SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC/143/2017**
Hearing Date: **13th-16th June 2023**
Date of Judgment: **30th June 2023**

Before

THE HONOURABLE MR JUSTICE CHAMBERLAIN
UPPER TRIBUNAL JUDGE MACLEMAN
MRS JILL BATTLEY

Between

K3

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Mr Hugh Southey KC and Mr Alasdair Mackenzie (instructed by Duncan Lewis Solicitors) appeared on behalf of the Appellant

Mr Neil Sheldon KC and Rosemary Davidson (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Mr Martin Goudie KC and Mr David Lemer (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

Introduction

1 K3 was born in Bangladesh, came to the UK at the age of 5 and was naturalised as a British citizen at the age of 9. He completed his school education, graduated from a university in London and worked as a sales manager. At the age of 26, he married a woman who has also been born in Bangladesh but was and is a British citizen. The couple had a child, who was and is also a British citizen. The family lived in the UK until May 2015, when they travelled to Bangladesh.

2 K3 appeals under s. 2B of the Special Immigration Appeals Act 1997 ("the 1997 Act") against a decision of the Secretary of State for the Home Department ("SSHD") to deprive him of his British citizenship pursuant to s. 40(2) of the British Nationality Act 1981 ("the 1981 Act"). Notice of the decision was given in accordance with s. 40(5) of the 1981 Act on 8 September 2017, when K3 was in Bangladesh, and the order effecting the deprivation was made on 11 September 2017. The decision was certified under s. 40A(2) of the 1981 Act, so the appeal lies to SIAC.

3 The reasons given were that K3 is "an Islamist extremist who is associated with proscribed terrorist organisation Al Muhajiroun ['ALM']" and has "previously attempted to travel overseas to ISIL controlled territory in order to participate in terrorism-related activity". SSHD assessed that K3 posed a danger to UK national security.

4 K3 appealed. The grounds now pursued are set out primarily in an application to amend the grounds of appeal dated 23 May 2022. They are that the decision rendered him stateless (ground 1); he does not pose a risk to UK national security (ground 2); there was no or no sufficient evidence to justify the conclusion that he is affiliated to ALM or attempted to travel to ISIL controlled territory (ground 3); the decision was arbitrary and therefore contrary to Article 8 ECHR and common law (ground 4); the decision was disproportionate because there are less onerous ways of achieving the same aim (ground 5); SSHD failed to undertake sufficient enquiries before depriving K3 of his citizenship (ground 6); the decision amounted to unlawful indirect discrimination on grounds of race contrary to Article 14 read with Article 8 ECHR (ground 7); the decision amounted to a disproportionate interference with the family life of K3 and his British wife and child (ground 8); the decision failed to treat the best interests of K3's child as a primary consideration (ground 9); and SSHD failed to obtain sufficient evidence about the likely effect on K3's child of depriving K3 of his citizenship (ground 10). There was no opposition to the application to amend to plead these grounds and we grant that application.

5 In addition, shortly before the appeal hearing before us, Mr Southey for K3 produced further amended grounds of appeal, which added two additional grounds: that SSHD failed to take account of relevant matters (ground 11) and acted inconsistently and/or otherwise unreasonably given the position of K3's wife and in-laws (ground 12). Mr Sheldon for SSHD did not consent to the addition of these grounds. Having considered them on their merits, we do not consider that SSHD is prejudiced by allowing the application to amend and we therefore allow that application.

6 Ground 1 was considered as a preliminary issue. For reasons set out in a judgment dated 16 February 2022, SIAC (Steyn J, Upper Tribunal Judge Lane and Mr Neil Jacobsen

OBE) found that K3 retained his Bangladeshi citizenship, so the decision did not render him stateless.

7 Mr Southey accepted that the Court of Appeal's decision in *R3 v SSHD* [2023] EWCA Civ 169 meant that K3's or his family's Convention rights were not engaged, though he reserved the right to argue these points in a higher court should *R3* be shown to be wrongly decided. Grounds 4, 7 and 8 were therefore not pursued before us.

8 At the start of the hearing Mr Southey raised a preliminary disclosure issue. The BBC podcast "I am not a Monster", about Shamima Begum, referred to Mohammed Al Rasheed, a people smuggler who had a list of individuals who had sought to travel to ISIL controlled Syria and who was alleged to have been working for the Canadian intelligence service. However, as Mr Sheldon pointed out, press reports indicate that Mr Al Rasheed was arrested "within days" after smuggling Shamima Begum into Syria in the middle of February 2015, some three months before K3 and his wife travelled to Bangladesh. That being so, it is difficult to see that the omission of K3's name from this list would help him.

9 Mr Southey then explained that the list might have further potential relevance because it might show that persons associated with K3, but who have not been deprived of their citizenship, were on the list, which could be relevant to grounds 11 and 12. After some discussion, Mr Southey accepted that this was a matter for the special advocates to pursue in CLOSED if appropriate. The special advocates had the point in mind. We explain in CLOSED what we made of it.

10 We can say, however, that we have seen nothing to indicate that SSHD has failed to comply with her disclosure obligations in this case and we do not find it necessary to make any further directions with respect to disclosure.

SSHD's OPEN evidence

11 SSHD's OPEN evidence is contained in the witness statement of Security Service officer XX dated 1 June 2023, which affirms the truth of the First OPEN National Security Statement ("1NS", dated 22 July 2022 and amended on 19 December 2022 following the rule 38 hearing) and the Second OPEN National Security Statement ("2NS", dated 10 March 2023). In OPEN, XX was cross-examined by Mr Southey, though many of the questions posed could only be satisfactorily answered in CLOSED.

12 The key assessments on which the 1NS is based are that K3 is affiliated to and has attended events associated with ALM and that K3 has attempted to travel to Syria in order to join ISIL and engage in terrorism-related activities. SSHD assesses that if K3 were to return to the UK he would seek to re-engage with ALM given his association with the group. It is pointed out that a number of individuals affiliated with ALM have either themselves travelled to Syria or encouraged others to do so. It is said that ALM uses da'wah, talks and events to radicalise and recruit individuals to the group and to create an environment which can encourage individuals to engage in violent extremism and terrorist activity; that ALM senior leaders have influenced, encouraged or given tacit approval to attack plans in the UK; and that K3 may involve himself in activities of this

nature if he were to return to the UK – and as such his presence here would pose a risk to UK national security. It is further assessed that, were K3 to return, he may seek to encourage or assist individuals looking to travel overseas to join ISIL or ISIL affiliates.

13 In 2NS, SSHD maintains the national security assessment set out in 1NS despite what is said in K3's witness statement and the expert report of Prof. Gleave. In addition, K3 is assessed to have attended "numerous ALM lectures and da'wah stalls which have been attended by multiple senior ALM leadership individuals".

K3's evidence

K3

14 K3's witness statement was relatively detailed. He explains his early life, education and marriage. He says that his religious faith deepened after his wife suffered an ectopic pregnancy and then developed further after the birth of his son. He began studying *tajweed* in a mosque in Lewisham and then at the Tayyibun Institute in Whitechapel. He initially attended classes which he paid for and passed the tajweed course at levels 1 and 2. He sought to expand his Islamic knowledge and seek out a variety of Islamic scholars on YouTube.

15 On one occasion when leaving a class at the Tayyibun Institute, he was approached by a Muslim man on the street whom he now knows to be Abu Sayfullah. The man told him that there were free classes a couple of doors down. He bumped into the same man some months later. He started attending these classes with his wife and her sisters, probably towards the end of the summer of 2014. He cannot remember what was taught, but did not notice anything objectionable. There was no discussion of ISIL, Syria, terrorism, the Caliphate, *hijrah* or the "covenant of security". There was only one occasion when he overheard a conversation between some of the brothers, who were discussing whether the Caliphate was legitimate. When the teacher walked in, he said that this was not something to discuss in class. The teachers included Abu Sayfullah, Mizanur Rahman (aka Abu Baraa) and, on one occasion, Anjem Choudary. K3 recognised the latter, as his picture had been all over the newspapers in connection with the murder of Lee Rigby. Choudary dissociated himself from the perpetrators and denied that they had attended his classes. K3 had no reason to disbelieve him.

16 K3 and his wife went on the *hajj* pilgrimage in September 2014. They had a religious guide, Dr Khalid Khan. K3 says he benefited from Dr Khan's teaching. At the airport on the way back, in October 2014, K3 was stopped, detained and questioned under Schedule 7 to the Terrorism Act 2000. He was warned about the company he was keeping, but did not know to whom the officers were referring.

17 After returning to the UK, K3 and his wife enrolled in Dr Khan's online classes, which he continued attending until April 2015. Then, until May 2015, he attended some free classes which he had heard about from his sisters-in-law. There was no discussion of ISIL, terrorism, Syria, the Caliphate, proscribed organisations, *hijrah*, or any individuals who had been arrested. (By this time some of the senior leadership of ALM had been arrested, but K3 says that he did not learn of this until his lawyers told him in 2022.)

18 While attending the courses, K3 was invited to a da'wah stall the purpose of which was to call people to Islam. Abu Sayfullah seemed to be organising this. He attended less than a handful of times. He did not agree with their slogan "Stay Muslim, don't vote!" because he did not think voting was *haram* and because the Qur'an demands that Muslims should obey Allah, the Messenger and also the leaders of your land, wherever you may be.

19 On 13 May 2015, K3 moved with his wife and son to Bangladesh. He explains that, up to 2014, the marriage was a happy one. However, he and his wife began to suffer from nightmares in which he would experience sleep paralysis. He would see black snakes, animals and evil-looking demons. He attributed these symptoms to *sihr*, a form of black magic. At around the same time, K3's wife started experiencing Islamophobia. She started talking about moving to live abroad. They opted for Bangladesh as they had family there, so did not have to worry about accommodation. K3's plan was to stay for a short period and then return to the UK. He left most of his belongings in the UK, did not end his tenancy and continued to pay rent. His wife did not tell her parents they were moving.

20 In Bangladesh, the symptoms of the *sihr* returned. The couple looked for a *raaqi* (a person who exorcises black magic through Qur'anic recitation – a practice known as *ruqya*). But the couple were not comfortable with the methodology of the local *raaqis*, who used *taweez* (amulets thought capable of driving away evil spirits), sought aid from the dead and invoked the assistance of *jinn*. K3's wife's sisters recommended a *raaqi* in Ankara, Turkey. The couple booked flights from Sylhet to Istanbul and accommodation for five nights. On arrival at the airport, the Turkish authorities allowed K3's wife to enter, but not K3. One of the officials at the border told K3 that he was a security threat. All returned to Sylhet.

21 The couple remained in Bangladesh and, after about another month, sought the assistance of a *raaqi* in Qatar. He advised the couple to perform *ruqya* themselves.

22 In late 2015, K3's wife's sister got married. Not long before K3 was deprived of his citizenship in September 2017, K3's wife's sister sent K3's wife a message saying that she and her husband intended to travel to Syria to support the Caliphate. K3's wife was concerned about this. Neither K3 nor his wife agreed with ISIL's ideology. K3 told his wife that her sister and her husband were *khawaarij* (extremists). They were eventually detained in Africa and spent a couple of months in prison there.

23 K3 and his wife tried unsuccessfully to have another baby. This took a toll on their marriage. Neither was able to secure a job, as this required photo ID. K3 did some work on his uncle's farm. The couple argued about domestic chores. Relations between K3 and his in-laws deteriorated. K3's wife told K3 she wanted a divorce in September 2020. She wanted to leave immediately with their son, but K3 told her that she had to remain in the house for 3 menstrual cycles (the *iddah* reconciliation period). She did so, but made no attempt at reconciliation. She left with the couple's son in November 2020. K3 later found photos and intimate conversations with a man on her Facebook account.

24 K3 does not know where his wife and son are now. K3's wife's father called and told K3 not to try to contact his son. He received an email from his son in December 2021. There was no indication of where he was, but the photographs seemed to look like the resorts in

Bangladesh. In January 2022, his son said that it was better they did not keep in contact. K3 has sent his son messages, but there has been no reply, save for a thank you to a birthday greeting in April 2022. K3 has not applied for access to his son because he has no status in Bangladesh and his in-laws have threatened him.

25 K3's life in Bangladesh is difficult. He is unable to access healthcare or drive. He is worried about being discovered. He has no friends and is extremely lonely. He misses football and music and his pursuit of Islamic knowledge (there are no structured courses in Bangladesh). He feels like an outsider.

26 K3 says that he is a Muslim who follows the Qur'an and authentic *sunnah* (or teachings) of the Prophet. He considers himself more aligned to the Qur'an than the *hadith*. Some people follow the *hadith* blindly. K3 believes that, if a *hadith* contradicts the message of the Qur'an, it is doubtful. K3 does not see why the *shariah* should be the governing law of the UK, when the majority of the population are not Muslims. *Shariah* cannot be used to justify atrocities such as beheadings. He considers the burning alive by ISIL of a Jordanian pilot to be "brutal". He does not know enough about the concept of the Caliphate to know whether he supports it or not. He does not recall discussing the issue with anyone.

27 K3 did not know that Anjem Choudary had declared his support for ISIL when he attended a class taught by him. Nothing was said at the class to indicate such support. If he did declare his support, then "absolutely 100% he falls within the definition of khawaarij". K3 regrets attending the classes and da'wah stalls. It was an error of judgment not to have left when he saw Anjem Choudary there. If he had known Choudary supported ISIL he would never have attended. K3 does not support terrorist attacks in the UK.

28 In cross-examination, K3 accepted that he had seen Anjem Choudary at da'wah stalls. When he attended these, he would briefly introduce himself, say where he was from and that he was married – and no more. He did not speak to passers by or hand out literature, because he was not at that time confident enough in his Islamic knowledge to do so. He did not know that those present at the da'wah stalls were connected to ALM because the stalls were not "branded". Prior to leaving for Bangladesh, K3's only knowledge of ALM came from what he had read or seen in the media.

29 K3 accepted that he had not told his parents that he was leaving for Bangladesh and his wife had not told her parents. He did not give his wife a reason for leaving most of their belongings behind.

30 As to what happened when they arrived in Bangladesh, K3 said that it was his uncle who had spoken to about five *raaqis* in Bangladesh. He himself had not. He did not do any research into the *raaqi* in Ankara, but trusted what his wife was saying about him. He referred to an exchange of messages downloaded from his mobile phone. Other messages were not available because he had dropped his phone and the glass had smashed.

31 As to the travel to Turkey, accommodation was booked for five nights, but K3 cannot remember the name of the hotel. He believes it was in Istanbul, but cannot remember. His wife informed him that her sister's friend would meet them there. He left it all to his wife.

He was planning to go back to Bangladesh after spending 5 nights in Turkey. He thought his wife's friend, who was going to meet them, was a woman, but cannot recall her name. He thought she was Turkish, but was not sure if she lived in Turkey. He had no contact details for her.

Prof. Gleave

32 Prof. Robert Gleave is Professor of Arabic Studies at the Institute of Arab and Islamic Studies in the University of Exeter. He had not spoken to K3. His report was based on reading K3's witness statement. It followed, as he fairly accepted, that his conclusions assume that what K3 has said is true. On this basis, Prof. Gleave concludes that K3, when describing his own religious beliefs, does not appear to have adopted the *salafi* perspective. Rather, he had moved between classes and institutes with different perspectives and appeared eclectic in his approach to his Muslim beliefs. K3's views, as described in his witness statement, are in fact contrary to *salafi* views in that he focuses on the Qur'an, does not place much weight on the *hadith* and regards only some of these as authentic. He does not cite or refer to any prominent *salafi* scholars. K3's broader political views about democracy (viewing it as legitimate), *shariah* (not seeing any reason why the UK should adopt it), the Caliphate (not overtly supportive) and *jihad* (viewing it as a personal struggle against one's desires, rather than a form of military activity) are not *salafi* views.

33 K3's declared statements on the principal ALM doctrines indicate that he does not share their perspectives on any of the issues they regard as critical. He does not appear to have been influenced by ALM doctrine.

34 *Sihr* describes various forms of magic. Opinions on magical practices vary in Islamic thought. For most Muslim interpreters throughout the centuries, however, the Qur'an regards *sihr* as real and counsels Muslims to protect themselves against it. *Raaqis* are highly sought after and, in most Muslim societies, seen as performing a valuable role. Against this background K3's account of travelling to Ankara to visit a *raaqi* is plausible.

Prof. Kenney

35 Prof. Michael Kenney is Professor of International Affairs at the Graduate School of Public and International Affairs at the University of Pittsburgh. His conclusions were also based on his reading of K3's witness statement and, like Prof. Gleave's, were premised on the truth of that statement. He is an expert on ALM and has conducted extensive research, including interviewing many of ALM's leaders and adherents. He is the author of *The Islamic State in Britain: Radicalization and Resilience in an Activist Network* (Cambridge University Press, 2018).

36 Prof. Kenney concludes that, while some of K3's beliefs are consistent with those of ALM, others are not. Leading, veteran and rank-and-file ALM activists would disagree strongly with many of K3's views. K3 does not appear knowledgeable about some of the core beliefs, including the Caliphate and the covenant of security. Prof. Kenney said that it was possible that a person with such views could be part of the outer circle of "contacts" whom ALM were seeking to cultivate or radicalise, but not the inner circle of "intellectual affiliates".

The law

37 It was common ground that, pending the handing down of the Court of Appeal's judgment in *U3 v SSHD*, our approach to the national security assessment should be as set out by SIAC in *U3 v SSHD* (SC/153/2018 & SC/153/2021), [22]-[43], *B4 v SSHD* (SC/159/2018), [10]-[19] and *Begum v SSHD* (SC/163/2019: *"Begum 2"*), [36]-[44]. There was, however, a significant dispute about the extent to which SIAC can make factual findings of its own and as to the relevance of such findings.

38 Mr Southey for K3 said that, although the composite national security assessment (that K3 poses a danger to UK national security) was subject to challenge on public law grounds only, SIAC should nonetheless make its own findings of fact. Factual allegations as to K3's past conduct (such as that he is ideologically affiliated with ALM and that he travelled to Turkey to join ISIL in Syria) must be proved to the civil standard: *Rehman v SSHD* [2001] UKHL 47, [2003] 1 AC 153, [22]. In any event, the authorities indicate a flexible approach to public law review: *Pham v SSHD* [2015] UKSC 19, [2015] 1 WLR 1591, [107]. Whilst national security is a matter on which the courts should be cautious about interfering with the judgment of the executive, the same is not true of the factual basis for SSHD's assessment: *P3 v SSHD* [2021] EWCA Civ 1642, [2022] 1 WLR 2869, [118]-[121] and [126] (Sir Stephen Irwin) and [135] (Bean LJ).

39 Mr Sheldon for the Secretary of State submitted that *Rehman* was not authority for the proposition that an appellant's past conduct must be proved to the civil standard. The passage relied upon by K3 from *Rehman*, at [22], was from the opinion of Lord Slynn. But in *R (Begum) v SSHD* [2021] UKSC 7, [2021] AC 765, at [59], Lord Reed contrasted Lord Slynn's "hybrid" approach, on which some facts had to proved on the balance of probabilities, with Lord Hoffmann's "more orthodox" approach, according to which the relevant questions were: (1) whether SSHD's evaluation had a proper factual basis and (2) whether SSHD's opinion was one which no reasonable minister could have held. Lord Reed concluded:

> "Whatever conclusion one might draw as to how the law stood at that time, the subsequent repeal of section 4 of the 1997 Act, and the absence of any similar provision in the current legislation, indicate that it is Lord Hoffmann's approach which is now the more relevant."

Mr Sheldon added that there was nothing in *P3* which was inconsistent with this approach.

40 In our view, Mr Sheldon is correct, on the current state of the authorities. The passage set out above from [59] of Lord Reed's judgment in *Begum* makes clear that SIAC is to apply Lord Hoffmann's orthodox public law approach, and not Lord Slynn's "hybrid" approach. *P3* does not alter the position. If there were any doubt about this, it is resolved (for the time being) by SIAC's decision in *U3*. At [29] of the judgment in that case, SIAC considered the passages from Sir Stephen Irwin's and Bean LJ's judgments in *P3* upon which Mr Southey now relies. SIAC concluded at [30] that there was nothing to indicate that it could interfere with a national security assessment unless it was vitiated by a public law error. Later in the judgment, at [195], it made clear that this applied not only to overarching assessments, such as "Did U3 pose a risk to UK national security when she was deprived of her British nationality?", but also to "the building blocks upon which the

national security assessment is based", which included matters as granular as "What motivated U3 to decide to leave Turkey for Syria…?". SIAC continued as follows:

> "If the lawfulness of the national security assessment depended on SIAC's assessment of the key factual elements underlying it, SIAC would in effect be substituting its own judgment for that of SSHD. If, after considering the evidence (including the oral evidence) for ourselves, we conclude that SSHD's assessment leaves out of account something material, or is vitiated by some other public law flaw, then the appeal will succeed. If not, it will fail."

41 This does not mean that SIAC is precluded from making findings of fact where it is appropriate to do so (as it did on certain matters in *U3*), but such findings are relevant only to the limited extent set out at [37]-[41] of *U3*.

42 The two matters on which Mr Southey invited us to make findings here (whether K3 was intellectually affiliated to ALM and whether he travelled to Turkey to align with ISIL in Syria) seem to us to be firmly in the "building block" category. If we were entitled to substitute our judgment for that of SSHD on those matters, we would effectively be substituting our judgment for that of the SSHD on the overarching question whether K3 poses a risk to UK national security. This we are not entitled to do.

43 Insofar as K3 alleges an error of established fact (*E v SSHD* [2004] EWCA Civ 49, [2004] QB 1044), this does not avail him in the present circumstances. As SIAC said in *B4* at [77], for the error to vitiate a public law decision, it must be "uncontentious and objectively verifiable". But national security assessments are unlikely to be susceptible to this kind of error, because they are "evaluative, inferential and judgmental, and cannot in any meaningful sense be said to rely on established facts". In most cases, including this one, the same is true of the building blocks on which they are based.

44 We accordingly approach the appeal on the basis that we are limited to considering whether SSHD's conclusion on these two points was irrational or vitiated by any other public law error.

Grounds 2-3

45 Given our approach to the law, grounds 2 and 3 will succeed only if K3 can show that there was no evidence, or no evidence upon which SSHD could rationally conclude, that he is affiliated to ALM or attempted to travel to ISIL controlled territory.

46 Our conclusion on this aspect of the case can be stated shortly. K3, in his own evidence, accepts that he attended da'wah stalls and events organised by persons now known to be leaders of ALM. The OPEN evidence is insufficient, on its own, to provide a rational basis for disputing K3's own account that he was not intellectually affiliated with ALM and did not know of the more extreme views of the leaders. Prof. Gleave's and Prof. Kenney's evidence establishes that, if K3 holds the beliefs he claims to hold, he could not have been part of ALM's "inner circle" and could not have been a true intellectual affiliate of that group.

47 However, as both experts readily accepted, their conclusions were based on K3's account. The CLOSED evidence contains elements which make it rational for SSHD to conclude that that account is false in material respects. When the OPEN and CLOSED evidence are considered together, there is ample factual basis for the conclusion that K3 was intellectually affiliated with ALM and shared the extremist ideology of ALM's leaders. That conclusion was highly significant given that, as SSHD knew and Prof. Kenney confirmed in his evidence, a significant proportion of those in the ALM inner circle had travelled or attempted to travel to Syria to align with ISIL.

48 In relation to travel to ISIL controlled territory, the position is similar. The OPEN evidence does not, on its own, provide a rational basis for concluding that K3's travel to Turkey was undertaken for the purpose of travelling onwards to ISIL controlled territory. However, the CLOSED evidence provides ample factual basis for SSHD's conclusion that K3 travelled for this purpose. When the evidence is considered as a whole, the conclusion is far from irrational. Although we do not need to make any finding in this regard, we would add that we found K3's answers in cross-examination unsatisfactory on this point. We consider it unlikely that K3 would have left all the travel plans to his wife and would have had no recollection of who was to meet them there or where they were to stay. We also find somewhat implausible the suggestion that K3 and his wife, who were clearly in straitened financial circumstances, should have chosen to travel so far to find a *raaqi* so soon after arriving in Bangladesh, a country where it is agreed there are many *raaqis*.

Ground 5

49 K3 says that the decision to deprive him of his citizenship was disproportionate because there were less onerous ways of achieving the aim of protecting national security. Mr Southey relies on *Pham*, at [107].

50 In our view, however, subsequent authority establishes as follows.

51 First, it is for SSHD to balance the interests of national security against those of the individual. The latter interests are relevant even in a case where the individual has no ECHR rights: see *Begum 2,* [62].

52 Second, however, it is not for SIAC to judge for itself the balance in any given case. Nothing in *Pham* suggests that it is: *Begum 2,* [65]-[69].

53 Third, in any event, proportionality does not form a separate ground of challenge at common law: *Begum 2,* [72], citing *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1335, [131] et seq.

54 Fourth, when considering whether the balance struck by SSHD is a rational one, SIAC should bear in mind that "[t]he making of the order, by keeping the deprived person outside the UK, is more effective than any other option. Generally speaking, therefore, the making of the order in such circumstances will be necessary and proportionate": *B4*, [81].

55 Fifth, even in contexts where SIAC is required to reach its own view about whether a particular measure is proportionate (for example, in entry clearance and other decisions where Article 8 rights are engaged), it is likely that any interference with the private and family lives of the appellant and any children will be proportionate if there is an assessment that the appellant poses a risk to UK national security and the assessment cannot be impugned in public law terms: *U3,* [8] and [40(a)].

56 On the facts of the present case, Annex C of the submission to Ministers makes clear that the impact of the decision on K3 and his child were considered. So was the fact that deprivation would not prevent K3 from engaging in Islamist extremist activities abroad (see para. 14 of the submission). Nonetheless, deprivation (which would prevent his return to the UK) was considered "the most effective way to mitigate the threat posed by [K3]". For reasons similar to those given in *B4* (see para. 54 above), it is impossible to characterise that assessment as irrational.

Ground 6: Failure to undertake sufficient enquiries

57 When considering the complaint that SSHD failed to undertake sufficient enquiries before taking the decision to deprive K3 of his citizenship, it is important to bear in mind that it is for the decision-maker to decide on the manner and intensity of the enquiries to be made, subject only to *Wednesbury* review. SIAC cannot intervene merely because it considers that further enquiries would have been sensible or desirable. It can intervene only if no reasonable Secretary of State could have been satisfied on the basis of the inquiries made that she possessed the information necessary for her decision: see *Balajigari v SSHD* [2019] EWCA Civ 673, [2019] 1 WLR 4647, [70]; *B4*, [78]; and *Begum 2*, [32].

58 Insofar as the enquiries it is said SSHD should have made involved seeking representations from K3, this is a repackaged natural justice challenge. But it is now well established that, at least in cases where inviting representations would risk "tipping off" the subject and might precipitate the very thing deprivation is aimed at preventing (his return to the UK), natural justice imposes no general duty to seek representations: *B4*, [138]; *Begum 2,* [341]. In this case, the decision to deprive was precipitated by the assessment that there was a risk of K3 returning to the UK. That being so, there could be no duty to seek K3's representations before depriving him of his citizenship.

59 In any event, SSHD has updated the national security assessment to take account of the evidence served by K3 in the proceedings. Following the approach set out in *U3* at [38], if the appeal had generated evidence which undermines or materially alters the original national security assessment, officials would be obliged to bring that evidence to the attention of SSHD. Where – as here – the national security assessment is maintained, the updated assessment takes the place of the original. If it were shown to be flawed, the appeal would be allowed. It has not been shown to be flawed.

60 Insofar as the complaint of failure to undertake sufficient enquiries is pursued on a broader basis, it is in our view without foundation. SSHD properly took into account all that was known about K3 at the relevant time. She sought advice from the Security Service. She concluded rationally that the materials before her were sufficient to enable

her to take an informed decision. We have considered separately under grounds 12 and 13 whether there was any material failure to enquire into the circumstances of K3's wife and her family. We have concluded that there was not.

Grounds 9 and 10

61 The complaints about failure to treat the best interests of K3's son as a primary consideration and failure to obtain sufficient evidence about the effects on K3's son are, in our view, misplaced.

62 In Annex C to the submission to Ministers, SSHD was advised that, while s. 55 of the Borders, Citizenship and Immigration Act 2009 did not apply to children not in the UK, consideration had been given to "the spirit of that duty". The conclusion was that deprivation would not have significant effects on the best interests of K3's child. Insofar as it might have an emotional impact on him, that impact was outweighed by the public interest in depriving K3 of his citizenship.

63 The rationality of this decision falls to be assessed as at the date of the deprivation decision (2017), when K3 was living with his wife and son. Even so, we do not regard the treatment of this issue as irrational or otherwise flawed in the public law sense. SSHD was correct to note that the deprivation decision would not have a direct impact on the status of K3's wife or son. They could still come back to the UK if they wished to do so. In that case, they would be separated from K3 and, as SSHD recognised, this would inevitably have an emotional impact on K3's son. Nonetheless, we find it impossible to criticise the view that any such impact would be outweighed by the public interest in depriving a person validly assessed to present a risk to UK national security of his citizenship. We note that the impact on K3's son was much less than the impact on U3's children (who would be unable for the foreseeable future to visit U3 in Syria).

64 The complaint about failure to make enquiries about the effect of the deprivation decision on K3's son fails for the same reasons as ground 6. Given that any such effect was very likely to be outweighed by national security considerations, and given that the likely emotional effect was factored in, it was rational for SSHD to consider that she had enough information about the effect of the decision on K3's son. In any event, it is difficult to see how further information about that effect could be gathered other than by seeking representations from K3, which would have had the negative effect on national security described in paragraph 58 above.

65 Even if, contrary to our view, there had been any flaw in the assessment of K3's son's best interests, or in the balancing of those interests against the public interest factors in favour of deprivation, or any failure to make adequate enquiries, there would be no point in remitting the decision for redetermination, because K3 no longer lives with his wife and son and has lost effective contact with them. It follows that, if the decision had to be retaken, SSHD would inevitably conclude that the decision to deprive K3 of his citizenship will make no or no material difference to his son. That being so, the "makes no difference" test would be met: see *Simplex GE (Holdings) v Secretary of State for the Environment* (1988) 57 P & CR 306, 327 and 329, as applied in *LA v SSHD* (SN/63/2015, 24 October 2018), [113] and *U3*, [33].

Grounds 12 and 13

66 We considered carefully whether there was any relevant failure to make enquiries about the position of K3's wife and family and whether the failure to take deprivation action against them shows that it was not necessary to deprive K3 of his citizenship or demonstrates inconsistency. Mr Southey fairly accepted that this was a point which could only be pursued in CLOSED. For reasons which we can only set out in CLOSED, we have concluded that there is nothing in this point on the facts of this case.

67 However, we can say this in OPEN. It will rarely be helpful to seek to undermine a deprivation decision taken against A by pointing to the fact that B, C and D (associates of A) have not been deprived of their citizenship. There may be many reasons for the difference. Deprivation is only legally possible where an individual has another nationality. As SIAC's case law shows, the question whether a particular individual does have another nationality may not be straightforward. Even where it is legally possible, other measures (such as criminal prosecution or TPIMs) may be more appropriate where the individual is physically in the UK. There may also be cases where, for perfectly proper national security reasons, the decision is taken not to take any overt action against a particular individual. Finally, even if it were shown (as it has not been in this case) that there was no good reason for inaction in cases B, C and D, that would not necessarily undermine the deprivation decision in case A: the proper response might instead be to reconsider the decisions not to take action in cases B, C and D.

Conclusion

68 For these reasons, together with those set out in our CLOSED judgment, none of the grounds of appeal succeeds. The appeal is therefore dismissed.