoyed a privileged position in NX's crime group. H12 considers that NX would not otherwise tolerate an individual making profit from his criminal enterprise.

102. XY did not accept the explanation given by H12 as to why he was recorded saying the things he did. XY considered this to be an attempt by H12 to rewrite the history of H12's offending. H12's conviction for conspiring to inflict grievous bodily harm is, according to XY, probative of the fact that H12 does not merely "present" as a dangerous person; he is a dangerous person.

103. The probe material demonstrated, in XY's view, a hierarchical relationship between NX and H12 but did not disclose any threats passing from NX to H12 in the course of their interactions, which might give any credence to H12's claims that he only acted in the way he did in order to feel safe. Furthermore, JP was an innocent woman who was not a threat to H12 or anyone else. There was accordingly no need for H12 to present himself as a dangerous person when it came to her, in order to make himself "safe". There was no suggestion that the attack on JP was undertaken on the instructions of NX. On the contrary, it was orchestrated by H12 for what appears to have been a financial commission, not because H12 was being put under pressure.

104. As for NV, XY noted that, for H12, this was a business from which he was making a profit. H12 also did not, in the recollection of XY, allege at trial that he was under any kind of duress to ill-treat NV. A similar point was made in respect of the attack on BL.

105. As for claims to have broken ties with NX, XY considered it "feasible that they no longer enjoy the same kind of close, working relationship but that does not undermine, in my view, the significance of the pair's long criminal history which H12 acknowledges; or the NCA's assessment of H12's personal capacity for violence and other criminal behaviour". XY assesses H12 as being highly likely to return to a life of serious, including violent and organised, crime, 'with or without the company of [NX]'.

106. As for Mr Lawrence's report, H12 was provided with a copy of it after it was written in 2021 and given the opportunity to make comments on it. XY understands that H12 raised some issues that he wished to clarify at the time and appropriate amendments were made. The fact that he did not seek to make the specific clarification regarding NV suggested to XY that H12 had invented this clarification retrospectively.

107. As for H12's position within the X OCG, XY considered it immaterial whether H12 accepted the title of "principal lieutenant" or "second in command" because it was apparently common ground that H12 had a senior role. H12 was also feared because of his proximity to NX and because of his very violent nature.

H12'S SECOND WITNESS STATEMENT (17 OCTOBER 2024)

108. On 17 October 2024, H12 made a second witness statement. This was done in order to respond to written questions provided by the Respondent; and also certain questions put to H12 by his lawyers about certain things the Respondent had said in the skeleton argument.

109. H12 was asked in what sense NX was not "involved" in the crimes of NX's brothers. H12 stated he was not privy to all the conversations that NX had with his brothers. However, since both BX and SX were subject to the NCA's surveillance, that would have captured recordings of NX speaking to his brothers and, if NX had been involved in their criminal activity, H12 would have expected NX to have been arrested and charged.

110. H12 was asked whether it was his case that the threat to shoot him, about which the police informed H12 in prison, emanated from NX. In reply, H12 said that the notice from the police in February 2018 said "You are aware from a previous notice to personal safety, served upon you by the Metropolitan Police that a threat exists to your personal safety from a [JB] and his associates". H12 said he knew JB to be a person who was a co-defendant with BX and who received a 13 year sentence of imprisonment for an offence of attempted murder. H12 believed that the threat from JB came from NX because, first, H12 knew JB to have been a co-defendant with BX and, second, H12 had seen NX and JB talking with each other in the past. Additionally, H12 was aware that NX was upset with H12 for having pleaded guilty and for distancing himself from NX's group. When told that JB presented a threat to H12, H12 was immediately sure that this was because NX was upset with him and that NX had arranged for retribution against H12 as a result.

111. Asked who the friend was who helped H12's wife move to Town V and purchase an armoured-plated car, H12 said that it was BI. A witness statement from him had been found and was attached to H12's second witness statement.

112. H12 said that the telephones seized at the family home were a mixture of old phones and those of his family. He understood that the police searched the devices but did not find anything suspicious on them. H12 was asked about machetes discovered during the search of the house in 2019 and said to have been previously present in H12's house in 2014. H12 confirmed that the machetes were in his house in 2014 and that the NCA officers saw them but that they were not seized as part of the case. A photograph had been found of H12's daughter, which showed one of the machetes displayed on a wall in the family living room. The date stamp shows the photograph was taken in 2015.

113. In his first witness statement, H12 had spoken about efforts undertaken by him in Country Z to investigate the viability of a possible business importing foodstuffs. H12 said that he had spoken to a friend who was involved in sending vegetables and fruit from Country Z to the UK but that H12 realised he would need a large amount of money in order to be able to start a profitable business in that area. He also felt that such a business would no longer be viable, given H12's inability to travel in the absence of a British passport. There were also a lot of big companies that had been involved in a similar business for many years and which were well-established.

114. H12 was asked for the names of the mutual friends which both he and SU knew. H12 said that there was a friend called ST and that SU had also known an individual, IB, in prison in 2010. Both of these were involved in criminal activity. In addition, SU knew an individual, OM, who had been in HMP Woodhill.

115. Returning to the issue of property seized in 2014, H12 said he did not remember any items being kept by the police or destroyed. The radio scanner was later returned and the machetes were not seized and so remained with the family throughout. It is possible that one of the lists of alleged debtors which the police found was from activity before H12 went to prison.

XY'S THIRD WITNESS STATEMENT (21 OCTOBER 2024)

116. On 21 October 2024, XY signed a third witness statement. Mr Chirico KC did not object to its admission, but asked the Commission to consider what weight should be given to it, in view of its late appearance. This witness statement responds to the suggestion in H12's skeleton argument that the Respondent failed to take into account the possibility that some of the items at H12's property were "residual of his previous criminality". H12 considers that to be unlikely given that in 2014, H12's address was searched by the NCA with the assistance of a team of Police Search Advisers from the Metropolitan Police Service. These advisors are experts in searching for evidence and its retrieval. An examination of the advisors' scene search books reveals no mention of any of the items to which H12 refers, including machetes or body armour, being found on the premises. However, pieces of paper with writing on them, regarded as potential evidence of loan-sharking and extortion, were uplifted. One piece of paper was found inside a washing machine. XY considered it "inconceivable" that such highly trained officers would not have found the various items in the course of their search or, if they did find them, that they would not have been seized or secured. More important, however, in XY's view was the undisputed fact that H12 had these items in his possession in 2019.

117. As regards threats to H12's life, XY noted that H12's first witness statement explained his belief that he was being threatened because he had cut ties with NX. That was reiterated in his second witness statement.

118. On 18 October 2024, the Metropolitan Police provided the following form of words, which XY considers may assist in understanding the proper origin of the threats. The

form of words is as follows: "The threats to life received by H12 in 2017 and 2018 arose as a result of the perception (by criminals) that H12 continued to be involved in serious and organised crime. There is no indication that this was as a result of cutting ties with the [X OCG]".

BBC NEWS REPORT

119. At the hearing, Mr Chirico KC filed a *BBC News* report concerning BX and the X OCG. Further details about these matters are contained in the Confidential Annex to this judgment.

120. The article also described the Y Group. Further details are contained in the Confidential Annex to this judgment.

121. The article also described the jailing of members of BX's gang. Further details are contained in the Confidential Annex to this judgment.

XY'S ORAL EVIDENCE

122. At the hearing, XY gave oral evidence. Subject to the correction mentioned earlier, XY adopted his three witness statements. XY was cross-examined by Mr Chirico KC. The oral evidence is addressed later in this judgment.

CASE LAW

123. In *U3 v Secretary of State for the Home Department* [2024] KB 433, Elisabeth Laing LJ addressed the nature of an appeal under s.2B of the SIAC Act 1997, by reference to the judgments in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 and *R (Begum) v Secretary of State for the Home Department* [2021] AC 765. Although it was decided by reference to the earlier statutory regime governing appeals to the Commission, *Rehman* remains relevant in the context of an appeal under s.2B, in that the judgment of Lord Hoffmann explains how what on the face of it would be a full "merits appeal" must be construed in such a way as to pay appropriate respect to the respondent's functions and consequent expertise in the area of national security. This had a material bearing on the fact-finding function of the Commission. As Elisabeth Laing LJ noted, at paragraph 47 of her judgment, Lord Hoffmann considered that the concept of standard of proof was not helpful, since the question in *Rehman* was not whether a given event happened but the extent of future risk. That depended

upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security was sufficient to justify the appellant's deportation (which was the issue in *Rehman*) could not be answered by taking each allegation *seriatim* and deciding whether it had been established to some standard of proof. Rather, it was a question of evaluation and judgment, in which it was necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee (*Rehman*, paragraph 55-56). The issue in *Rehman* was not a binary question about whether it was more likely than not that a person had done something, but an evaluation of risk, as to which an appellate court would usually give a "considerable margin" to the primary decision maker (*Rehman*, paragraphs 57-58; *U3*, paragraph 48).

124. In *Begum*, the Court held that s.40(2) of the 1981 Act gives the respondent, not the Commission, the power to decide to make a deprivation order. The Commission's function was not to take its own decision because Parliament had conferred no such power on it. The Commission could, however, review the respondent's exercise of discretion and set it aside in certain circumstances. Lord Reed held that when the Commission reviews the exercise of the respondent's discretion under s.40(2), the Commission must apply principles which are "largely the same as those applicable in administrative law". However, in determining whether the respondent had acted compatibly with the appellant's ECHR rights, the Commission would form its own assessment (*Begum*, paragraphs 66-69; *U3*, paragraphs 64 and 65).

125. In reviewing the respondent's discretionary decision, the Commission had to give the respondent's national security assessment appropriate respect, for reasons of institutional capacity and democratic accountability. The Commission still, however, had important functions. For example, it could assess whether the respondent had acted in a way in which no reasonable Secretary of State could have acted; or had taken into account an irrelevant matter; or failed to take into account something that was relevant; or was guilty of procedural impropriety. The Commission could consider whether the respondent had erred in law, including making finds of fact which were unsupported by any evidence or based on an unreasonable view of evidence. Lord Reed added that the Commission might have to consider relevant evidence (*Begum*, paragraphs 70 to 71; *U3*, paragraphs 66 to 68).

126. At paragraph 72 of her judgment, Elisabeth Laing LJ addressed the judgment of the Supreme Court in *R (Pearce) v Parole Board* [2023] AC 807. The issue in that case was the lawfulness of guidance issued by the Parole Board, which said that if the Board was not able on the balance of probabilities to make a finding of fact about an allegation concerning a prisoner, the Board should make a judgment about the "level of concern" which arose from an unproven allegation; and then consider what impact that level of concern had on the Board's decision whether to direct the release of the prisoner. The Supreme Court held that the Board's guidance was lawful. Lord Hodge held that the judgments in *Rehman* and *Begum* were consistent in saying that the original decision making process was not confined to deciding whether or not past facts had been proved. Lord Hodge held that the judgments of Lord Slynn and Lord Hoffmann in *Rehman* supported the view that a decision maker, whether a member of the executive branch of Government or a judicial body, when it is assessing future risk, is not as a matter of law compelled to have regard only to those facts which individually have been established on the balance of probabilities. Instead, the decision maker, from an assessment of the evidence as a whole, can take into account, alongside the facts which have been so established, the possibility that allegations, which have not been so established, may be true (*Pearce*, paragraph 44).

127. In *P3 v Secretary of State for the Home Department* [2022] 1 WLR 2869, the Court of Appeal held that a proper degree of respect for the national security assessment of the respondent should not be mis-translated into an erosion of the right of appeal under s.2B, so that it becomes indistinguishable from a review under ss.2C to E (*P3*, paragraph 118; *U3*, paragraph 74). Sir Stephen Irwin held that proper deference did not amount to a simply supine acceptance of the conclusions advanced by the respondent (*P3*, paragraph 129).

128. In *U3*, beginning at paragraph 73, Elisabeth Laing LJ examined the Commission's judgment in *P3*. The Commission had rejected the submission of the special advocates that, in the light of *Begum*, the appeal against deprivation arising from the respondent's assessment of the risk posed by P3 to national security was governed solely by public law principles. The Commission observed that, if that were correct, all of U3's evidence would be inadmissible on that appeal (paragraph 81). The Commission was not the *alter ego* of the Administrative Court. It had special expertise in immigration law and in the assessment of intelligence. Its procedures allowed for detailed consideration of evidence, including exculpatory evidence. First,

the tools available to the Commission went beyond those which would be available to the Administrative Court, even in the case where CLOSED material procedures applied (paragraph 88).

129. All of this meant there might be cases in which the Commission could see a flaw, which could not be detected in ordinary judicial review procedures, because the Commission "has a more powerful microscope, not because it is looking for a wider range of flaws" (paragraph 89). The Commission gave as an example the way in which the special advocates could test the details of an assessment in the course of CLOSED hearings. Importantly, however, the question whether such a flaw vitiated a decision was to be answered by applying the same standards as on an application for judicial review. Conversely, there might also be cases, in the Commission's view, in which such close scrutiny could show that what seemed at first sight to be a flaw was not, on closer inspection, a material flaw (paragraph 90). In a deprivation appeal, the Commission could consider evidence which was not before the respondent, but that was limited to evidence about things which happened before the deprivation decision. The Commission might identify something that the respondent did not consider but which (given what she did know or ought reasonably to have known) she should have taken into account. That might be relevant to a *Wednesbury* review or to a *Tameside* review (*Secretary of State for Education & Science v Tameside Metropolitan Borough Council* [1977] AC 1014) (paragraph 94).

130. Furthermore, once an appellant appeals, the national security assessment will be updated to take account of her evidence and of any material uncovered by the exculpatory review. Thus, those advising the respondent keep the deprivation decision under review during the appeal. The updated assessment would in practice replace the original assessment for the purposes of the appeal, even if it had not been shown to the respondent. If that updated assessment were shown to be flawed in the public law sense, the appeal would be allowed. This approach differed from judicial review, in which "rolling" judicial reviews had been deprecated (paragraph 95).

131. The fact that the Commission was not limited to evidence which was before the respondent at the time of the decision still, however, had to be seen in the light of *Rehman* and *Begum*, with the result that the Commission could not have recourse to the "new" evidence in order to reach its own view about whether the appellant was a risk to national security. That was so even though the Commission had heard the

appellant's oral evidence and that of other factual and expert witnesses (paragraphs 97 to 100).

132. How these considerations operated in an appeal to the Commission can be seen, beginning at paragraph 155 of Elisabeth Laing LJ's judgment in *U3*. The appellant's evidence was that her partner employed violent controlling behaviour towards her and that this affected the factors considered by the respondent as demonstrating that *U3* was a risk to national security. The focus of the appellant's challenge was the respondent's categorisation of the relationship between the appellant and the partner as "no more than difficult". The Commission agreed that the word "difficult" was not a fair or adequate description. However, the Commission did not accept that the description constituted a public law error. This was for three reasons. First, the author of the assessment was responding to the appellant's second witness statement. The contents of that statement had not been left out of account. The structure of the assessment made it clear that that the respondent maintained her assessment, despite the appellant's evidence. Second, even if it were fully accepted, the appellant's evidence about the nature of the relationship did not determine the separate question of whether or not she was aligned to ISIL at the relevant times and during the relevant period. The respondent considered that the appellant had minimised her own alignment with ISIL. This was not inconsistent with accepting her evidence about the relationship with her partner. Third, in those circumstances, the description given to the relationship by the respondent did not matter. Read as a whole, the respondent's assessment was that, despite the appellant's evidence, she was assessed to be ideologically aligned with ISIL at the relevant times. That was based in part on the respondent's rejection of her evidence that she did not at that stage know about ISIL's ideology or atrocities. The Commission added, significantly in the view of Elisabeth Laing LJ, that "We also reject U3's evidence in that regard" (paragraph 156).

133. Beginning at paragraph 167, Elisabeth Laing LJ determined the nature of the Commission's functions on a s.2B appeal. At paragraph 168, she held that references to applying judicial review principles on appeal were apt to cause confusion. Such language might be an imprecise proxy for the bases on which an appellant can challenge the respondent's assessment of national security on an appeal. At paragraph 169, Elisabeth Laing LJ rejected the submission that the Commission's approach had been incoherent because the Commission had, on the one hand, said that it must apply judicial review principles to s.2B appeals and, on the other, had taken into account

material that was not before the respondent when she made the impugned decision. The reason why this submission was wrong was that "a s.2B appeal is not an application for judicial review … " (paragraph 169). The starting point was that the right of appeal gave the Commission power to decide questions of fact and law. Contrasts between s.2B and statutory reviews, where principles of judicial review fall expressly to be applied, were, in her view, "eloquent" (paragraph 170).

134. At paragraph 171, Elisabeth Laing LJ observed that the parties were agreed that an appellate body can take into account evidence which postdates the impugned decision, as long as that evidence was capable of casting light on events before and at the time of the decision. Given that the procedure for deprivation was "inherently unfair", Parliament had given an appellant a forum in which the decisions in question should be examined as meticulously as is possible, within the constraints established by the authorities. The Commission had an important role in scrutinising all that evidence independently, with the invaluable help of the special advocates. The Commission saw more intelligence materials than the respondent would have done. The respondent would "normally only see a ministerial submission perhaps with some annexes …" (paragraph 170). The Commission's reference to its "powerful microscope" was, in Elisabeth Laing LJ's view, "apposite". The Commission would also have a potentially wide range of evidence from the appellant which would not have been considered by the respondent, either. The appeal would be the appellant's first and only opportunity to influence a decision maker. The Commission was entitled to expect that by the time of the appeal, it would have been given an updated national security assessment which took on board the evidence which the appellant had served for the purposes of the appeal. The Commission was entitled to expect that the respondent "will make available a national security witness who is immersed in the detail of the case, and who is ready to be cross-examined by the OPEN representatives and by the special advocates" (*ibid*). Because of its special expertise, the Commission was in a uniquely good position, within the limits expressed in *Rehman* and *Begum*, to review and rigorously to test the assessment of an appellant's risk to national security (paragraph 172).

135. Beginning at paragraph 173, Elisabeth Laing LJ examined whether the Commission could make findings of fact. She held that the authorities did not prevent the Commission on a s.2B appeal from making findings of fact on the balance of probabilities. There were many examples of cases in which the Commission may or

must find facts. One was on the issue of statelessness, when the Commission would usually hear expert evidence about foreign law. The Commission had a duty to make findings on that evidence and to decide whether the effect of the deprivation order was to make the appellant stateless. In addition, if the Commission considered it could, and that such findings were appropriate, the Commission "may make findings of fact which may be relevant to the assessment of national security, 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". Those findings would be the material to which the Commission must apply the tests set out in *Rehman* and *Begum*. One of the Commission's tasks was to allow the appeal if there was no factual basis for the national security assessment. Thus, for example, if the Commission accepted that on the balance of probabilities the appellant had never been to Syria and that the respondent had mistaken her for someone else, then the Commission's duty would be to make that finding and allow the appeal (paragraph 174).

136. At paragraph 175, Elisabeth Laing LJ held that there was a wide area in which it was for the Commission as a specialist court to judge whether it could and whether it was appropriate for it to make a particular finding of fact. The Commission's task was to see whether the respondent's assessment could withstand its view of the evidence, provided the Commission remembered that the respondent's assessment was frequently not solely or even primarily based on specific findings of fact made on the balance of probabilities but was an evaluation, based on a range of different types of material, many of which were not evidence for the purposes of litigation. Sometimes, there would be a pivotal finding such as that the appellant travelled or stayed somewhere, which the Commission was in a position to contradict. Often, however, such core facts would not be in dispute and the contentious aspects of the assessment would often turn on questions of motivation, which would depend on inferences or on similar issues. The Commission was not a jury deciding whether or not a defendant intended to commit a crime. Nevertheless, in an appropriate case, the Commission might judge that the evidence enabled it to make a finding about a person's motivation. If it could, then the Commission may do so. However, it needed to bear in mind that if it considered such a finding to be possible and appropriate, the use to which it could put such a finding would be limited. The finding was part of the factual picture to which the Commission must then apply the tests in *Rehman* and *Begum*. Since a finding about motivation necessarily involved an assessment based on

inferences from primary facts, the Commission must bear in mind that its finding about motivation could not displace a contrary assessment by the Secretary of State, as long as there was material which would rationally support a contrary assessment (paragraph 175).

137. Elisabeth Laing LJ summarised her findings as follows:

> "178. SIAC can, and in some cases must, make findings of fact based on its own assessment of the evidence on the appeal. As long as it respects the limits of the *Rehman* approach, it may make whatever findings of fact it considers, in its expert judgment, it is able to make and which are appropriate in the appeal it is considering. A judgment SIAC makes about whether to make a finding or not, is unlikely to be susceptible to a challenge on an appeal on a point of law.

138. Beginning at paragraph 181, Elisabeth Laing LJ addressed the issue of whether the Commission erred in law in its approach to the evidence. She concluded that the Commission did not materially err in any respect. The following particular example is, perhaps, instructive, in the context of the present appeal. At paragraph 186, the Commission was recorded as accepting that the appellant's evidence was a strong basis for her case that she was disillusioned with ISIL and would have left its territory if she had been able to do so. The Commission did not make a finding about that, instead relying on elements of the CLOSED evidence which the respondent could properly consider cast doubt on that. Elisabeth Laing LJ considered that the Commission "could have made a finding of fact on this question, if it had thought it appropriate to do so. If and to the extent that it considered that it could not, in principle, make such a finding, it erred in law". Nevertheless, any such error was immaterial because the question was part of the respondent's overall assessment of risk. Thus, "even if SIAC had found that U3 had not freely stayed in Syria, it could not lawfully have overset the Secretary of State's assessment on the basis of such a finding, either on its own, or in combination with others. On the authorities, the question it had to ask, and did ask, was whether there was material which rationally supported the Secretary of State's assessment to the contrary."

139. On the question of U3's motivation, it was submitted that the Commission erred in not accepting certain expert evidence. At paragraph 191, Elisabeth Laing LJ held that even if the Commission had accepted all that expert evidence, the Commission would not have been entitled to find that the respondent's assessment was flawed on any relevant basis. This was because the respondent's assessment did not and could not

depend on an informed analysis of U3's psychological state at any point, or on making findings on the balance of probabilities about what U3 did, or did not, do, or about her motives. It was based, rather, on all the evidence, OPEN and CLOSED, which was relevant to the question whether or not the appellant was aligned to ISIL. Second, it was not, as a matter of law, the Commission's functions to make any such assessment for itself, whether or not that assessment was informed to any extent by the expert evidence. All this meant that the weight that the Commission could give to the expert evidence was necessarily limited. Whatever view the Commission might have formed about whether or not the appellant was aligned with ISIL at the relevant times could not have displaced the assessment of the Secretary of State.

140. In *D5, D6 and D7* (SC/176/177/178/2020), the Commission considered appeals by three appellants, who had been deprived of British citizenship because the respondent assessed that to do so was conducive to the public good, having regard to the involvement of the appellants in serious and organised crime. It was submitted that *Rehman* and *Begum* were national security cases. This contrasted with the present appeals, which involved concerns about whether the appellants had been involved in serious and organised crime. Since that depended on past events rather than future risk, it was submitted that it was necessary for the respondent to establish the facts on which she relied for the decisions made to deprive D5 and D6 of their nationality as well as the decision to exclude D7 from the UK.

141. The Commission disagreed. It held that the principles identified in *Begum* applied in that case. The Commission gave ten reasons, set out at paragraph 67 of its judgment. These included the fact that the decision under challenge in each case was whether deprivation of citizenship (or exclusion in the case of D7) was conducive to the public good; the fact that the allocation of appeals to the Commission made no distinction between cases where the Respondent had taken account of material which should be withheld in the interests of national security; and those cases where the respondent had taken account of material which should be withheld in the public interest; the "conducive" decision was entrusted to the respondent, not the Commission; the principle of democratic accountability applied as much in the context of decisions made to address serious and organised crime as it did to decisions made in the interests of national security; that there was no sharp distinction between national security and cases of serious and organised crime; and that the authorities supported a consistent approach to deprivation appeals.

142. At paragraph 68, the Commission accordingly rejected the submissions that the respondent must prove the facts on the balance of probabilities. What was at issue was a holistic assessment as to whether action would be conducive to the public good. That assessment fell to be reviewed on public law grounds.

143. *B4 v Secretary of State for the Home Department* [2024] EWCA Civ 900 concerned an appeal to the Commission against a deprivation decision taken on the ground that it was conducive to the public good. Relying on the judgment of Simon Brown LJ in *R v Somerset County Council ex parte Fewings* [1995] 1 WLR 1037, the appellant submitted that exculpatory material fell within the first of the three categories identified Simon Brown LJ in *Fewings*, which was to the effect that regard must be had to such material. Alternatively, the appellant submitted that it fell within the scope of the third category, in that it was "obviously material" to the decision in question and thus had to be taken into account.

144. At paragraph 45, Singh LJ, giving the reasoned judgment of the Court, was not persuaded by the appellant's first submission but noted the respondent's acceptance that "any meaningful exculpatory material is obviously material and therefore must be taken into account by the Secretary of State before a lawful decision can be made under s.40(2) of the 1981 Act".

145. The second ground raised by the appellant in *B4* was fairness. Before the Commission, the appellant submitted that the Security Service was under an obligation to provide a "fair and balanced assessment of the position in relation both to national security … and the Article 2/3 risk". Relying on *R (Khatib) v Secretary of State for Justice* [2015] EWHC 606 (Admin), the Commission concluded that, given that the statute did not itemise or indicate the factors relevant to the exercise of the discretion, it was for the decision maker and those briefing him to decide what those were, subject to *Wednesbury*. The Court of Appeal rejected that approach. Singh LJ considered that, in *Begum*, the Supreme Court had "decided for itself what fairness required in the circumstances of that case, including the very weighty consideration of national security" (paragraph 57). One of the functions of the Commission was to decide whether the impugned decision had involved "some procedural impropriety". In paragraph 68, Singh LJ explained that the phrase "procedural impropriety" did not carry any connotation of bad faith or other such behaviour. It simply described

breaches of procedural requirements, in particular the duty to act fairly, or what used to be called the rules of natural justice.

146. At paragraph 60, Singh LJ explained that it was well-established in this area of law that the draconian effect of the scheme for deprivation of citizenship was such that there was no right to make representations in advance of that decision, where it was made on grounds of national security: *Begum v Secretary of State for the Home Department* ("*Begum No. 2*") [2024] HRLR 5. The absence of such a right reinforced the need for there to be such procedural fairness as it is possible to give in the context before the respondent reaches her decision. Singh LJ considered that:

> "It is precisely because the person affected is not entitled to prior notice before the decision, or to make representations before the decision is taken, that it is incumbent on the advisors to the Secretary of State to ensure that their advice is fair and balanced. This must include exculpatory material which would tend to favour the person concerned rather than a decision to deprive them of citizenship."

147. At paragraph 61, Singh LJ held that the question whether there has been procedural fairness is an objective one and it is for the Court, or in the present context, the Commission, to determine for itself.

148. At paragraph 62, Singh LJ was, however, at pains to "emphasise that it does not follow that SIAC can simply substitute its own view as to what should have gone into the advice or report to the Secretary of State". Although the question was an objective one, there was still "a margin of appreciation to be afforded to the authors of the advice to be given to the Secretary of State". This was partly because the input into that advice will have come from organisations with expertise. But it also followed from the approach generally taken by courts when they had to review matters of this kind the mere fact that the question was ultimately an objective one for the Court or the Commission did not mean that "it can simply substitute its own view of what should go into an advisory report. The question is whether, taken in the round, the advice which is given to the Secretary of State is fair and balanced. The fact that a detail here or a comment there might or might not have been left out does not mean that the overall effect of the report is unfair or unbalanced".

149. In this regard, Singh LJ considered that some parallel could be drawn with the approach taken in planning law. In *R (Whitley Parish Council) v North Yorkshire County Council* [2023] EWCA Civ 92, Sir Keith Lindblom SPT confirmed that the

test as to whether a planning committee's decision was vitiated by an error of law is if the effect of the planning officer's report was "significantly to mislead members on a material issue". The report must be read as a whole, with a reasonable degree of benevolence and considering the audience to which it is addressed. This echoed Sir Keith's earlier judgment in *Mansell v Tonbridge & Malling Borough Council* [2017] EWCA Civ 1314, where he put the question as being "whether on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made". It was only if the advice in the report was such as to misdirect members in a material way "so that but for the flawed advice it was given, the committee's decision would or might have been different", that the Court will be able to conclude that the decision itself was rendered unlawful by that advice (paragraph 42(2)).

150. Singh LJ summarised the position as follows:

> "65. Returning to the present context, in my judgment, the correct approach is for SIAC itself to decide whether the advice given to the Secretary of State was fair and balanced but, in performing that task, SIAC must give appropriate respect to the judgments of the experts involved, for reasons both of institutional capacity and democratic accountability. The test is not, however, one of *Wednesbury* unreasonableness."

151. At paragraph 70, Singh LJ observed that the Court of Appeal had held that it was within the Commission's remit to conclude that a deprivation decision will inevitably have been the same even if a public law error had not occurred. It does this by applying *Simplex: Begum No.* 2 [2024] EWCA Civ 152 (paragraph 120).

152. At paragraphs 71 and 72, Singh LJ held that although the Commission did err in its approach in concluding that it was not for the Commission to decide for itself whether the advice given to the respondent was fair and balanced, this error was not material as the outcome would inevitably have been the same. Having considered the ministerial submission and its annexes with care, Singh LJ was satisfied that the advice given to the respondent was, in fact, fair and balanced. It made the salient points that needed to be brought to the decision maker's attention. It did not set out all the underlying intelligence, but that was neither necessary nor desirable. There was a risk that the respondent would be "overwhelmed with material and so be unable to see 'the wood for the trees'. What is required is a summary of relevant matters, which are set out in a fair and balanced way".

THE CASE FOR H12

153. As developed and refined in the appellant's skeleton argument and oral submissions, the grounds of challenge are, in summary, as follows. First, the Respondent took an irrational or unreasonable approach to the decision of the Parole Board. The Respondent departed from the Board's assessments of H12's ongoing criminality and future risk. The deprivation decision was premised centrally on the assessment that H12 had continued to engage in serious criminality since his 2014 conviction and that he was highly likely to continue to engage in serious organised crime. The deprivation decision was justified centrally on the need to disrupt H12's active criminality and by the threat that he posed. This was, in particular, based on the items recovered from H12's house in February 2019 and the NCA's consequent assertion that H12 had "immediately reverted to his previous mode of existence by loan-sharking and preparing for violent retaliation". It was also based on the assessment that H12 was centrally involved in the conspiracy to import firearms and drugs with SU in 2019, with H12 being SU's principal intermediary in the enterprise.

154. However, H12 submits that the Parole Board considered both of these matters carefully and had taken full account of the evidence adduced by the Respondent/NCA. Having done so, the Board found "no evidence" that H12 "was involved in any criminal activity during his five months on licence", other than breaches of the SCPO; found that the Respondent' evidence fell "well short" of being sufficient to implicate H12 in the conspiracy with SU; and found that it had seen no evidence to substantiate the NCA's suspicions that H12 was still involved in serious crime.

155. Although H12 accepts that the Respondent was not bound by the findings of the Board, the Respondent's approach to the Board's assessment was unlawful. The Board deserved a very high level of respect and its decision merited great weight. The composition of the Board was significant. It included a former Director of Public Prosecutions and High Court judge; and a judge of the Old Bailey. This was a panel "which knew criminals, and knew very well how to assess evidence, candour and risk". The Board heard oral evidence from H12 and from professional witnesses including Mr Lawrence. It tested and explored that evidence. When the Respondent made a deprivation decision, she was not in possession of the material that was before the Board. All of these matters were, according to H12, material considerations, which the Respondent failed to address. Furthermore, the Respondent's justification

for departing from the Board's assessments was so inadequate as to be *Wednesbury* unreasonable. The suggestion that SU would have needed a Z intermediary and that because H12 was Z and had been in contact with SU, it was likely to be H12, was inadequate.

156. As for Mr Lawrence's report, an aspect of which the Respondent considered the Board had not addressed, the Board, in fact, had the totality of Mr Lawrence's report before it and subjected it to careful analysis, not least by questioning Mr Lawrence about it. The fact that a specific aspect of his report was not mentioned by the Board in their decision did not mean that the Board overlooked or disregarded it. Ongoing criminality and future risk was central to the Respondent's decision; and the highly experienced Board addressed those matters.

157. H12 also submits that the Respondent breached her *Tameside* duty because when she took her decision she was not in possession of Mr Lawrence's full report or the full dossier that had been before the Parole Board. No reasonable decision maker could have concluded that they could proceed to a decision without this material.

158. H12 submits that the failure of the Ministerial Submission and the NCA recommendation to mention the Osman notices received by H12 amounts to a failure on the part of the Respondent to have regard to relevant matters. It is said that the Osman notices were crucial and obviously material when drawing inferences regarding the items found at H12's property. Although, viewed in a vacuum, the fact that a person was driving an armoured car and was in possession of body armour and a machete would be extremely concerning, given the recent credible and extremely serious threats against H12 and his family, those circumstances may take on a very different complexion. Accordingly, rational and reasonable decision making would have involved consideration of the Osman notices. They were meaningful exculpatory material and obviously material to the decision.

159. The Respondent also failed to take into account the possibility that the items recovered at H12's property were residual of his previous criminality, given that the move to Town V had taken place when H12 was in custody.

160. H12 submits that the Respondent unlawfully reached her decision in respect of drugs and firearms involvement on the part of H12, without any evidential basis. There was no evidence in OPEN to support the conclusions that H12 was directly involved in

drug dealing or heroin trafficking. Apart from what are described as "recordings of unreliable conversations involving H12", there is said to be no evidence in OPEN to support the conclusion that H12 was involved in firearms offences. The Respondent did not take this "evidential gap" into account.

161. H12 contends that the Respondent reached conclusions on the structure of the X OCG without evidence. There was no evidence in OPEN to support the assessment that there was a single X OCG which changed hands between the brothers over time and that H12 was operating under BX or SX. H12's evidence was that the brothers operated separately and H12 worked only for NX, whose criminal operations were smaller scale and less serious than those of his brothers. Accordingly, H12's level of involvement in serious organised crime would be affected by the answer to the question of whether he had been operating on behalf of a single X OCG since the early 2000s, or only for NX.

162. Under the heading "Additional public law grounds", which H12 sought permission to pursue and which the Respondent did not oppose, H12 submits that the Ministerial Submission and the NCA's recommendation were not "fair and balanced", as required by the case of *B4*. The Submission did not mention the Parole Board's decision at all; prominently highlighted the items found in H12's property without mentioning the Board's findings in relation to them or the Osman notices; and failed to identify the absence of clear and direct evidence of H12's involvement in drug offending or the possession of firearms. The NCA's assessment dealt with the Board's decision in an inadequate and imbalanced way. It did not identify the standing, experience and expertise of the panel comprising the Board; that the Board had heard oral evidence from H12 and professional witnesses; that the NCA had not had sight of the full dossier before the Board and the strongly expressed conclusions of the Board regarding the items found in February 2019; the alleged conspiracy with SU and the NCA's suspicion that H12 continued to be involved in serious crime. When the NCA assessment addressed the Board's decision, it gave reasons only pointing in one direction. This was not balanced.

163. As regards the items found in February 2019, H12 says that the NCA Recommendation dealt inadequately with the findings on this matter by the Parole Board; did not mention the Osman notices; did not identify the seized electronic devices that had been examined; did not identify that no criminal charges had been

brought on the basis of any of the items found; did not mention H12's explanation for the presence of the machete; and suggested there had been three breaches of the SCPO rather than two. The NCA Recommendation also gave inadequate prominence to the assertion of H12 that he had severed all links with NX and did not identify any surveillance evidence which strongly supported that assertion. The NCA Recommendation did not identify that there was no clear and direct evidence of H12 being involved in drug offending or the possession of firearms; or that there was a single X OCG.

164. All of this was significant, given that H12 was not going to have any opportunity to have input into the Respondent's decision to deprive him of British citizenship and would have no opportunity to draw matters that favoured him to her attention.

165. H12 submits that XY's second OPEN witness statement cannot cure the procedural unfairness as the statement was not before the Respondent at the time of the decision and has not been placed before her for review. The NCA Recommendation has not been revised or updated. In any event, the second witness statement of XY is not fair and balanced. On the contrary, it overwhelmingly highlights and identifies matter that supports the NCA's case. The statement does not mention or address the Osman notices.

166. Additionally, H12 submits that his case should have been referred back to the Respondent together with the amended NCA Recommendation and that the failure to do this was unlawful.

167. Finally, H12 submits that, in taking the decision to deprive, the Respondent failed to address two separate questions inherent in the legislation. These are (1) whether the condition precedent for deprivation is met; namely whether deprivation would be conducive to the public good; and (2) if so, whether the discretionary power to deprive should be exercised. In this regard, H12 relies upon the decision of the Upper Tribunal in *Kolicaj (Deprivation): Procedure and Discretion (Albania)* [2023] UKUT 294 (IAC). At no point did the Respondent separately consider the exercise of her discretion under s.40(2).

168. In his oral submissions, Mr Chirico KC submitted that the evidence of XY and arguments put forward in the Respondent's skeleton argument constituted *ex post facto* reasoning of the kind described by Underhill LJ at paragraph 30 of *Caroopen v*

Secretary of State for the Home Department & Anr [2017] 1 WLR 2339. That case involved supplementary letters issued in the course of immigration judicial review proceedings. At paragraph 30, Underhill LJ held that such a supplementary letter might be sent in order to supply reasons, or fuller reasons, from the original decision in response to a criticism of the adequacy of the reasons given with that decision. In such a situation, Underhill LJ held that the authorities expressed caution about permitting a decision maker to cure defects in his original decision in this way. Even in a case where there was no explicit statutory duty to give reasons, the courts should approach attempts to rely on subsequently-provided reasons with caution. That was particularly so in the case of reasons put forward after the commencement of proceedings and where important human rights were concerned. For his part, Beatson LJ held, in paragraph 100, that in cases where the Secretary of State wished to rely on a supplementary letter as a defence to a challenge to a decision taken in an earlier letter, the court should scrutinise carefully whether the later letter was simply supplementing the reasons for an earlier decision or whether it was in fact and in substance an entirely new decision. At paragraph 101, he held that the court should not adjudicate on the contents of the supplementary letter where, because of the time it was served, the claimant can legitimately assert that it is difficult for him or her to deal with it and that there is a real risk of unfairness if the court does so. This was, Beatson LJ acknowledged, an intensively fact-sensitive matter that depended on the circumstances of the particular case.

DISCUSSION

169. It is necessary, first, to address the nature, if any, of the Commission's fact finding in the present case. Mr Chirico KC's submission on this issue could not be clearer. On behalf of H12, he contends that, as set out in what might be described as the perfected grounds of appeal, the Respondent's deprivation decision is unlawful in public law terms. The Commission does not need to make any findings of fact in order to arrive at that conclusion. Although Mr Chirico did not suggest that the Commission should decline to make findings of fact, or that it would err in law if it did so, any such findings would merely bite on air. Accordingly, Mr Chirico argued that if the Respondent wished the Commission to make findings of fact, she had to explain why.

170. The Commission does not accept these submissions. They are indicative of the erroneous approach to a s.2B appeal identified by Elisabeth Laing LJ in *U3* at

paragraphs 169 and 170. The s.2B appeal is not an application for judicial review, for the reasons she articulated. The fact that *Rehman* and *Begum* categorise the nature of the challenge to the impugned decision in public law terms does not mean the Commission is precluded from making findings of fact, which may either serve to show the existence of a public law error; or that there is no such error. This emerges plainly from paragraph 71 of *Begum* (*U3* paragraph 67) and paragraphs 171 and 173 to 175 of *U3*. The logical conclusion of the submission advanced on behalf of H12 would find the Commission in the situation rejected by the Commission in *U3*, in which there would be no opportunity for the Commission to engage with the evidence presented by the appellant in the appeal proceedings. It would also affect the Commission's ability to make findings on material disclosed during the exculpatory review provided by the Special Immigration Appeals Commission (Procedure) Rules 2003.

171. As can be seen from paragraphs 88 to 98 of *U3*, the Commission in that case held that, deploying its expertise or "powerful microscope", the Commission might see a flaw in the Respondent's decision which could not be detected in ordinary judicial review proceedings. Conversely, there might also be cases in which such close scrutiny could show that what seemed at first sight to be a flaw was not, on closer inspection, a material flaw. The Commission might identify something that the Respondent did not consider but which she should have taken into account; and this might be relevant to a *Wednesbury* review or a *Tameside* review (paragraph 94).

172. The Commission does not accept Mr Chirico KC's submission in reply that the approach of the Commission and the Court of Appeal in *U3* can be explained by reference to the fact that, when dealing with the human rights elements of a s.2B appeal, the Commission is reaching its own conclusion on the compatibility of the decision with the ECHR, based on all the evidence before the Commission. On the contrary, it is plain that both the Commission and the Court of Appeal in *U3* (and the Supreme Court in *Begum*) were addressing also the appeal against the decision under s.40(2) that deprivation was "conducive to the public good".

173. In *U3*, Elisabeth Laing LJ made reference to findings of fact on the balance of probabilities. As she explained, there may be certain "hard-edged" matters, such as statelessness, where a finding of fact applying that standard will directly inform the lawfulness or otherwise of the impugned decision. By contrast, where the

Commission is concerned with challenges to national security assessments (or the equivalent in cases of serious and organised crime, such as the present), the Commission's analysis of the evidence will need to be undertaken with reference to what Elisabeth Laing LJ said at paragraph 47 of *U3*, in considering the judgment of Lord Hoffmann in *Rehman*. Although the question is always whether the tribunal thinks it more probable than not that something occurred (or did not), the lawfulness of an evaluative assessment cannot be determined by taking each element *seriatim* and deciding whether it has been established as some standard of proof. Rather, it is a question of evaluation or judgment taking into account the importance of the security interest of the state and the serious consequences to the individual concerned. How this operates in practice can be seen from paragraph 191 of the judgment of the Commission in *U3*. There, the Commission examined the evidence that could suggest that U3 was aligned with ISIL. As regards social media posts from U3's Skype and Twitter accounts, the Commission reminded itself that it was not its function to decide what significance to give to these posts. What mattered was whether the Respondent could properly take into account the social media posts, together with the other evidence in the case, as suggesting an ideological alignment to ISIL. The Commission considered that she could. What weight to give them was part of the overall assessment for the respondent. Repeating the point at paragraph 192, the Commission held that the question was not to what extent the Commission considered U3 was ideologically aligned with ISIL when she left Turkey but whether it was open to the Respondent to assess that U3 was so aligned.

174. Mr Chirico KC submitted that XY's part in the proceedings before the Commission was unusual. XY had not authored the NCA Recommendation which went before the respondent, nor had XY had a hand in the Ministerial Submission. XY was, nevertheless, being put forward by the Respondent to justify the Respondent's decision. In so doing, XY's evidence was being deployed to provide what, in many respects, was *ex post facto* reasoning of the kind described by Underhill LJ in *Caroopen*, which required to be treated with suspicion. Furthermore, XY's evidence was, on its own terms, not fair and balanced.

175. The Commission does not consider that this categorisation of XY's evidence is correct. XY's role in the present proceedings is entirely unexceptionable. XY is in a directly analogous position to the national security witness described by Elisabeth Laing LJ at paragraph 171 of *U3*. XY's witness statements correspond to the updated

national security statement described by Elisabeth Laing LJ in that paragraph; "which takes on board the evidence which the appellant has served for the purposes of the appeal". Although the Commission acknowledges the somewhat belated nature of the third witness statement of XY, the witness statements are appropriate responses to the evidence emerging in the appeal proceedings, not least from H12 himself. Elisabeth Laing LJ went on to say that the Commission "is also entitled to expect that the Secretary of State will make available a national security witness who is immersed in the detail of the case, and who is ready to be cross-examined by the OPEN representatives and by the Special Advocates". Again, XY is such a witness, in the context of serious organised crime as opposed to national security.

176. We do not accept that the judgment in *D5, D6 and D7* is wrong, in declining to draw a distinction between national security and serious organised crime, which would render the cases on national security appeals inapposite to appeals involving such crime. We respectfully find the reasoning in that judgment to be sound.

177. XY was cross-examined. The Commission found XY to be a witness of quality. A significant part of XY's career has been spent investigating and combating serious organised crime involving drug trafficking, money laundering, weapons offences and "multi-faceted organised crime groups". We accept that he has detailed knowledge of the X OCG. In the light of that background, we found that XY was aware of the need to guard against jumping to conclusions in respect of H12. XY said in terms that his aim was not to win a "competition". XY was closely tested under cross-examination but maintained that, in his considered view, H12 had not ceased his serious criminal activities at the behest of his wife and having become ashamed of how he had acted in the past.

178. Once the true position of XY and his evidence is understood, the submission at paragraph 121 of the appellant's skeleton argument loses traction. There, it is contended that since the appeal is said to have generated evidence that undermines and materially alters the NCA's assessment, H12's case should have been referred back to the Respondent. The failure to do so was accordingly said to be unlawful. This proposition rests upon what the Commission considers to be a misunderstanding of paragraph 38 of the Commission's judgment in *U3*. There, the Commission said that "If the appeal generates evidence which undermines or materially alters the original national security assessment", officials would be obliged to bring that evidence to the

attention of SSHD. 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. If the updated assessment is shown to be flawed in a public law sense, the appeal will be allowed". The Commission then contrasted this with the 'more austere procedure applicable in judicial review proceedings, where a "rolling approach" to challenges to successive or updated decisions has been deprecated …'

179. In paragraph 38, the Commission was not suggesting that a failure to refer back to the Respondent constituted a discrete form of public law error, justifying allowing the appeal. Nor was the Commission suggesting that evidence generated in the course of the appeal, which necessitated a consideration of whether the national security assessment could be maintained, meant that the evidence in question had to be drawn to the attention of the Respondent. That this cannot be so is made pellucid by the final words of the second sentence, just quoted "even though the updated assessment will not necessarily have been placed before the Minister".

180. The point can be explained as follows. An assessment is made by the Respondent on the basis of the evidence informing the submissions to her. If, in the course of the s.2B appeal other evidence emerges relevant to the position as it was at the date of decision, those representing the Respondent before the Commission can either (a) take the view that the new evidence should be placed before the Respondent; or (b) maintain the national security assessment in the light of the new evidence, without putting that evidence before the Respondent. In the latter case, although the conclusion of the assessment remains the same (i.e., that the appellant should be deprived of citizenship because that is conducive to the public good), the assessment will have been "updated" in the sense that it is now based on all the available evidence. But if that updated assessment is flawed, for example because the Commission takes the view that having regard to the totality of the evidence now available, no reasonable Secretary of State could have concluded that it would be conducive to the public good to deprive the appellant of citizenship, then the appeal will be allowed.

181. In reality, therefore, there can be no separate head of challenge on the basis that those representing the Respondent before the Commission have not referred the matter back to her. If H12 were to succeed in showing a public law error, then his appeal would be

allowed and the Respondent would have to consider whether to make a fresh decision to deprive, or not. That is the issue to which we shall turn shortly.

182. Before doing so, however, it is necessary to address H12's reliance on *Caroopen* and the submission that the Respondent should not be allowed in this appeal to rely upon what Mr Chirico KC categorised as *ex post facto* reasoning. Although H12 accepts that the Commission has what Mr Chirico categorises as a higher level of acceptance of rolling review of material, he submits the Respondent nevertheless cannot adduce at this stage reasons for her deprivation decision, which were not in her mind when she took it.

183. The Commission does not accept this submission. It proceeds from what we consider to be an erroneous view of the role of XY in the present proceedings. Once that role is properly understood, XY's evidence can be seen as a justification, in the light of all the material now available, for maintaining the assessment that the danger posed by H12 is such that deprivation of his British citizenship is conducive to the public good. H12 is entitled to invite the Commission to examine carefully whether the maintaining of the assessment is defensible in public law terms, in the light of any additional evidence. That is particularly so where the additional evidence is very different from that known at the time of the Respondent's decision. That, however, is the extent of any reliance that H12 can place upon *Caroopen.*

184. We turn to the ground of challenge which alleges an irrational/unreasonable approach to the decision of the Parole Board.

185. XY was closely cross-examined about this issue. It was put to him that H12 had told the Board that he had received the threats resulting in the Osman letters as a result of breaking off ties with the Xs. XY replied, correctly, that paragraph 2.5 of the Board's decision does not record H12 as suggesting that the threats were because of his breaking off that association. In that paragraph, H12 is recorded as having said that "he did not think he would have had any threats if he had still been associated with them". The Commission will return to this in the context of the challenge to the Respondent's decision not being "fair and balanced". For the moment, however, it is sufficient to emphasise the point made by XY; and that the Board regarded the Osman letters as indicating that H12 "had been involved in serious crime whist at liberty" (paragraph 2.4).

186. XY did not accept that H12 and his wife had decided to acquire the armour-plated car as a result of the threats. XY noted that that was the reason given by H12 to the Parole Board, but XY did not accept the truth of that explanation.

187. The Respondent submitted that the decision of the Parole Board at the time it was made was governed by the judgment of the Court of Appeal in *R (Pearce) v Parole Board & Anr* where, at paragraph 47, the Court said that "An assessment of risk can only be made upon undisputed or established facts". The judgment of the Court of Appeal in *Pearce* was reversed by the Supreme Court, which held, at paragraph 65(4), that "In the assessment of risk of future behaviour – an inherently imprecise exercise – it is not necessary to consider each allegation of past behaviour individually and decide whether it is established on the balance of probabilities".

188. The Commission agrees with Mr Blundell KC that there are passages in the Parole Board report which strongly suggest that the Board was not conducting itself compatibly with the guidance that was held to be lawful by the Supreme Court. At paragraph 2.24, discussing H12's involvement with SU, the Board stated that despite "the mass of evidence detailed in [the police report] the Panel has seen no evidence to justify the Panel in concluding that [H12] was involved in any way in the conspiracy". At paragraph 2.26, the Board said this:

> "2.26 There is naturally room for suspicion that [H12] had some connection with the conspiracy but the Panel is a judicial tribunal required to act on evidence and not on suspicion. The information summarised in the police report falls well short of being evidence sufficient to implicate [H12] in the conspiracy."

189. Mr Chirico KC submitted that paragraph 2.26 is a clear instance of the Board not applying a balance of probabilities test. It is, however, in our view, difficult to understand what the last sentence of that paragraph was intended to convey, if it were not suggesting that the evidence failed to show that it was more likely than not that H12 was part of the conspiracy involving SU.

190. In the same vein, when discussing the issue of H12 having severed links with the Xs and no longer being involved in serious crime, the last sentence of paragraph 3.18 reads "Whatever suspicions there may be, there is no real evidence to contradict [H12's] evidence that he has severed his links with the [Xs] and is no longer involved in serious crime". It is difficult to see what the reference to "real evidence" might be, other than evidence that would meet the balance of probabilities test.

191. But such an exegesis of the Board's decision is, in any event, unnecessary. On any view, the Respondent's task in reaching the decision to deprive H12 of citizenship was wholly different from that of the Board. Rather than the issue being the binary question of whether there is evidence as opposed to suspicion, the Respondent has to reach an evaluative assessment of future risk. Whilst that evaluation will be susceptible to challenge if, upon analysis, it rests on mere suspicion or speculation, it is permissible to reach an evaluation without each and every fact being proved on the balance of probabilities. That is the point made by Lord Hoffmann in *Rehman*, reference above.

192. The Commission agrees with Mr Blundell KC that the tasks facing the Parole Board and the Respondent are materially different in other important respects. The Respondent is concerned with whether deprivation is conducive to the public good. The risk to the public, with which the Respondent is concerned in a case of serious and/or organised crime has no temporal limit. In sharp contrast, s.256(1)(a) of the Criminal Justice Act 2023 is concerned with whether a prisoner's risk is manageable in the community during the period up to the end of their custodial sentence. The fact that the Board was (as to be expected) aware of this important point is evident from paragraph 3.26. Describing one of the witnesses, Ms Evans, as speculating on the possibility that H12 would return to a criminal lifestyle and/or to associations with the Xs, the Board concluded that "that possibility cannot, of course, be excluded altogether, but in the Panel's view it is highly unlikely that it will happen during the relatively short period which the Panel has to consider, during which he will be residing at Approved Premises under close supervision". Even more plainly, at paragraph 3.27, the Board described its task as being to assess H12's "risk of serious harm to the public during the period between now and 26 December 2022 when his sentence will expire …"

193. The Commission accordingly rejects H12's contention that the Respondent had to justify "departing from the Parole Board assessments". In no sense did the Board's findings represent a "starting point" for the Respondent. The position is far removed from *Devaseelen (Secretary of State for the Home Department v D) (Tamil)* [2002] UKIAT 00702*. In oral submissions, Mr Chirico KC sought to re-formulate H12's submission as being that the Parole Board's findings were staging points along the route to the Respondent's decision on deprivation. We do not consider that this reformulation assists H12. In so far as it seeks to go beyond the uncontested fact that

the Board's decision was one of the material factors that the Respondent had to consider in order to reach her decision, it is mistaken, for the reasons already given.

194. There is no suggestion that the Respondent failed to have regard to the decision of the Board. The NCA Recommendation expressly referenced the Board's decision. The challenge under this ground has, therefore, to be that the Respondent, by accepting the NCA Recommendation, committed some public law error in not following the Board. There is, in the Commission's view, no such error. H12 seeks to emphasise the experience of the Panel. This is not, however, a factor that required the Respondent to apply some form of extra layer of anxious scrutiny to her own assessment of risk, based as it was on a different legal regime. Nor was the composition of the Panel a reason to afford its findings some additional degree of deference.

195. H12 emphasises that the Parole Board heard oral evidence from H12 and a number of professional witnesses and that the Board tested and explored the evidence through questioning. This gave the board a "significant advantage over a paper decision-maker". This submission loses its force once one appreciates the different tasks being undertaken respectively by the Board and the Respondent. It also ignores the relevant expertise of the NCA and, in particular, that of XY with regard to serious organised crime involving persons in London having a connection with Country Z.

196. The Commission has referred earlier to what the Board had to say about the alleged conspiracy between H12 and SU. The Board found that the evidence presented to it on this issue fell well short of being sufficient to implicate H12 in the conspiracy with SU. H12 contends that there were other Z nationals known to SU, who could have assisted him in his criminal enterprise. Paragraph 32 of the NCA Recommendation, however, goes beyond the mere fact that H12 was a Z national. The NCA assessed that, as someone born in Guyana and raised in the UK, SU could not have brokered the deal concerning firearms importation with an organised crime gang operating in or with links to Country Z "without a [Z]-speaking intermediary who was trusted by both sides". The last six words of that sentence are important. They are directly relevant to the fact that H12 had a background in serious organised crime. SU and H12 had, furthermore, been assessed to be closely associated since 2010. SU travelled to Country Z "within a couple of weeks of his release". All of this was assessed to "strongly point" to H12 being SU's "principal intermediary" in the enterprise.

197. None of this discloses any public law error. We remind ourselves that this passage is concerned with an assessment, undertaken by those with the appropriate expertise. The factors identified in the NCA Recommendation were plainly such as to go beyond mere speculation or suspicion.

198. Paragraph 33 of the NCA Recommendation concerns the report of the senior forensic psychologist, Mr Lawrence. Paragraph 33 observed that the Board had not addressed the indication highlighted in Mr Lawrence's report that H12 still regarded NV, from whom H12 had been convicted of demanding money with menaces, as still being in debt to H12. Mr Lawrence noted how this apparent intention to pursue the illegal debt appeared to be at odds with H12's professed break with his previous criminal conduct. That cast doubt on H12's commitment to breaking ties with previous associates and "changing", as had been allegedly demanded by H12's wife.

199. H12 contends that there is nothing to suggest that the Board was not, in fact, aware of this aspect of Mr Lawrence's report. The Board did not need to refer to each and every element of the evidence before it. The Board reached the decision it did concerning the nature of the connection between H12 and SU by reference to the complete report of Mr Lawrence, which the Respondent did not see.

200. This submission is, on analysis, an aspect of the broader ground advanced by H12, which the Commission has rejected. The NCA Recommendation did not have to identify that the Board had committed some form of legal error with regard to Mr Lawrence's evidence, before the Recommendation could take a different view of that evidence. It was sufficient that, in the NCA's assessment, what H12 had said to Mr Lawrence about his intentions regarding NV, was relevant to the important question of whether H12 had, as he claimed, renounced any further serious criminal activity. It was information that fell to be considered alongside the evidence obtained from surveillance operations, addressed in detail in the NCA Recommendation.

201. H12 submits that the Respondent failed in her *Tameside* duty in not calling for Mr Lawrence's full report or the full dossier of material that had been before the Parole Board. But since Mr Lawrence's report was not supportive of H12's being released on parole, there can be no irrationality in the NCA Recommendation being reached without reference to that report. As for whether the NCA should have examined the full dossier that was before the Parole Board, Mr Chirico KC did not seek to draw

attention to any element of that dossier as undermining the NCA Recommendation and the Respondent's decision. H12's submission regarding the full dossier therefore amounts to the proposition that, because the Board had considered a great deal of material, its conclusions demanded particular respect. But this collapses back into the submission which the Commission has earlier rejected; that the statutory tasks facing the Board and the Respondent were so similar as to require the Respondent to treat the Board's findings as a starting point or staging point.

202. The Commission now addresses the ground which contends that the failure of the Respondent (and, relatedly, the NCA Recommendation) to mention the Osman notices means the Respondent committed the public law error of failing to have regard to relevant matters. As has been noted, H12 submits that the Osman notices were crucial and obviously material. They provided an explanation for the acquisition of an armoured vehicle and for the presence at the family home of body armour. The Osman notices were meaningful exculpatory material.

203. The notice from Hertfordshire Constabulary, dated 16 March 2017, said that threats had been made that upon H12's release from prison "you are at risk of an attempt on your life. We are unaware of any specifics of who, where or when this threat will be carried out". On 9 February 2018, Thames Valley Police said "You are aware from a previous notice to personal safety, served upon you by the Metropolitan Police that a threat exists to your personal safety from [JB] and his associates. Although we are not aware of any new intelligence re this threat, we would remind you that this threat was directed towards you upon your release from prison. We therefore feel it is proportionate that it is time to repeat this warning to you". On 16 February 2018, a notice from the Metropolitan Police told H12 that "Police hold intelligence that persons maybe(sic) seeking to cause you serious harm because of association with another". On 16 February 2018, the Metropolitan Police wrote to say that police were in receipt of intelligence that occupants of what was H12's family address were at risk of serious harm. He was advised that the best resolution to avoid harm would be to rehouse the occupants away from their current address.

204. XY was cross-examined about the Osman letters. XY said that he could speak in more detail on this issue in CLOSED. However, XY said that the Osman letters were not regarded as being exculpatory. XY's reference in paragraph 16 of his first witness statement to exculpatory material was a reference to what was identified by

independent counsel. XY agreed that the Osman letters were referred to for the first time by him in his third witness statement, which contained the form of words provided by the Metropolitan Police that "the threats to life received by H12 in 2017 and 2018 arose as a result of the perception (by criminals) that H12 continued to be involved in serious and organised crime. There is no indication that this was as a result of cutting ties with the [X OCG]". XY said he was unable to state in OPEN why the form of words was produced or on what evidence they were based. XY could not say in OPEN why those threats were not as a result of H12 cutting ties with the X OCG.

205. XY was aware that JB was convicted of attempted murder in 2003 and that he had worked for BX.

206. Asked if XY decided not to refer to the Osman notices because it was not evidence of threats emanating from the X OCG, XY said he determined that the threat to H12's life arose from H12's engagement in criminality and not as a result of breaking with the X OCG.

207. In submissions, Mr Chirico KC said that it was impermissible to conclude that because material was not considered to be exculpatory, it did not need to be put before the respondent. Mr Chirico fairly acknowledged that, in so submitting, he was necessarily working exclusively by reference to the OPEN material. He reiterated the need for anxious scrutiny. As it was, the Respondent would have been wholly unaware, when she made the impugned decision, that H12 had received these warnings.

208. The Commission will need to return to the Osman letters in the context of the later ground of challenge, which contends that the Recommendation and Ministerial Submission were not fair and balanced. There is a degree of overlap between that ground and the present one.

209. The Osman letters would be a material consideration if they had a bearing on whether H12 had renounced his previous serious criminality, so as to present no future risk. At the time the respondent took her decision, there was no indication that H12 regarded the threats giving rise to the Osman letters as having come from the X Group. It was only in his first witness statement that H12 raised this point. If true, it would be significant because it would lend support to H12's assertion to have renounced criminality. The way in which H12 put the matter to the Parole Board was very

different. As has been noted, in paragraph 2.5, he told the Board he did not think he would have had any threats if he had still been associating with the Xs; not that it was they who were threatening him because of his change of heart. There is more to be said about this matter in CLOSED.

210. The Commission notes that Rule 2 of the SIAC Rules defines "exculpatory material" as "material which adversely affects the Secretary of State's case or supports the appellant's case". As matters stood when the NCA recommendations were prepared, by reference to XY's draft witness statement, it could not be said that the threats that were the subject of the Osman letters were capable of supporting the case that H12 was a reformed character. The threats were, as the Parole Board noted in paragraph 2.4 of its decision, indicative that H12 had "been involved in serious crime whilst at liberty".

211. In reply, Mr Chirico KC submitted that even if -- which we find must be the position having regard to the Metropolitan Police "form of words" -- JB fell to be regarded as a criminal acting in his own right, rather than at the behest of the X OCG, this was still capable of being exculpatory. It was capable of explaining the reason for the armoured vehicle and body armour. The failure to draw the respondent's attention to the Osman letters was, accordingly, still fatal to her decision.

212. The fact remains, however, that the true reason for the threats provides no discrete support for H12's claim to have ceased serious criminality. Although it is compatible with (and modestly supportive of) H12's severing of ties with the X Group, for the reasons that will be given later, it is not the respondent's case that deprivation is conducive to the public good because H12 continues as a senior member of that group. At best, the Osman letters constitute a possible reason why the armoured vehicle was acquired and why the body armour and machetes were found at the family home. This consideration, however, cannot in the Commission's view cause the Osman letters to be regarded as "exculpatory material" or otherwise something that had to be addressed in the NCA Recommendation. On the key issue of whether H12 had genuinely renounced his life of serious criminality, the acquisition of the armoured vehicle and presence in the house of the aforementioned items have no material bearing. They are incapable of affecting the assessment that the relationship between H12 and SU strongly pointed to them being involved in a criminal conspiracy. Likewise, the letters had no bearing on the assessment that, after his release from prison, H12 intended to

pursue NV, as part of H12's former loan-sharking activities, which, as XY's evidence indicates, had not been wholly driven by H12's association with the X OCG.

213. The acquisition of the armoured vehicle and presence of body armour also have to be seen in light of paragraph 18 of the NCA Recommendation. This shows that body armour and an armoured vehicle were utilised by H12 in the course of his criminal enterprises, at least between 2011 and 2014. Engaging in violent criminal behaviour carries the obvious risk of retaliation.

214. The Commission received a good deal of evidence and submissions about the items discovered at the house, including notes referencing loans. Paragraph 20 of the NCA Recommendation refers to these matters in historic terms. XY accepted that the reference in paragraph 20 to three breaches of the SCPO in H12's use of unregistered vehicles and an unregistered phone was incorrect. There were only two breaches, relating to vehicles. No breach was proved in respect of an unregistered phone. Although XY said that weight had been placed on paragraph 20, in reaching the assessment, it was only one paragraph among many. That appears to the Commission to be correct, given the structure of the Recommendation. The key passages begin at paragraph 30 under the heading "NCA's assessment of risk". Apart from what we have said above about the armoured vehicle, body armour and machete, the Commission does not consider that anything of material significance turns on whether particular items were, or were not, left after an earlier search, with the result that they were moved to the Town V premises along with the rest of the family's possessions.

215. We deal next with the structure of the X OCG. This is because the Commission's conclusions on that issue have a bearing on the ground which asserts that there was no evidence to support the assessment that H12 was involved in drug dealing and firearms offences. H12 submits there was no evidence in OPEN to support the respondent's case that there is a single X OCG, which changed hands between the X Siblings over time; and that H12 was operating at a senior level of that X OCG. H12's evidence was that the X Siblings operated separately and H12 worked only for NX. NX's criminal operations were said to be smaller scale and less serious than those of his brothers.

216. The Commission does not accept H12's evidence that there were separate OCGs, each run by a Sibling. XY was cross-examined about the matter and did not resile from his

view, summarised at paragraph 9 of the NCA Recommendation, that there was a single X OCG. XY has, as has been earlier noted, considerable experience in this regard and we give his evidence weight. XY's evidence is supported by a matter contained in the Confidential Annex to this judgment. We also note that XY was not cross-examined on the issue of whether there were one or more OCGs.

217. There is no indication that, before the Parole Board, H12 sought to make any distinction between NX and the other X Siblings, in terms of NX operating a self-contained OCG. On the contrary, in paragraph 1.7 of the decision, the Board records H12 as having said on several occasions in the past that he was the No. 2 "in the [X] organisation". H12 disputed having said that this was his position in the hierarchy; but it does not appear that he questioned the reference to the X organisation. On the contrary, at paragraph 2.4, H12 is recorded as having told the panel that "by the time he received these letters he had broken off any association with the [Xs]": not, specifically, NX.

218. Seen in this light, H12's contentions in his witness statement have a strong self-serving character.

219. Mr Chirico KC sought to undermine the weight placed by XY on what TN had said at the latter's criminal trial. TN exchanged fire with someone he thought was "one of the [X] gang". TN was asked "As someone who lived in [area of London] as a member of the Z community, how do you feel about the Z gang, the [X] gang?" TN answered "It was a really dangerous gang". He said that they kill people, blackmail and extort shop owners and kidnap people. Asked who he understood was in charge of the X gang, TN answered "[NX]".

220. Even having regard to the possibility that, in saying what he did, TN might have wished to maximise the significance of the Xs, TN's evidence falls to be given weight. It accords with the evidence mentioned in the Confidential Annex to this judgment.

221. TN's account also corresponds with the *BBC News* report filed by H12. Details are given in the Confidential Annex to this judgment.

222. Reference to H12's evidence on this issue being self-serving brings the Commission to the issue of H12's credibility. We have already explained why we reject H12's submission that the Commission should not make findings of fact or, if it does, that

these are irrelevant to determining the lawfulness of the respondent's impugned decision. We have given full allowance for the fact that H12 has been unable to give oral evidence. The Commission has nevertheless concluded that H12 is not a witness of truth. Quite apart from what has just been said, H12's attempt to parse the X OCG is belied by the surveillance evidence described at paragraph 10 of the NCA Recommendation, where H12 referred repeatedly in conversations to being part of "a group, sometimes specifically as the [X] Group or family". On one occasion he referred to them as a "Mafia group". At paragraph 11, conversations between NX and H12 "outlined how [NX] wanted the OCG to be structured so that he did not always have to provide direct instructions, thus effectively distancing himself ..." Although in another conversation concerning the potential ramifications of former OCG head IX returning, H12 asserted that he would support NX in any power struggle, the conversion would be nonsensical if, as H12 now asserts, NX was running a separate OCG.

223. On other matters, H12 can be seen not to have told the truth. In the recall and review report on H12 of 25 February 2019, H12 is recorded as stating that JP was beaten up at H12's instigation, because she owed money to someone H12 knew. However, the sentencing remarks in respect of H12 make it plain that JP was targeted as "a punishment beating to satisfy the hurt feelings of a rejected partner". The beating was, therefore, not about a debt.

224. H12 told those preparing his OASys report that he had been involved with serious crime for five years; whereas his own witness statement in these proceedings admits to being involved for at least 12 years.

225. Regarding the breaches of the SCPO, H12's first witness statement says that he forgot to inform the authorities about the cars without realising how serious the consequences would be. However, the sentencing judge for these offences found them to be "plainly deliberate breaches, however complex the order may appear to be, you plainly knew that it was a condition of the Serious Crime Prevention Order that the authorities knew the vehicles that you were driving ..."

226. The problems we have with H12's credibility extend to his belated attempt to minimise the significance of his position in the X OCG. The reality is, we find, that H12's position was one of real power and authority.

227. We can now return to the ground concerning drugs. Paragraph 34 of the NCA Recommendation states that the activities H12 is believed to have engaged in have been at the highest levels of harm "likely to include extortion, violence, drug dealing and firearms offences". That is mirrored in paragraph 10 of the Ministerial Submission. This assesses H12 as having had a controlling role within the OCG. That OCG was involved in serious organised crime, notorious within the Z community in London as being responsible for "heroin trafficking, extortion and associated violence".

228. H12 asserts that there was no evidence to support the conclusions that he "was directly involved in drug dealing or heroin trafficking". The word "direct", however, has no parallel in the NCA Recommendation or the Ministerial Submission. The complaint is, therefore, in the nature of a straw man. Once it can be seen that the X OCG was a single entity, and that one of its main activities (no doubt also a major generator of finance) was drug trafficking, there is nothing irrational or otherwise unlawful in public law terms about the passages just cited.

229. Turning to firearms, H12 categorises the probe recordings as unreliable. His witness evidence is that he was saying inflated and fanciful things to increase his standing, inspire fear and project a certain image of himself. There is no direct evidence in OPEN that H12 had ever been in possession of a gun or used one. It is said that the respondent did not take this evidential gap into account.

230. XY maintains the assessment on the issue of firearms, which is found in the NCA Recommendation and the Ministerial Submission. The Commission accepts XY's evidence that this probe material demonstrates an understanding of firearms, familiarity with them and readiness to use them, if the need arises. Given the problems the Commission has with H12's credibility, the Commission does not accept his proffered explanations. In any event, we are, again, in the area of specialist assessment of risk and it cannot properly be said that H12's explanations achieve such a degree of cogency as to render the assessment irrational. We say more about this matter in the CLOSED judgment.

231. The Commission turns to the recently formulated ground, which contends that the respondent's decision involved procedural unfairness in that the submissions made to the respondent, upon which she took her decision, were not fair and balanced.

232. In addressing this ground, the Commission will "itself … decide whether the advice given to the Secretary of State was fair and balanced, but in performing that task, SIAC must give appropriate respect to the judgments of the experts involved, for reasons both of institutional capacity and democratic accountability" (*B4*, paragraph 65).

233. In his closing submissions, Mr Chirico KC correctly categorised the nub of the appeal as being the assessment of future risk posed by H12. Although H12's criminal history was relevant to the assessment of risk, the respondent could not merely rely on H12's past conduct. The Commission accepts this is so. We did not take Mr Blundell KC to dissent to that approach in these particular proceedings.

234. H12 contends that the Ministerial Submission was not fair and balanced, in that it did not mention the decision of the Parole Board. The Commission considers that this criticism misses the mark. Importantly, the Ministerial Submission expressly advised the respondent to read the NCA Recommendation, which was annexed to the Submission "alongside the summary below". As has already been seen, the NCA Recommendation specifically addressed the salient findings of the Parole Board and explained the reasons for the NCA's own views as to the risk that H12 posed.

235. H12 complaints that the Ministerial Submission "prominently highlighted" the items found in H12's property in February 2019, without mentioning the Parole Board's findings in relation to them or the Osman notices.

236. We refer to what we have found earlier regarding the Osman notices. The reference in paragraph 7 of the Ministerial Submission to the items found during the February 2019 search is factually accurate. Paragraph 7 occurs under the heading "Immigration history and statelessness". There is no specific reference to these items in the paragraphs of the Ministerial Submission that fall under the heading "The case for deprivation". We shall return to the subject of the items shortly, in the context of H12's criticism of the NCA Recommendation.

237. H12 submits that the Ministerial Submission failed to identify the absence of clear and direct evidence of his involvement in drug offending or the possession of firearms. We refer to what we have said earlier on these subjects.

238. Turning to the NCA Recommendation, the present ground essentially repeats the criticisms advanced in respect of the ground which alleges an irrational/unreasonable approach to the decision of the Parole Board. The Commission has earlier addressed the points raised by H12 concerning the composition of the panel; that it heard oral evidence; that the NCA did not have the full dossier that was before the Parole Board; and the Board's conclusions regarding the alleged SU conspiracy. For the reasons given earlier, the Commission does not find that fairness required the NCA to take a different approach.

239. H12 complains that when the NCA came to consider whether the Parole Board's assessment should be followed or departed from, it gave reasons only pointing in one direction. This was not balanced advice. The Commission refers to its findings concerning the different roles and functions of the Board and the respondent respectively. We have also explained why, bringing its expert, informed analysis to bear, the NCA was entitled to conclude that the Osman notices were not exculpatory. Rather, as the respondent contends, they were a continuation of H12's position: that he has consistently been placed at risk because of his involvement in serious organised crime. As for H12's broader criticism that the NCA Recommendation gave reasons only pointing in one direction, it is not the purpose of an assessment of this kind to produce a kind of balance sheet, which is required to list factors said to be in favour of the individual who is the subject of the assessment, whether or not those factors are regarded by those responsible for the assessment as capable of having a material bearing on the outcome. That said, the NCA Recommendation did, in fact, record the decision of the Parole Board. The Board's decision was manifestly a matter that could potentially assist H12 and therefore needed to be addressed. The NCA Recommendation did so.

240. H12 says that the NCA Recommendation "prominently highlighted the items found in H12's property in February 2019" and made "the forceful assertion that they showed that H12 was 'far from being in any way rehabilitated' and had 'immediately reverted' to serious organised crime after he was released from prison". This is said to be unfair and unbalanced in an important respect. The Recommendation did not identify that the seized electronic devices had been examined and no charges had resulted; did not identify that no criminal charges had been brought on the basis of any of the other items found; did not mention H12's explanation for the machete, recorded in the

Parole Board's decision; and suggested there had been three breaches of the SCPO, rather than two.

241. The complaint that the respondent was not told that no charges had arisen from the interrogation of the electronic devices goes nowhere. It was obvious from the fact that she was not told about any other charges that no other charges were brought. The fact that there had been two breaches of the SCPO rather than three cannot, in the Commission's view, rationally be said to have had any material bearing on the respondent's decision, having regard to the totality of what was before her.

242. It is important to bear in mind that the description of what was found during the February 2019 search occurs in paragraph 20 of the NCA Recommendation under the sub-heading "2014 conviction and subsequent recall to prison". Although the overall heading "Assessment of risk to public security posed by [H12]" covers paragraphs 19 to 44 of the Recommendation, it is paragraphs 30 to 40 that specifically address the NCA's "assessment of risk", which, as noted above, is the key issue in the appeal. Paragraph 35 reads as follows:

> "35. The fact that a SCPO was granted against [H12] at the time of his original convictions for blackmail and conspiring to cause Grievous Bodily Harm, confirms the court's finding that he represented an on-going risk and that an order was required to protect the public. [H12's] conduct in the very short time that he was first out on licence demonstrates that, far from being in any way rehabilitated, he immediately reverted to his previous mode of experience by loan-sharking and preparing for violent retaliation. Following his further conviction for breaching the SCPO, a more restrictive order was granted."

243. H12's focus on the seized electronic devices and the presence of the machete (or machetes) misses the points being made in paragraph 35 of the NCA Recommendation. Whether or not the body armour had previously been in H12's London residence, its presence in the Town V house in 2019 was indicative of H12 intending to continue his criminality, whether or not in conjunction with NX. Likewise, it was open to the Respondent to conclude that the armoured vehicle was indicative of such continuing criminality rather than -- as H12 sought to portray it -- a consequence of his foreswearing any further criminality, by breaking his ties with NX. The Commission also notes H12's explanation that he wished to have a machete in order to protect against intruders. The fact that H12 was anticipating what must be regarded as a violent form of intrusion into his home further underscores the reference at paragraph 35 to "violent retaliation".

244. The reference in paragraph 35 to loan-sharking falls to be read by reference to paragraph 33, where the NCA drew on the report of Mr Lawrence and what H12 had said to him about pursuing the illegal debt owed by NV. Finally, it will be recalled that H12's explanation for breaching the SCPO is inconsistent with the findings of the sentencing judge. The breach demonstrates that H12 was prepared deliberately to defy the law. That defiance, the Commission finds, has continued in that H12 was, following his release by the Parole Board, recalled to prison because he chose deliberately to breach his reporting restrictions. The fact that H12 handed himself into the police is not a point in his favour but, rather, demonstrates his defiance of those seeking to control his actions.

245. H12 submits that the NCA Recommendation gave inadequate prominence to his assertion that he had severed links with NX and did not identify or draw the respondent's attention to the surveillance evidence which strongly supported that assertion.

246. At the hearing, the issue of breaking ties was the subject of cross-examination of XY and of oral submissions from both Mr Chirico KC and Mr Blundell KC. XY indicated that it was not the NCA's position that the risk posed by H12 was predicated on him still being a member of the X OCG. Both of them sought to subject the NCA Recommendation to a close linguistic analysis, turning on the use made of present, past and past perfect tenses.

247. Read fairly and as a whole, the Commission finds that the NCA Recommendation cannot be construed as assessing that the risk posed by H12 involved his being still a member of the X OCG, whether specifically in conjunction with NX or otherwise. Paragraph 22 correctly records the Parole Board's acceptance that in the past H12 had admitted to being in the X OCG but that "now, he had broken off his association". Importantly, paragraphs 30 to 40 do not express any disagreement with the Parole Board's findings on that issue. On the contrary, the primary reasons for disagreement with the Board as to risk concerned the issue of a conspiracy between H12 and SU to import firearms from Country Z. The NCA did not suggest that this conspiracy would have been undertaken at the behest of NX. By the same token, the assessment that H12 intended to pursue the illegal debt from NV was not predicated on H12 having any such continued involvement with NX.

248. We understood XY to accept in cross-examination that the surveillance evidence to which reference has been made indicated that H12 had severed links with NX, when pleading guilty to the offences for which H12 was convicted in 2014. The surveillance evidence recorded NX as referring to H12 in disparaging terms, for example calling him a "traitor". XY was, however, adamant that, strong though this language was, XY's knowledge of NX led XY to assess NX's displeasure as not being at a level that would involve NX taking violent retribution against H12. This evidence is, accordingly, supportive of the NCA's assessment of the relevance of the Osman notices.

249. H12 contends that the NCA Recommendation did not identify that there was no clear and direct evidence of H12 being involved in drug offending, or the possession of firearms; or that there was no evidence to support the implication that there was a single X OCG, or that H12 had worked under BX or SX. The Commission refers to what it has found earlier regarding these issues. It agrees with the respondent that the NCA fulfilled its duty by disclosing the extent of the evidence linking H12 with drugs and firearms.

250. H12 criticises the second OPEN witness statement of XY. In this, XY explains why he does not assess H12's behaviour and statements as being driven by H12's desire to portray himself as a dangerous person, when, in truth, he did not wish to be such. So far as JP was concerned, XY says that there was no need for H12 to present himself as a dangerous person when it came to her. Nor did XY accept that H12 felt under pressure to intimidate NV.

251. H12 says that this second OPEN witness statement "cannot cure the procedural unfairness" and is therefore irrelevant to this ground of appeal. The statement was not before the respondent at the time of her decision and had not been placed before her for review.

252. The Commission has already explained why that last criticism is wrong: see the discussion above concerning the judgment of Elisabeth Laing LJ in *U3*. Properly understood, XY was informing the Commission why, in the light of H12's evidence (which H12 had been unable to put before the respondent prior to the impugned decision being made, and so could not have been addressed in the Recommendation), the assessments that informed the respondent's decision remained unchanged.

253. The criticism that XY's second witness statement is, in its own terms, not fair and balanced is, likewise, misconceived. The complaint that it did not identify where the concessions were being made is met by the point that it makes no such concessions. The statement explains why the original assessment of risk is considered to be correct. Applying *Rehman* principles, the statement discloses no public law error. Nor is it procedurally unfair. For the reasons given earlier, there was no need to refer expressly to the Osman notices; likewise, the Parole Board decision. Nor is there merit in the contention that the witness statement does not make plain whether the SU allegations are maintained. They plainly are.

254. The final ground concerns the issue of discretion. H12 submits that the respondent needed to address two separate questions. The first was whether the "condition precedent" for deprivation was met; that is to say, whether deprivation would be conducive to the public good. The second question was whether the discretionary power in s.40(2) of the 1981 Act to deprive should be exercised. H12 submits that at no point did the respondent separately consider the exercise of her discretion under s.40(2).

255. The authority cited in support of this ground is the decision of the Upper Tribunal Immigration and Asylum Chamber (Dove J, President; Mr OCG Ockelton, Vice President) in *Kolicaj v Secretary of State for the Home Department* [2023] UKUT 00294 (IAC). The Upper Tribunal held that where the Secretary of State determines that the condition precedent for exercising the power of deprivation is made out, she must then exercise her discretion as to whether to deprive the person concerned of their British citizenship in the light of all the circumstances of the case. Accordingly, even if the Secretary of State's decision in respect of the condition precedent were free from public law error, her decision might nevertheless be unlawful where she failed to exercise her discretion, or where the exercise of that discretion was itself tainted by public law error.

256. We were informed at the hearing that permission to the Court of Appeal had been granted in *Kolicaj*, at the behest of the Secretary of State. Mr Blundell KC urged the Commission not to follow *Kolicaj*, which he submitted was wrong.

257. Both the Upper Tribunal and the Commission are superior courts of record. Although having different compositions and somewhat different functions, the Commission

would not ordinarily be expected to depart from the *ratio* of a decision of the Upper Tribunal, unless it were of the view that that decision was plainly wrong. As matters stood at the hearing, the Commission did not consider that the respondent had demonstrated this. Since that time, the Court of Appeal has handed down the judgments in *SSHD v Kolicaj* [2025] EWCA Civ 10, confirming the existence of the discretion.

258. The Commission therefore approaches this ground on the basis that a decision to deprive under s.40(2) involves the respondent concluding both that deprivation is conducive to the public good and that she should exercise her power to make the deprivation order.

259. The Commission is entirely satisfied that the two stage test identified by the Upper Tribunal in *Kolicaj* was met in the present case. Paragraph 38 of the Ministerial Submission is plain. The respondent was recommended that deprivation should take place "on the grounds that it is conducive to the public good to do so due to the threat [H12] is assessed to pose to the UK from his involvement in SOC". Then, "based on the consideration set out above", the respondent was recommended to "exercise your powers under s.40(2) … to have an order made depriving [H12] of his British citizenship …" The "consideration" referred to can only be the passages of the Ministerial Submission, beginning at paragraph 14. In these, it was explained that, although the ECHR does not have extra-territorial effect in the circumstances of this case, the respondent's policy was not to deprive where to do so would involve a real risk of mistreatment contrary to Articles 2 or 3 of the ECHR. In addition, the rights of H12's wife and children (including the adult son) were also considered, in the context of Article 8 ECHR. The best interests of the minor children were addressed, as a primary consideration, pursuant to s.55 of the Borders, Citizenship and Immigration Act 2009. The recommendation was that deprivation would not create a real risk of Article 2 or 3 harm to H12 and would not be a disproportionate interference with Article 8 rights.

260. The fact that the Commission is not deciding the human rights aspects of H12's appeal in the present proceedings does not mean that the Commission should leave these paragraphs of the Ministerial Submission out of account, in determining this ground of challenge. To do so would be highly artificial. The thrust of the Recommendation is clear. Having been told why it was considered that deprivation would be conducive to

the public good, the respondent was then separately addressed on whether she should exercise her discretion under s.40(2). If the Recommendation had been that deprivation would give rise to a real risk of an Article 2 or 3 breach or a disproportionate interference with Article 8, the Recommendation would have been not to exercise discretion to deprive. It is immaterial that, in such a scenario, the respondent would have had no choice but to refuse to order deprivation, lest she be in breach of s.6 of the Human Rights Act 1998. The existence of the discretionary power is the means whereby, in a case such as this, the respondent is able to act compatibility with the ECHR. That this is so does not mean that the "human rights" assessments in the Ministerial Submission did not form the basis of the discretionary decision referenced in paragraph 38.

261. For all these reasons, we find that the appellant's appeal (limited as described above) falls to be dismissed. The Respondent's decision is not legally erroneous. Accordingly, the Commission has not found it necessary in this OPEN judgment to make a *Simplex* finding; that is to say, a finding that the decision, although containing legal error, would inevitably have been the same if retaken. Were, however, the Commission to be wrong about there being no such legal error, the CLOSED judgment explains why the respondent's decision would inevitably have been to deprive H12 of his British citizenship.