SPECIAL IMMIGRATION APPEALS COMMISSION

APPEAL NUMBER: SC/151/2018

DATE OF HEARING: 10 -12 October 2023

DATE OF JUDGMENT: 20th December 2023

BEFORE:

THE HONOURABLE MR JUSTICE LANE
UPPER TRIBUNAL JUDGE KAMARA
MR NEIL JACOBSEN

BETWEEN:

S3

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MR B. JAFFEY KC and Ms J. KERR-MORRISON (instructed by ITN Solicitors) appeared on behalf of the Appellant

MR Z. AHMAD KC and MS R. TONEY (instructed by the Special Advocates' Support Office) appeared as Special Advocates.

MR R. DUNLOP KC and MR J. STANSFELD (instructed by the Government Legal Department) appeared on behalf of the Respondent.

OPEN JUDGMENT

MR JUSTICE LANE:

1. The appellant, S3, appeals under section 2B of the Special Immigration Appeals Commission Act 1997 ("the SIAC Act") against the decision of the respondent to deprive the appellant of his British citizenship on 21 March 2018, under section 40(2) of the British Nationality Act 1981 ("BNA 1981"). The respondent considered that depriving the appellant of British citizenship would be conducive to the public good because the appellant is assessed to support ISIL and to be responsible for encouraging others to do so. The deprivation order was signed on 26 March 2018.

2. The appellant is a national of Sudan who entered the United Kingdom illegally in September 2005 and claimed asylum. The respondent refused that claim but the appellant was found to be a refugee by an immigration judge in a determination of April 2006. The appellant was found to be a member of the Tunjur tribe of Darfur, one of the minority African or non-Arab ethnic groups in Western Sudan. These groups were seen as disloyal by the authorities in Sudan and were persecuted by them. The immigration judge found that the appellant had been detained and tortured by military forces in Darfur from January 2003 to January 2005. The immigration judge concluded that there was a reasonable degree of likelihood that, if returned to Khartoum, the appellant would be questioned by the authorities, partly because he had come from the United Kingdom and partly because he would be recognised as someone of African ethnicity from Darfur. The appellant would not be able to satisfy the authorities in Khartoum that he was not a rebel sympathiser. There was, accordingly, a real risk of detention and torture on return to Khartoum airport.

3. The appellant was granted indefinite leave to remain in the United Kingdom and, on

28 July 2015, he became a British citizen by naturalisation. On 4 February 2016, the appellant travelled to Sudan, using his British passport. He returned to the United Kingdom on 11 March 2016.

4. In December 2016, the appellant travelled to Sudan again. Whilst there, he applied for a Sudanese residence permit card, which allowed him to exit and enter Sudan for five years. After some four months in Sudan, the appellant returned to the United Kingdom in April 2017. It was during his time in Sudan on this occasion that the appellant is said to have received and disseminated ISIL propaganda.

5. On his return to the United Kingdom on 19 April 2017, the appellant was subject to an examination and interview pursuant to Schedule 7 to the Terrorism Act 2000. An examination of the appellant's mobile telephone disclosed a significant volume of Islamist extremist communications. On 21 March 2017, the appellant had disseminated to three separate WhatsApp groups two propaganda videos produced by ISIL.

6. The Security Service assessed that the appellant was a committed Islamist extremist who had demonstrated a commitment to the extremist ideology of ISIL. There was a realistic possibility that the appellant would seek to radicalise other individuals and encourage them to engage in Islamist extremist activities. There was also assessed to be the potential for the appellant's activities to go further, with a risk of the appellant encouraging others to conduct operational activity in the United Kingdom on behalf of ISIL.

7. On 22 February 2018, the appellant travelled to Sudan. He was in that country at the time of the decision to deprive him of British citizenship.

8. The respondent sent a letter to the appellant at his home address in the United Kingdom,

informing him of the intention to deprive him of British citizenship. According to the appellant's statement, the appellant's wife took a photograph of the letter and sent it to the appellant via WhatsApp. The appellant could not fully understand the letter, but recognised that, coming from the Home Office, it was likely to be important. The appellant, therefore, asked his wife to take the letter to a friend, who contacted the appellant's previous solicitors.

9. Before travelling to Sudan in 2018, the appellant had booked the return part of his trip, so as to arrive back in the United Kingdom on 26 March 2018. On that day, the appellant was due to return from Sudan via a connecting flight in Istanbul, Turkey. At this stage, the appellant says that he did not understand the contents of the Home Office letter and had not yet spoken to a solicitor about it. He was not sure if he would be stopped at the airport in Sudan, but he decided to try and fly home as he felt he had no other option, his flight having already been booked. He travelled on his British passport from Sudan to Istanbul.

10. However, when the appellant attempted to take the Turkish Airlines flight from Istanbul to Manchester, he was prevented from doing so by the airline. He was not told the reason. The appellant was shown a letter from the Home Office addressed to the airline, which said something to the effect that the appellant was prevented from travelling. The letter said that, if there were any issues, the Manchester police should be contacted. The appellant called the telephone number contained in the letter but was unable to get through. The airline gave the appellant two options: to return to Sudan; or to go the British embassy in Istanbul. The Turkish authorities provided him with a 90-day Turkish visa. The appellant went to the British embassy but was not allowed to enter. When he went to the visa office, he was told that, since he had a British passport, he did not need a visa.

11. Whilst in Istanbul, the appellant contacted his previous immigration solicitor, who explained the contents of the deprivation decision letter. The solicitor advised the appellant to return to Sudan and that he would lodge an appeal on the appellant's behalf. The appellant raised funds to pay for a flight to Sudan, although he was afraid to do so. The appellant returned to Sudan using his British passport on 9 April 2018. Although anxious about this, his previous solicitor had told him that, whilst the appellant had an ongoing appeal, the British Government would not notify the Sudanese authorities that they were attempting to remove the appellant's British citizenship.

12. Once back in Sudan, the appellant decided that it would be a good time to make a Hajj pilgrimage. He applied for a Sudanese passport, with the assistance of a lawyer in Sudan. He did not tell the lawyer that his British citizenship had been removed. The appellant says that, for his own protection, he maintained in the application for the Sudanese passport that he still had British citizenship. The appellant obtained a Sudanese passport and went on the pilgrimage. The appellant subsequently flew to Dublin before entering the United Kingdom illegally in September 2018. The appellant was detained for four months, before being released on bail with requirements to live at his home address; not work or study; and report to a police station once a week. He was not subjected to "tagging"; nor were restrictions placed on his ability to access online services. Since May 2021, the only conditions of bail have been a prohibition on work and the requirement for weekly reporting.

13. The decision to deprive involved officials taking steps to prepare a submission to the respondent. As part of this process, questions were asked of HMG partners to assist with assessing whether deprivation would expose the appellant to a risk of mistreatment which would infringe article 2 or 3 of the ECHR, if that Convention were applicable. The relevance of these questions is

explained by the fact that the respondent has a policy of not depriving individuals of British citizenship when they are not within the UK's jurisdiction, if she is satisfied that doing so would expose those individuals to a real risk of treatment which would "constitute a breach of article 2 or 3 if they were within the UK's jurisdiction and those articles were engaged" (passage in memorandum to the Bill for the Immigration Act 2014, cited at para.21 of the judgment of Lord Reed in *R (Begum) v. Special Immigration Appeals Commission* [2021] 2 WLR 556). As Lord Reed explained, the legal effect of this policy, like any other administrative policy, is to be found in principles of administrative law (para.120).

14. A question was asked about the risk of mistreatment if the individual were "apprehended/arrested/detained". The response said that HMG "is aware of reports that individuals subject to arrest in Sudan are subject to CIDT" (i.e. cruel, inhuman and degrading treatment). The response added that Mr Phillip Cox, a British journalist, alleged that he had suffered CIDT whilst detained by the Sudanese authorities.

15. Another question was whether, if there is a real risk of detention/mistreatment, "dual nationality would make a substantial (positive) difference in terms of (mis) treatment". The answer provided was "NO (please refer to a previous incident where the UK was denied consular access to the British journalist referred to above whose released (sic) is considered to have come about as a result of diplomatic efforts)".

16. A draft of the risk assessment was sent for comment. The following response was received from HMG partners:-

> "The article 2/3 assessment looks right, except to note that we did have one consular visit in the case of the British journalist. On the question of whether the Sudanese treat dual Sudanese nationals differently, we are advised that this does not make a difference and that the Sudanese authorities do not treat a dual Sudanese national differently from a mono-Sudanese national. A dual Sudanese national in Sudan is Sudanese. This has been backed up by a recent case in which we have tried to get information on an arrested dual national and have not received it despite the individual travelling

into Sudan on their British passport."

17. The submission to the respondent recommended taking deprivation action against the appellant, based on national security grounds as summarised at paras. 6 to 9 of the submission. These referred to the assessment of the appellant as a committed Islamist extremist who may seek to radicalise other individuals. The Security Service assessed that deprivation would be the best means of protecting national security by mitigating against the appellant's return to the United Kingdom.

18. Beginning at para.11, consideration was given to ECHR articles 2 and 3. Paragraph 11 stated that there were no substantial grounds to believe that there would be a real risk of mistreatment contrary to article 2 (right to life) or 3 (prohibition of torture) of the ECHR as a result of the appellant being deprived of British citizenship. This was said to be the case while the applicant was in Sudan or Turkey.

19. Paragraph 12 reads as follows:-

> "12. It has been considered that whilst there is a risk that were [the appellant] to be detained, then he would be mistreated, there are no substantial grounds for believing there is a real risk of detention due to depriving [the appellant] of citizenship and, therefore, there are no substantial grounds for believing there is a real risk of mistreatment or death as a direct result of deprivation".

20. Paragraph 13 described the success of the appellant in his asylum appeal, but said refugee status "falls away once an individual acquires citizenship of another state and is not reinstated following loss of citizenship". Reference was made to the findings of the immigration judge that the appellant was a member of a persecuted minority; had been detained by the other military forces in Darfur from 2003 to 2005 and suffered torture; and that it was likely that, on return to Khartoum, he will be interrogated by the authorities and be unable to satisfy themselves that he was not an opposition

sympathiser. He would therefore be subject to mistreatment. Paragraph 13 ended as follows:-

> "We note that [the appellant] has returned to Sudan voluntarily. We further note the assessment that British citizenship makes no material difference to the risk of mistreatment by the Sudanese authorities".

21. There were a number of Annexes to the submission. In OPEN form, Annex B and C concern the "Cross HMG Article 3 assessment concerning mistreatment risk".

22. Paragraph 1 of this Annex stated that HMG was aware that the appellant "may return to the UK via Turkey and, therefore, assess that the risks in Turkey should be considered".

23. Under the heading "Risk of mistreatment in Sudan", there were the following paragraphs:-

> "3. [The appellant] travelled to Sudan on 21 February 2018.
>
> 4. HMG is aware of reports that Sudanese authorities have mistreated prisoners in the past. If the Sudanese authorities were to apprehend, arrest or detain [the appellant] HMG assesses that he may be mistreated. In February 2017, a British journalist was released from the custody of the Sudanese authorities and alleged he had suffered mistreatment in the form of cruel, inhumane and degrading treatment (CIDT).
>
> 5. HMG assesses that dual British nationality or links to the UK, post-deprivation, will not make a substantial, positive difference in terms of potential mistreatment. In the case of the British journalist described above, British links or nationality did not make a difference. Consular access to the British journalist was limited to only one visit. The release came through diplomatic intervention.
>
> 6. [The appellant] has Sudanese nationality so it will be highly unlikely that the Sudanese authorities would look to send him to another country post-deprivation".

24. Under the heading "Risk of mistreatment in Turkey", there was the following:-

> "7. If the Turkish authorities were to apprehend or detain [the appellant], HMG assesses that the risk of mistreatment in Turkish detention is less than serious.
>
> 8. Should [the appellant] be detained in Turkey, HMG assess that the deprivation of his British nationality is unlikely to change this risk.
>
> 9. If [the appellant] is detained by Turkish authorities on immigration grounds, it is possible that, at that stage, they may look to deport [the appellant] to Sudan".

25. Annex E to the submission was headed "European Convention on Human Rights (ECHR) Issues". Paragraph 5 of this read as follows:-

> "5. If [the appellant] was detained, it is assessed he would be at risk of mistreatment. It was also assessed by HMG that British nationality would make no difference to detention, treatment or length of detention. In a case concerning a British journalist, it was noted that the release came about from high level diplomatic pressure and that they were restricted to one consular visit".

26. On the issue of Turkey, para.6 stated that, whilst the Turkish authorities would be likely to deport the appellant to Sudan, Turkish law protects against deportation taking place, where there are serious indications that the deportee would be subject to the death penalty or inhumane or degrading treatment. It was, however, not possible to determine whether the appellant would be able successfully to claim conditional refugee status or subsidiary protection in Turkey.

27. The respondent decided to act in accordance with the submission, with the consequence that, as described above, the appellant was deprived of citizenship whilst

in Sudan. However, at some point after the deprivation decision but before 17:53 hours on 9 May 2018, the FCDO's desk officer reported that the FCDO could not confirm the risk to the appellant without knowing more about his particular circumstances; that there was considerable evidence that the National Intelligence and Security Services (NISS) in Sudan did routinely mistreat detainees; that the FCDO did not have evidence to suggest that "being a dual British-Sudanese national makes no difference to the risk of mistreatment by the Sudanese authorities"; and that "they could not say that being a dual national makes no difference to the risk of mistreatment". An example was given in which the FCDO had "lobbied the Government of Sudan extensively on recent dual detainees and even requested consular access. They are not sure whether this, in turn, impacted on his release and/or treatment when in prison – but they could not say that being a dual national makes no difference to the risk of mistreatment". At some point after this but before 15:29 hours on 10 May 2018, the desk officer stated that he had spoken again to the Sudan team and they, in turn, had engaged with the Post in Khartoum. The OPEN gist of the Sudan team's response was as follows:-

> "An FCDO official responded to [the desk officer], alongside David Lelliott's response [see below] and said they did not agree that removing UK nationality would not have an impact on mistreatment. They also thought that FCDO would be able to use the fact that someone is a UK national to try to gain consular access (even though FCDO were not entitled to it) and that would help avoid risk of mistreatment, but stated that they did not feel well able to judge."

David Lelliott (DHM Khartoum) said:-

> 'It's slightly hard to say whether there are no substantial grounds for believing there is a real risk of detention, given that they don't know the background. If the question is

> whether Government of Sudan will view deprivation of UK citizenship as reason to detain the individual concerned, then the answer is probably "no". But if they were already inclined to detain him, then his being a mono-national might make this "lower cost" in their eyes than if he were a dual national. As to whether British citizenship makes a material difference to the risk of mistreatment by the Sudanese authorities, you could argue that Government of Sudan has recently shown (and is indeed currently showing) that they are willing to detain and mistreat dual nationals, and that our interventions, in particular requests for consular access, have been ineffective (we never got access and there is no evidence that our dual nationals receive preferential treatment or earlier release than others). But dual nationality undoubtedly gave us a locus to intervene in the case of dual nationals in different ways to how we could for other detainees, and enabled u [sic] and others to mobilise greater parliamentary and civil society interest, thereby increasing the pressure on Government of Sudan to release them (and others). So I don't think I could agree that British citizenship makes no material difference to the risk of mistreatment by the Sudanese authorities'.

28. There is no certainty regarding the catalyst for the expression of these views, taking issue with aspects of the submission to the respondent. It seems likely, however, that they arose, following the lodging of the appellant's appeal under section 2B against deprivation, as part of an exercise conducted by the respondent in order to determine if there was exculpatory material, which should be disclosed in the appellate proceedings.

29. It is common ground that no action was taken following receipt of these views, when the appellant was still in Sudan. Action was eventually taken in 2022, by which time the appellant had been in the UK for a number of years. On 7 December 2022, the respondent was sent a submission, which recommended "not withdrawing the deprivation of British citizenship" of the appellant. The recommendation sought the respondent's agreement that, having had sight of the information held, the deprivation

appeal before SIAC should continue to be defended and that the deprivation decision should not be withdrawn.

30. Paragraph 5 of the 2022 submission stated that during the course of the appeal process, statements were discovered from the FCDO "contradicting the 2018 [ministerial submission] and suggesting that British citizenship might make a difference to risk of mistreatment". Reference was made to the disclosure of the email exchanges from May 2018 within the FCDO, expressing a conflicting view as to whether British nationality would have provided the appellant with protection in Sudan. Reference was made to an FCDO official stating that British citizenship "does make a difference to the risk of mistreatment in detention, because it allowed HMG to increase pressure on Sudan to release someone".

31. Paragraph 6 of the submission said that, additionally, the 2018 submission "did not consider whether the removal of [the appellant's] British citizenship would have made a material difference to his treatment, given his ethnicity as a non-Arab Darfuri, or that he was previously granted asylum in the UK, in part on the basis of his ethnicity". In this regard, the respondent was informed that the appellant's representatives had referred in the appeal proceedings to a number of Country Guidance cases involving non-Arab Darfuris in support of the appellant's contention that the respondent's policy had not been properly applied, as the article 2/3 ECHR decision conflicted with those cases.

32. Under the heading "Considerations", the 2022 submission stated that HMG had conducted a review of the relevant materials available both at the time of the decision and the evidence submitted as part of the appeal. HMG had compiled a note on the

article 3 assessment. This was Annex F. The note explained why the conclusions of the assessment "remain accurate, taking into account the matters noted in this submission and the material filed in this appeal" (para.8).

33. Paragraph 9 stated that, after considering the material, "FCDO maintained the assessment that, as at the time of the decision, British nationality would not have made any difference to the risk of mistreatment that [the appellant] would receive in the event that he were detained".

34. At para.10, it was noted that FCDO assessed that, if the appellant were detained, he would be at risk of mistreatment, but depriving the appellant of his British citizenship did not expose him to a risk of detention. Although dual nationality offered the ability to lobby for consular visits, release and better treatment, it was said that there was "no evidence to suggest that being a dual national has in any way impacted on treatment". Both dual and British nationals had been mistreated. Thus, although the comments of FCDO officials in 2018 had been correct insofar as they said that British citizenship gave the FCDO an ability to lobby the Sudanese for better treatment, "the FCDO have confirmed that there is no evidence to suggest that this would make any practical difference, particularly for a dual national" such as the appellant.

35. Annex F to the 2022 submission begins by stating that it had been produced "following the identification of contradictory assessments from the FCDO relating to the difference British nationality would have had on the potential detention and mistreatment of" the appellant, were he to be of interest to the Sudanese authorities. As part of the litigation process, the FCDO had identified "what they considered at that time to be a possible error" with the submission "relating to the protection

afforded to an individual who held dual British-Sudanese nationality status as opposed to a mono-Sudanese national".

36. At para.8 it was said that FCDO considered that, because the appellant was a dual British-Sudanese national, the authorities in Sudan would not have bowed to diplomatic pressure to release him, were he to be detained. This was in contrast to the case of the British journalist. Accordingly, the FCDO emails relating to the significance of British citizenship were not considered to alter the original assessment that "British nationality would not make a substantive positive difference to [the appellant's] treatment".

37. At para.9, whilst noting that the FCDO comments correctly identified the fact that British nationality gave them a basis to lobby the Sudanese authorities, the FCDO confirmed "that there is no evidence to suggest that this would make any actual difference to the mistreatment risk" which the appellant would face. Accordingly, the conclusion in the 2018 submission that deprivation would not give rise to a mistreatment risk was correct.

Paragraphs 10 and 11 read as follows:-

> "10. FCDO have subsequently considered the material filed in the proceedings relating to [the appellant's] non-Arab Darfuri identity and the country guidance cases [*AA (non-Arab Darfuris – relocation) (Sudan)* CG [2009] UK AIT 00056; *IM and AI (risks – membership of Beja Congress and Jem*) Sudan CG [2016] UK UT 00188 (IAC); *AAR & AA (non-Arab Dafuris – return) (Sudan)* [2019] UK UT 00282 (IAC)]. The FCDO do not dispute that non-Arab Darfuri ethnicity gives rise to a risk of mistreatment in Sudan, and did so at the time of deprivation. However, as referenced above, the FCDO assess that British nationality, and the possession of a British passport did not afford individuals protection from the Sudanese authorities, including in the cases of dual British-Sudanese nationals of non-Arab Darfuri ethnicity such as [the appellant].

11. Therefore, insofar as the Country Guidance cases referenced in the proceedings suggest that British nationality offers protection against mistreatment for non-Arab Darfuris [e.g. IM and AI … p.48, para.187] the FCDO does not agree that this is accurate. The FCDO's assessment is based on its experience of dealing with consular assistance cases in Sudan and attempting to secure better treatment for British nationals on the basis of British nationality. Although as set out above, British nationality provides a basis for lobbying Sudanese authorities for better treatment, the FCDO has no evidence that British nationality does offer any protection against mistreatment, and nor did it at the time of the deprivation.

12. In the light of that, the country guidance material referred to in the proceedings does not alter the assessment made in the [2018 submission] that British nationality made no difference to treatment in Sudan and therefore deprivation did not expose [the appellant] to a risk of mistreatment".

38. On the first day of the hearing of the appeal, Mr Dunlop KC filed a document headed "Clarification/Correction to 2022 Note". This reads as follows:-

"Para.6 FCDO … note that in the case of dual nationals, there are no examples of requests for consular visits being granted and there is no evidence to suggest that being a dual national has in any way impacted on treatment or detention time.

Clarify/Correct – there are no examples of formal requests for consular visits through the foreign ministry being granted. However, there are some examples of access to dual nationals being given in police custody early in their detention. However, it remains the case that there is no evidence to suggest that that (sic) being a dual national has in any way impacted on treatment or detention time.

Para.10. The FCDO do not dispute that non-Arab Darfuri ethnicity gives rise to a risk of mistreatment in Sudan and did so at the time of deprivation.

Clarify/correct – 10. The FCDO do not dispute that non-Arab Darfuri ethnicity gives rise to a risk of mistreatment in Darfur and did so at the time of deprivation. The FCDO do not accept that non-Arab Darfuri ethnicity gives rise to a risk of mistreatment in

Khartoum either now or at the time of deprivation."

39. Whilst on the subject of clarifications or corrections, it is convenient here to record that, in an email sent at 15:37 hours on 16 December 2022, it was stated that, on consideration of the FCDO 2018 emails disagreeing with the assessment that British citizenship would make no significant difference to the position of a detainee in Sudan, the respondent "maintains the deprivation decision in this matter". At 17:22 on the same day, however, an email stated that there was a "typo" in the email of 15:37, the last part of which should have read the respondent "has decided not to withdraw the deprivation decision in this matter".

LEGAL PRINCIPLES

40. We have referred above to the judgment of Lord Reed in *Begum* in the context of the approach to be taken to the respondent's article 2/3 policy in respect of deprivation of citizenship which takes place whilst the person concerned is outside the United Kingdom. At para.124, Lord Reed observed that, whilst policy is not law and can be consciously departed from, a failure by a public authority to follow its policy without good reason can be open to challenge. Amongst the examples of successful challenge are where the relevant authority failed to have regard to its policy and misdirected itself as to the meaning of the policy, or departed from its policy without good reason. The question of how policy applies to the facts of a particular case is generally treated as a matter for the authority, subject to the *Wednesbury* requirement of reasonableness. Lord Reed said that was most obviously the correct approach where, as in deprivation, the application of the policy expressly depends upon the decision-maker's exercise of judgment, inherent in the test "if she is satisfied that doing so would expose those individuals to a real risk …".

41. In the light of the Supreme Court judgment, SIAC has had to determine how its function of receiving and considering evidence which was not before the decision-maker at the relevant time is compatible with the Supreme Court's conclusion that, in essence, a judicial review test applies to the respondent's assessment of national security, notwithstanding that a section 2B appeal is not, as such, a judicial review but an "apparently unqualified right of appeal": Elisabeth Laing LJ at para.170 of U*3 v. Secretary of State for the Home Department* [2023] EWCA Civ 811. At para.171, Elisabeth Laing LJ described as "apposite" SIAC's description in *U3* of its role as giving SIAC a more "powerful microscope" than that which was available to the respondent at the relevant time, noting that SIAC will likely have before it far more material than was before the respondent.

42. In *Begum v. Secretary of State for the Home Department* [2023] HRLR 6 ("*Begum 2*"), SIAC addressed the role of the Commission in a section 2B appeal. At para.39, SIAC noted that "the full gamut of public law grounds is available to an appellant". These included a failure to take into account relevant considerations; as well as "breach of the *Tameside* duty to make adequate inquiry (to which *Wednesbury* principles apply, because it is not for the Commission to decide for itself what constitutes adequate inquiry), failure to provide the decision-maker with adequate information and a fair and balanced account of the case as a whole and error of established fact".

43. At para.40, the Commission noted that the public law error must be "material in the sense that it would be open to the Secretary of State to show that the outcome would have been the same irrespective of the error".

44. At para.41, SIAC observed that, whilst evidence postdating the deprivation decision is admissible in the appeal, it must relate to matters occurring before the decision.

45. At para.42, the Commission adopted what had been said at para.31 of its judgment in *U3 v. Secretary of State for the Home Department* (SC/153/2018 and SC/153/2021). SIAC is not simply the alter ego of the Administrative Court, as its constitution gives it special expertise both in immigration law and in the assessment of intelligence. It can, and very often does, hear oral evidence from the Security Service witness about the national security assessment. Thus, the tools available to SIAC (the "more powerful microscope") go beyond those which would be available to the Administrative Court.

46. At para.43, SIAC refined the point that it had made in para.41. During the course of the appellate process, including an exculpatory review, material may come to light which warrants further consideration by those advising the respondent. It was incumbent upon the respondent to keep the decision under review, albeit that did not entail the re-making of the national security assessment on a "rolling basis". Rather, the correct analysis was that, in the event that exculpatory material demonstrated a particular piece of evidence or intelligence might now bear a different interpretation, the respondent must consider whether the original decision can still be supported.

47. At para.44, SIAC observed that its role is limited to allowing or dismissing an appeal. Any response of the respondent to a decision allowing an appeal would be for her to decide in the light of all relevant factors. If the Commission concluded that the national security assessment was *Wednesbury* unreasonable, the respondent could not properly make the same assessment unless further evidence or intelligence came to light. Upon a reconsideration following a successful appeal, the respondent "would of course be looking at the matter as at the current date, not at the date on which the original decision was made".

48. In *U3 v Secretary of State for the Home Department*, SIAC held, in para.27 of its

judgment, that neither Lord Hoffmann in *SSHD v. Rehman* [2001] UKHL 47 nor Lord Reed in *Begum* was suggesting that public law grounds of challenge before the Commission did not include the full range of grounds on which a decision could be impugned in judicial review proceedings. If a public law error was identified and it could not be said that the outcome would inevitably have been the same, absent that error, then SIAC "would be left not knowing what the decision-maker would have done if the error had been pointed out". In those circumstances, SIAC considered that the "constitutional and institutional considerations which animate the approach to national security assessments" pointed firmly in favour of SIAC allowing the appeal "so that the decision-maker can apply her mind properly to the matter under consideration, rather than SIAC purporting to correct the error itself". SIAC rejected the respondent's submission that, even if it found that the national security assessment was vitiated by a material public law flaw, SIAC must still dismiss the appeal "if the decision has some factual basis and is one which a reasonable decision-maker could have made". SIAC considered that position to be "contrary to principle". The reason why a rationality-based review was appropriate was that the decision being reviewed "has been taken by the constitutionally designated decision-maker, on a correct legal basis and taking into account all and only relevant considerations". If that had not taken place, then there would be no valid decision to which respect was due. If the decision might have been one that a reasonable decision-maker could have made, then, if SIAC were to dismiss the appeal on that basis, SIAC would be saying that it is satisfied that deprivation is conducive to the public good. As the judgment in *U3* pointed out, that is an assessment that statute requires to be made by the respondent. Accordingly, for SIAC to step into the respondent's shoes at this point would be to make "precisely the error identified in *Begum* at [67] para.27(c)".

49. Before concluding this section on legal principles, it is necessary to make further reference to the *Tameside* duty. The imposition of a *Wednesbury* standard, in assessing whether there has been a breach of the *Tameside* duty, ensures that a court does not arrogate the function of deciding whether the enquiry undertaken was appropriate.

50. As the Divisional Court held in *R (Plantagenet Alliance Ltd) v. Secretary of State for Justice* [2015] 3 All E.R. 261 the court "should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision": para.100(3). The court should establish what material was before the authority "and should only strike down a decision by the authority not to make further enquiries if no reasonable council possessed of that material could suppose that the enquiries they had made were sufficient": para.100(4).

EVIDENCE OF Mr STJOHN GOULD

51. At the beginning of the hearing on 10 October, Mr Dunlop KC addressed the issue of whether the proposed FCDO witness, Mr St John Gould, should be permitted to give evidence. Mr Jaffey KC objected to Mr Gould giving evidence.

52. Mr Dunlop KC submitted that, in the view of the respondent, she was not in breach of SIAC's order of 11 November 2022, in tendering Mr Gould to give evidence, by reference to his witness statement. It was a "customary practice" of SIAC to hear a witness give oral evidence in respect of the respondent's national security case, not least so that the witness could be cross-examined in OPEN and CLOSED. It was often

only shortly before the hearing that an appropriate national security witness could be identified. The same was true of Mr Gould, albeit that he was not speaking in respect of national security matters.

53. We ruled that, notwithstanding Mr Dunlop KC's submissions, the respondent needed to obtain relief from sanctions, if Mr Gould was to be heard. In SIAC's oral ruling, it was explained why, in the particular circumstances of this case, SIAC considered it appropriate to give such relief. In particular, SIAC considered that it would be assisted by cross-examination of Mr Gould, as it would provide the appellant with an opportunity to probe any weaknesses in the respondent's case and to demonstrate any public law errors.

54. Having heard CLOSED submissions on the matter from Mr Ahmad KC, we concluded that there was nothing in CLOSED that affected the position.

55. Mr Gould is Head of the Sudan and South Sudan Unit in the FCDO, a position he has held since April 2023. Prior to that, the Sudan and South Sudan team was one of the teams within the FCDO's East Africa Department. Mr Gould headed that Department from April 2019. Accordingly, he had been the senior civil servant with responsibility for Sudan and South Sudan from April 2019 to the present. From 2019, he had been responsible for the work of both the British embassy in Khartoum and the Sudan team in the FCDO in London. This included oversight of work on human rights issues and migration matters, as well as a broader political input to the Consulate Directorate for their lead on issues concerning British nationals in Sudan.

56. Mr Gould said that the Foreign and Commonwealth Office merged with the Department for International Development in September 2020, so as to become the

FCDO. Although he referred throughout his statement to the FCDO, including in respect of matters occurring prior to September 2020, these were to be taken, where appropriate, as references to the FCO. We would add that we have adopted the same approach in this judgment.

57. Mr Gould agreed with and adopted the assessments in the OPEN ministerial submission of 2018, save that he considered para.5 could have been clearer, by identifying that the journalist, Mr Cox, was a mono-British national, whereas the appellant had Sudanese nationality.

58. Mr Gould understands that, after the 2018 deprivation decision and the filing of the appellant's appeal, officials from the FCDO reviewed the documents and expressed views on whether British citizenship would make a difference to the risk of mistreatment. The three officials in the OPEN summary of the emails (which we have referenced above) were "a junior FCDO official, the then counterterrorism delivery desk officer for the Middle East": a mid-ranking official, David Lelliott, the then deputy head of mission in Khartoum; and the Deputy Head of the Sudan team. As a result of a recent rule 38 process, we know that this official was Lucy Cowan. These three roles are junior to the role that Mr Gould has held since April 2019.

59. So far as concerns the 2022 submission and Annex F, Mr Gould agreed with and adopted the assessments contained in that annex, although he did not have direct involvement in drafting it.

60. When cross-examined by Mr Jaffey KC, Mr Gould accepted that the human rights situation in Sudan in 2018 could be described as appalling, particularly in respect of non-Arab Darfuris in Darfur.

61. Mr Gould agreed that the clarification/correction to para.10 of the Annex F note of 2022 was a substantial correction. He disagreed, however, that this meant that the submission to the respondent had been wrong. Mr Gould said that "Sudan" includes "Darfur". In Khartoum, the risk was considerably less. When asked if the respondent was supposed to have understood all this from the original version of para.10, and whether he agreed that this was a very substantial change, Mr Gould said that it was for colleagues to decide. He accepted that it was an important clarification.

62. Mr Gould agreed that in 2018, the judiciary in Sudan were highly politicised and unable to stop the torture and mistreatment of detainees. Prison conditions in Sudan in 2018 were harsh and life-threatening. The authorities operated secret, undisclosed detention facilities. Mr Gould agreed that the purpose was to enable the authorities to mistreat with impunity people in these facilities.

63. Mr Gould was asked about Annex B and C to the 2018 submission. Mr Gould said that he did not think that this had been prepared by the FCDO. He could discuss this in CLOSED.

64. Mr Gould was questioned intensively on the passages in Annex B and C relating to risk of mistreatment in Turkey. Mr Gould said that he was not responsible for this component of the document. He trusted the process that had produced it. As far as he knew, it was correct, but he was not an expert on Turkey. He did not know if the Sudanese authorities had been informed of the deprivation of the appellant's citizenship. He would not have, however, expected this to happen in the ordinary course of events. If they had been informed, Mr Gould agreed that it would be risky for the appellant to return from Turkey to Sudan. He did not know why the Turkish

authorities might remove the appellant to Sudan as opposed to the United Kingdom. He inferred that, if the authorities stopped the appellant from boarding a plane bound for the United Kingdom, the other option was to return the appellant to the place that he had come from. He did not know whether the appellant would be returned to Sudan on the basis that he was Sudanese. Nor did he know if the appellant would need a Sudanese emergency travel document. He did not have detailed knowledge as to whether such returnees were routinely interrogated on return. He could not speculate on what the appellant might answer if he were interrogated at this point. He could not advise on this issue. He did not know whether, in these circumstances, the appellant would be at real risk. Mr Gould said that he was not involved in designing these assessments.

65. When asked if he agreed that para.9 of Annex F was incomplete, he said that he had not been asked about this. He did not know if it was incomplete. He agreed that the scenario envisaged in para.9 would not exist if the appellant had not been deprived of British citizenship. When asked if deprivation, therefore, made a difference, Mr Gould said that it assumed a judgement about risk and there were a variety of ways he could answer.

66. Mr Gould was asked about the reference to the British journalist, Mr Cox, in para.5 of Annex B and C to the 2018 submission. Reference was made to articles in the media, including an article written by Mr Cox for *The Guardian*, published on 6 August 2012, in which Mr Cox described his torture and other ill-treatment whilst in detention. Mr Gould said that what was described sounded credible. When asked if para.4 of Annex B and C underplayed, in particular, the torture that Mr Cox had

sustained, Mr Gould said that he considered that the paragraph was a powerful description of the treatment meted out.

67. Mr Gould opined that Mr Cox's British nationality did not affect his treatment whilst in custody, whereas it was of significance that he was a prominent journalist and Channel 4 was heavily engaged in seeking his release. Mr Cox received consular access on one occasion but there had also been what Mr Gould described as consular contact on another occasion. This contact involved a whispered conversation with a consular official. Mr Gould explained that consular access involved a confidential conversation with the person concerned and the FCDO official. Consular contact was a very rare occurrence.

68. In the period 2018 to 2023, Mr Gould said that five out of 43 dual nationals had some form of local, low-level contact involving a member of the local staff of the UK embassy visiting the police station at an early stage in detention, before others took over. Mr Gould said that he had obtained this information from colleagues.

69. Mr Gould said that the Sudanese authorities did not believe that the United Kingdom had a locus when it came to dealing with dual British/Sudanese nationals.

70. Mr Gould was asked about Mr Hari, who was the producer/translator for Mr Cox and who was kidnapped along with him. Mr Hari appeared to have previously been given refugee status in the United States. Mr Gould did not know whether the US had put pressure on the Sudanese to effect the release of Mr Hari. He did not know the position of this individual. He did not know if Mr Hari's case had been considered

before Annex B and C had been drafted.

71. From *The Guardian* article written by Mr Cox, it was suggested that he had been attempting to report on possible war crimes being committed by the Sudanese authorities with regard to chemical weapons. Mr Gould agreed that this was likely to attract the most severe adverse attention on the part of those authorities. Mr Jaffey KC asked about the passage in the article where "Louise from the embassy" had been introduced to Mr Cox whilst the latter was in detention. After that meeting, Mr Cox had started to receive food parcels. Although the name of the sender was hidden by the authorities, when chocolate Penguin biscuits appeared in one delivery, Mr Cox realised that this must be from the British embassy. It showed that someone remembered him and that he was on a list somewhere. This was followed by a consular meeting with three British embassy staff who informed him that the US State Department, the UK Foreign Office, Channel 4 News and many others had been working on his behalf since Christmas and that Daoud Hari had been released some weeks before and was back in New York.

72. Mr Gould said that he had been unable to find any information about the US efforts to release Mr Hari. He also did not know whether *The Guardian* article, which had been published in April 2017, had been taken into account by those drafting the deprivation submission materials. Mr Gould had, however, seen the article in the paperwork but did not know of it in relation to the 2018 decision.

73. Mr Gould was asked about *The Guardian* article published on 6 August 2012 about the arrest, beating and torture of Mr Magdy El-Baghdady, a British citizen from North London, who reported being imprisoned in Sudan for more than two months, beaten, tortured, tried and subjected to a mock execution in Sudan. According to the article,

Mr El-Baghdady was identified by the Sudanese Security Forces as an activist intent on fomenting revolution. In the article, Mr El-Baghdady is reported as saying that his ordeal was in no way comparable to the mistreatment of local prisoners.

74. Mr Gould said that the detention of Mr El-Baghdady would have been known by the UK embassy and would have been reflected in the embassy's input to the respondent. There was no reason to believe that account would not have been taken of the experiences of Mr El-Baghdady.

75. Mr Gould was asked about the reference to local prisoners being treated differently. It was put to him that British citizenship did, therefore, have a protective effect. Mr Gould said that Mr El-Baghdady's treatment had been pretty appalling and that his British citizenship had not helped him in this regard. There could have been all sorts of different circumstances, including whether the authorities thought they would ever release a person, which might affect their behaviour. British nationality did not prevent ill-treatment, but he had not been discussing whether it prevented the worst forms of treatment.

76. Mr Gould was asked about a report by the organisation Waging Peace entitled "The danger of returning home: the perils facing Sudanese immigrants when they go back to Sudan: September 2012". The report documented experiences of Sudanese individuals who had spent time in Europe and who had been subjected to varying levels of interrogation, detention and ill-treatment on their return to Sudan. Mr Gould said he would be surprised if those responsible for the 2018 and 2022 ministerial submissions had not read this report. On p.64 an individual who had been detained by

the NISS was told by them that what saved him was that his father was a son of the Nile, not that the individual was British: "the fact that I had a British passport and was born in London meant little to them to start with … not much was openly said about Britain or me being British … They made every effort to avoid [calling the British embassy] in the hope that they really had found someone they could charge … Later on they made us sign the papers not to disclose what happened to us …"

77. Later in the report, at p.100, an individual said that on the first day of detention "I begged for the British embassy to be alerted to prove my words. Every time I said 'British embassy' the men paused momentarily and looked to one man … The man never responded quickly, but shook his head and said, 'No embassy' …"

78. Mr Gould considered that these experiences supported his analysis. The authorities were playing with the individual.

79. He was asked about a passage at p.76 where a detainee "asked Major Mohamed Saleh to contact the embassy. He paused, clearly worried, and did not answer; the word embassy made him very uncomfortable …" Mr Gould said he found it difficult to say what were mind games and what were not. This particular individual was an unusual person. Mr Gould agreed that the embassy was in this case making representations to effect release.

80. When asked if the NISS do what they think they can get away with, Mr Gould said

that the critical factor was whether the person in question was Sudanese. That was a crucial distinction for the authorities.

81. Mr Gould was asked about the email chain of May 2018 and the "dissenting views". Mr Gould said that they were not necessarily dissenting. The desk officer was only temporarily covering counterterrorism in the Middle East. Mr Gould had not asked him about his 2018 observations. The issue was, rather, how one interpreted the absence of evidence. Mr Gould said that the embassy does not believe that lobbying on behalf of dual nationals has effected release.

82. Mr Gould said that Lucy Cowan was still with the FCDO. He had not consulted with her about the matter. He reiterated that the key issue was about the position of dual nationals.

83. Mr Gould did not know whether these views had been passed to the respondent, given that they were expressed at a time when the appellant was still in Sudan.

84. When asked about Mr Lelliott's observation that, having British citizenship gave the FCDO a locus, Mr Gould said the question was whether this was recognised by the other side. Mr Lelliott had not characterised the issue as Mr Gould would have done. He placed more weight on the aspect of locus than Mr Gould would. The 2022 submission made it clear that there was a substantive difference in the case of a dual national. Mr Gould had not consulted Mr Lelliott, who was still with the FCDO,

having moved to another role, at the same grade. Mr Gould accepted that Mr Lelliott had experience on the ground in 2018, but this did not necessarily assist in making a well-founded judgment. Mr Gould considered that excessive weight had been placed by Mr Lelliott on the significance of dual citizenship, but he accepted that Mr Lelliott's was a respectable view. It was one which could have been taken into account by the respondent.

85. Mr Gould did not know what had been done with the email chain of 2018 and whether it had been passed to the Home Office. Mr Gould had a different view of the weighting.

86. Mr Gould did not know who gave the original 2018 assessment, so far as the FCDO was concerned. He assumed it would have been the head or deputy head of the unit but he just did not know. It might have been the case that the Sudan team was consulted and he assumed this. He would have been surprised if they had not been.

87. When it was put to him that the deputy head – Lucy Cowan – did not look like she had been consulted, Mr Gould said that he did not know. He reiterated that he did not know who made the original FCDO assessment in 2018.

88. Mr Gould was asked about the significance or otherwise of achieving earlier release from detention in Sudan, as a result of being a British citizen. When asked if getting out sooner was "not enough", Mr Gould agreed. He then answered "Yes" to the

question, if someone gets out of prison quicker, is that a substantial positive difference?

89. After submissions in the absence of Mr Gould, he returned and was asked whether he agreed if a person was released faster from Sudanese detention, that made a substantial positive difference in terms of treatment. Mr Gould said that, setting aside the test that the respondent set here, being released from Sudanese detention was a positive thing. He did not know the basis upon which the respondent made her decision. There was a range of arguments put to her.

90. Mr Gould was asked about the clarification/correction to para.6 of Annex F and the evidence he had given about early access in five out of 43 cases concerning dual nationals. He was asked, specifically, whether he agreed that the respondent was not told in 2022 about this aspect. Mr Gould said that the small minority of the 43 cases had low-level early access visits. This was not through any formal route. It was not granted by the Sudanese central authorities, but depended upon the diplomatic skill of staff with the local police station. There was no evidence that this early contact had made a difference. When asked if such access made it harder for the authorities to transfer the information to a "ghost" prison, Mr Gould did not think that it did. He was asked if it would make it harder for the person to "disappear". Mr Gould replied to the effect that just because a junior person from the Embassy had seen someone in a police station did not stop the authorities saying that the person was still in detention, even if they had been moved on to such a facility. In the period in question, these visits did not make a difference and the FCDO had had no success in getting consular access to dual nationals in that period.

91. Mr Gould said that he had found out about this police station access in the week before the hearing. When asked when it was known in the FCDO, Mr Gould said that the embassy staff had been dispersed by the civil war in Sudan and the local staff had been dispersed and traumatised.

92. When asked if Mr Lelliott knew about the practice in 2018, Mr Gould said that his dataset was for the period 2018 to 2023.

93. When asked if there had not been a completely inadequate investigation, Mr Gould said he did not think so. Mr Gould said that Mr Lelliott was clear that British nationality would not make a difference.

94. It was put to Mr Gould that the last sentence of the email exchange recorded Mr Lelliott in terms of saying he did not think that he could agree that British citizenship made no material difference. Mr Gould said that he did not know if these early access cases had taken place when Mr Lelliott made that comment.

95. When asked about the clarification/correction to para.10 of Annex F, Mr Gould said that it was his perspective that Sudan included Darfur. There was in his view a stark contrast between the position of non-Arab Dafuris living in Darfur and those living elsewhere in Sudan, at least until the current conflict. He was asked if he had read the

Country Guidance before giving these views. Mr Gould said that he had read it at some point in the past two weeks.

96. Mr Gould said that he agreed with the executive summary in the Home Office Country Policy and information Note Sudan: Security Situation (Version 1.0-June 2023).

97. There was no re-examination.

THE EVIDENCE OF MS KAREN O'REILLY

98. We also heard oral evidence from Karen O'Reilly. She had prepared a country expert report on 7 October 2019, together with a supplementary report of 25 March 2022.

99. Ms O'Reilly spoke about the current conflict in Sudan. In her view, the position of non-Arab Dafuris had not improved at the present time. On the contrary, she said their position was extremely precarious. Many illegal detention centres had been set up.

100. Ms O'Reilly was asked about the view expressed in para.8 of Annex F to the 2022 ministerial submission. She said that she did not agree with the views expressed. Even as a dual national, her experience with non-Arab Darfuris was that the Sudanese authorities employed a sort of risk/benefit analysis. Being a British citizen meant that those authorities knew that the British could seek to intervene and that there might be media interest. A British citizen had the possibility of leaving Sudan after release but

a mono-national did not have that option.

101. Cross-examined, Ms O'Reilly said that she would have mentioned seeing the decision of the immigration judge in the case of the appellant, in the list of materials in her report, if she had done so. She said that she drew on her experience from interviewing refugees and consulting the decisions of colleagues who had made assessments of Sudanese refugees. Ms O'Reilly confirmed that she had no personal experience of seeking consular assistance for a mono-Sudanese national. She had never been deployed to Sudan itself. None of the cases that she had considered involved a Sudanese who was a British citizen. Nor did they involve someone who had formerly been British.

102. Ms O'Reilly stated that she had not read the report of a fact-finding mission to Khartoum conducted between 10 and 17 August 2018 and published in November 2018 by the Home Office. She would, however, have read it in connection with other reports she would have compiled.

103. Ms O'Reilly considered that there were more than 10 million people living in Khartoum. When asked about the assessment in the fact-finding mission report, that there were between 100,000 and 1 million non-Arab Darfuris in Khartoum, Ms O'Reilly said she did not know; not least because she did not know what the expression "Khartoum" meant in this context. She agreed with the view expressed at 1.5.2 of the report that there are non-Arab Dafuris spread across Sudanese and Khartoum society.

104. Ms O'Reilly was asked about the views expressed by embassy officials, as recorded at 3.3.2 and 3.3.3 of the report, to the effect that they were not aware of wide-scale arrests of Dafuris, or of particular difficulties faced by them. Ms O'Reilly said that she knew that there were arrests of non-Arab Dafuris but was unsure about whether there were round-ups. She was not aware of large-scale arrests of this kind at that time. There were, however, arrests and raids on homes.

105. Ms O'Reilly was asked about the passages in her report dealing with people of Tunjur ethnicity; specifically, whether these were from an early period of 2003 to 2008. She said that there was a low threshold for those who were perceived to be political activists. A non-Arab Darfuri who happened to move in with political activists would be of concern, because of their associations. Individuals could have a political opinion imputed to them. She agreed that the documentary materials did not refer to perceived political activists.

106. Ms O'Reilly said she was unsure why she had not referred in her report to the November 2018 fact-finding mission report. It tended to be male, younger non-Arab Darfuris without children who would be perceived as being involved with a rebel group.

107. Referring to paras.63 and 74 of her supplementary report, Ms O'Reilly confirmed that the appellant would, in her view, be at risk if he had been returned from the United

Kingdom. There was a "watch list" in operation at Khartoum airport in 2016 to 2018. She considered that the appellant would have encountered a more circumspect attitude on the part of the authorities, if they had encountered him as a British citizen. If he had a high profile, he might be arrested, even if he were British, but, otherwise, the authorities would not consider it was worthwhile to do so. Ms O'Reilly's "cost-benefit" analysis was based on interviewing people who had been arrested and tortured in Sudan. The appellant would, in her view, be at a much higher risk if he was not British. She could not, however, say that there was no risk, even if he had British citizenship.

108. Ms O'Reilly was asked about para.165 of her report where she referred to the appellant as someone who had previously been associated with a Darfuri charity, which would, in her view, be perceived to be political and assisting rebels. It was put to Ms O'Reilly that the immigration judge's determination had concluded that the authorities did not know of the appellant's charitable work. Ms O'Reilly confirmed that she was unaware of this. She did not, however, agree with the judge's findings of fact.

109. She was asked whether she knew that in 2016 to 2018, the appellant had passed through Khartoum airport without being stopped. She said this was right, but he did so as a British citizen. When asked if she was aware that he had passed through the airport after he had been deprived of citizenship, Ms O'Reilly said that she was aware of this now. It was put to her that paras.18 to 20 of her instructions in respect of the expert report made this plain. She confirmed this was so. When asked why, therefore, she had not referred to these same passages in her report, she said that she did not consider them to be relevant.

110. Ms O'Reilly said that one could obtain a visa even if one had already been arrested and even though the authorities considered one to be a threat. She did not know whether it was easy or difficult to obtain a Sudanese residence permit, as the appellant had done. She was aware that the appellant had obtained a five-year permit. When asked why this had not featured in her report, Ms O'Reilly said that she did not consider it to be relevant as, despite a permit, a person could be arrested in order to send a message.

111. Ms O'Reilly confirmed that, whilst she was working with UNHCR in respect of Sudanese persons, she did not work with those who had British citizenship.

112. When asked if she had ignored everything that happened to the appellant after the deprivation decision, Ms O'Reilly said that she was examining the issue of risk at the time of deprivation and what happened or not afterwards would not, in her view, be relevant. She said that obtaining a Sudanese passport did not, in her view, affect the issue of risk.

113. Ms O'Reilly said that non-Arab Darfuris were not all monitored, but there were random raids on people's homes. The focus was on those who were perceived to be in opposition, but that was a low bar and a person might be detained in order to send a message, even if they were not a threat.

114. When asked about the experiences of Mr Cox and Mr El-Baghdady, who had both been arrested and ill-treated despite their British citizenship, it was put to Ms O'Reilly

that para.175 of her report could not be correct. There, she stated that it was highly unlikely that the Sudanese authorities would arrest and torture an individual who could easily call for help from the British authorities. Ms O'Reilly maintained her stance that it was highly unlikely that this would occur. She also said that one would be beaten much more if one was not British, referring again to her cost/benefit analysis. She admitted that she did not know how many British citizens might have been arrested and tortured by the Sudanese.

115. When asked why she had not drawn a distinction between mono-British citizens and dual British-Sudanese citizens, Ms O'Reilly said that she had answered the questions that had been put to her.

116. When re-examined, Ms O'Reilly was taken to paras.220 and 221 of *IM and AI*, read with paragraphs 216 and 217. On the basis that IM was not a Darfuri, Ms O'Reilly accepted the conclusion at para.221 that draft evaders and deserters would not as such be seen by the authorities as a threat to the regime or as having political leanings supporting opposition to the Sudanese State.

117. She also noted the description by Mr El Baghdady of his time in detention, including his view that his ordeal was in no way comparable to those of local origin.

DISCUSSION

118. The respondent's case in resisting this appeal is put on a number of bases. First, the respondent contends that there were no public law errors in the 2018 decision, based as it was on the submission to the respondent. Second, even if there were any such errors in the 2018 decision, these were not material. Third, even if there were material

public law errors in the 2018 decision, SIAC should, nevertheless, exercise its discretion to dismiss the appeal.

119. The respondent's first basis relies upon para.12 of the 2018 submission, which stated that, "Whilst there is a risk that were [the appellant] to be detained, then he may be mistreated, there are no substantial grounds for believing there is a real risk of detention due to depriving [the appellant] of citizenship and therefore there are no substantial grounds for believing there is a real risk of mistreatment or death as a direct result of deprivation".

120. We remind ourselves that, as SIAC held at para.21 of *X2 v. Secretary of State for the Home Department* (SC/132/2016), the risk of treatment contrary to article 2 or article 3 of the ECHR "must be both foreseeable, and a direct consequence of the impugned decision"; that is to say, the decision to deprive the individual of British citizenship.

121. Despite the narrowness of that test, it is, in our view, evident that the respondent cannot rely upon para.12 as providing a complete answer, with the result that the remaining part of the submission – in particular, para.13 – must be redundant. A person may be at risk of treatment, which may, but for their British citizenship, reach the article 2/3 threshold. It is no answer, in such a case, to say that, because the person concerned would not be at risk of detention (and consequent ill-treatment) <u>because</u> of his loss of British citizenship, there can be no relevant connection between the already-present risk and no longer having the protection in respect of that risk which derives from British citizenship.

122. We find it is for this very reason that the 2018 submission proceeded to say what it did

in para.13; and to assess the position in both Turkey and Sudan, as set out in Annex B and C (OPEN version).

123. Paragraph 13 of the submission needs, therefore, to be read with paras.4 to 6 of Annex B and C, under the heading "Risk of mistreatment in Sudan". Paragraph 4 begins by stating something that is uncontroversial and which was amply borne out by the evidence of Mr Gould and Ms O'Reilly. The plight of those who find themselves in detention in Sudan is generally dire. Serious mistreatment is commonplace. What is said in para.4 about Mr Cox is borne out by the evidence referenced above regarding his experiences in detention.

124. Against that background, SIAC agrees with Mr Jaffey KC that para.5 fails to accord with ordinary principles of public law. The first sentence contains the assessment that dual British nationality or links to the United Kingdom post-deprivation will not make a substantial, positive difference in terms of potential mistreatment. According the requisite deference that SIAC must give to assessments of this kind, it is entirely unclear what was intended to be conveyed by the words "will not make a substantial, positive difference in terms of potential mistreatment". Paragraph 61 of the respondent's skeleton argument says that it "is possible for something to 'make a difference' (e.g. eventually result in release) without making a substantial, positive difference to mistreatment (e.g. it does not stop them being tortured before they are released)". If that is the respondent's justification for the quoted passage in para.5 (and we have heard no other), it is wrong. The interpretation of the respondent's article 2/3 deprivation policy is for a court to determine. It cannot possibly be correct, as a matter of interpretation of the policy, that an individual who suffers article 3 ill-treatment (e.g. from beatings) each day of their detention, but who is released from that detention earlier than would otherwise have been the case as a result of them

being a British citizen, can be deprived of British citizenship because they would – on this hypothetical – already have suffered article 3 ill-treatment on each of the days before their release. To conclude otherwise would be for the policy to withdraw the protection of British citizenship from those who are at the mercy of a regime that grossly disrespects the rule of law, and who are therefore most in need of that protection.

125. There is another problem with para.5. The second sentence makes reference to the case of Mr Cox, asserting that "nationality did not make a difference". That is, with respect, nonsense, as Mr Cox's account in *The Guardian* article makes plain. Those responsible for the 2018 submission did not need to have read that article, since they were (or should have been) aware of the visit, other contact and material assistance provided to Mr Cox. The contention that consular access was limited to only one visit is, as we have seen from the evidence, significantly less than the full story. The final sentence, which states that "release came through diplomatic intervention" is correct but constitutes an irrational non sequitur with what has proceeded it.

126. The same non sequitur occurs in paragraph 5 of Annex E. Although that paragraph opines that nationality would not make a difference to the <u>length</u> of detention, that assessment contradicts the last sentence of paragraph 5 of Annex B and C, unless it was being suggested that the release of Mr Cox through diplomatic intervention just happened to occur at the very time that the Sudanese authorities would in any event have released him. Such a suggestion would, of course, be bizarre and we can find no evidence for it.

127. These public law defects are such that the respondent cannot successfully defend the

2018 decision (leaving aside, for the moment, the 2022 submission). This is so, irrespective of the issue of risk arising from the appellant's presence in Turkey.

128. We shall, nevertheless, address the criticisms advanced by the appellant in respect of the risk of mistreatment in Turkey (including risks arising from returning the appellant to Sudan from that country).

129. Given the history of these proceedings, SIAC does not consider that there is merit in the respondent's contention that the issue of Turkey was not pleaded by the appellant. We accept what Mr Jaffey KC said, that the thrust of the respondent's case on the 2018 decision did not become apparent until receipt of the respondent's skeleton argument.

130. What counts as a foreseeable and direct consequence of deprivation must, of course, depend on the circumstances of the particular case. As para.1 of Annex B and C stated, the respondent was aware that the appellant may return to the United Kingdom via Turkey (or at least attempt to do so) and therefore the respondent considered it correct to assess the risks in Turkey. SIAC sees no reason to permit the respondent to resile from that position.

131. In its OPEN form, paras.7 to 9 of Annex B and C leave unresolved what we agree with the appellant was the important question of what might transpire if, following deprivation, the appellant were to be returned to Sudan from Turkey; in particular, how he would be perceived by the authorities in Khartoum. Mr Gould was unable to shed any light on this in his OPEN evidence. Accordingly, the 2018 decision is flawed for the public law reason that, as regards Turkey/Sudan, there was a failure to have regard to relevant considerations. We have more to say about this issue in the

CLOSED judgment.

132. We therefore turn to the second strand of the respondent's case, which is that there was no material public law error in the 2018 decision. This involves consideration of the 2022 submission. The respondent's case is that, having regard to this, the respondent was bound to have reached the same decision as she did in 2018, even if errors were made at that time.

133. It is necessary at this point to consider the nature of the 2022 submission and the stance that SIAC should adopt in relation to it. Both sides made reference to *Caroopen and Another v. Secretary of State for the Home Department* [2017] 1 WLR 2339. At paras.29 to 34 of the judgment, Underhill LJ identified three different types of purpose which a "supplementary" decision letter may serve in judicial review proceedings. The first category was where the supplementary letter sought to supply reasons, or fuller reasons, for the original decision, in response to a criticism of the adequacy of the reasons given with that decision. As regards this category, Underhill LJ noted that the authorities "express caution about permitting a decision-maker to cure defects in his original decision in this way": para.30. Underhill LJ endorsed the view of Stanley Burnton J in *R (Nash) v. The Chelsea College of Art and Design* [2001] EWHC Admin. 538 that, even in a case where there was no explicit statutory duty to give reasons, the court should approach attempts to rely on subsequently provided reasons with caution, particularly those put forward after the commencement of proceedings and where human rights are concerned.

134. The second category identified by Underhill LJ was where the supplementary letter did not retrospectively cure the original decision but prospectively filled a gap which

would arise if the original decision should be held to be invalid. Underhill LJ described these as "fresh decision" cases: para.31. Underhill LJ approved the judgment of Upper Tribunal Judge Jordan in *Kerr v. Secretary of State for the Home Department* [2014] UKUT 493 (IAC) who said (at para.15) that, if "the later decision is a lawful consideration of all the factors that the decision-maker was required to consider but failed to consider in the earlier decision and admits consideration of all those factors that the decision-maker was required to admit, the later decision will be a lawful one. This does not alter the status of the earlier decision". At para.16, Upper Tribunal Judge Jordan said that, in such a situation, if the earlier decision was quashed, it would normally be appropriate to direct that the respondent make a fresh and lawful decision. If, however, such a decision had already been made, there would be no point in requiring a further decision in this regard.

135. At para.32 of *Caroopen*, Underhill LJ identified a third category, where further material – whether in the form of evidence or arguments – may have been brought to the Secretary of State's attention which required her to reconsider her original decision, irrespective of whether it was valid when first made. As a matter of analysis, this third category "constitutes a fresh decision". Underhill LJ called cases of this kind "new material" cases.

136. A fourth category, identified at para.33, was where the Secretary of State explicitly acknowledged that her original decision was defective but simultaneously made a fresh decision to the same effect.

137. At para.34, Underhill LJ recognised that, although these categories are clear enough conceptually, they could often be blurred in practice.

138. Mr Jaffey KC submitted that the 2022 submission/decision fell within the first of Underhill LJ's categories. As a result, SIAC should adopt a cautious approach to the reasoning contained in the 2022 materials.

139. Mr Dunlop KC submitted that the 2022 submission/decision fell within the third of Underhill LJ's categories. The catalyst for the reconsideration by the respondent had been the articulation of views within the FCDO, to the effect that possession of British citizenship could affect the treatment which a person might receive from the authorities in Sudan.

140. We have seen how, on 16 December 2022, the respondent's officials described the respondent's decision as being one to maintain the deprivation decision. This was later sought to be corrected, in that the decision was "not to withdraw the deprivation decision". The appellant says that the difference between the text of the original email and its replacement is significant because the December 2022 decision appears to be a legally-improper attempt to bolster a legally-flawed deprivation decision with *ex post facto* reasons and decision making, without properly reconsidering the decision or providing the appellant with an opportunity to make representations.

141. We do not consider that anything of substance turns on the terminologies employed in these emails. We are also conscious of what Underhill LJ said at para.34 and that the categories he identified are not necessarily hermetically sealed from each other.

142. That said, however, SIAC considers that this is a case that falls substantially, if not entirely, within the first category. Paragraph 5 of the 2022 submission contains the implicit recognition that proper enquiries within the FCDO would have brought the

contradictory or dissenting statements of Mr Lelliott, Ms Cowan and the desk officer to light, so as to inform the respondent in 2018. We say that, bearing in mind that the appellant's plans to return to the United Kingdom via Turkey meant that the submission to the respondent had to be made with a good deal of expedition.

143. Furthermore, para.6 of the 2022 submission acknowledges that the 2018 submission "did not consider whether the removal of [the appellant's] British citizenship would have made a material difference to his treatment, given his ethnicity as a non-Arab Darfuri, or that he was previously granted asylum in the UK, in part on the basis of his ethnicity". This acknowledgement underscores the findings SIAC has made in respect of paras.12 and 13 of the 2018 submission and paras.4 and 5 of Annex B and C.

144. This brings us to the issue of the *Tameside* duty in relation to the 2022 submission. We have earlier acknowledged that, as recently reiterated in *Plantagenet Alliance*, the court will intervene only where a claimant's challenge is made good on a *Wednesbury* basis. There are, however, different degrees of *Wednesbury* review, with the courts subjecting an authority's decision-making to greater (or "anxious") scrutiny where, as here, the subject matter concerns unqualified human rights, such as articles 2 and 3 of the ECHR.

145. In support of their submissions regarding the desirability of hearing oral evidence from Mr Gould, the skeleton argument of Mr Dunlop KC and Mr Stansfeld emphasised that hearing live witness evidence from an appropriate FCDO witness would enable SIAC to use its "powerful microscope" to examine and determine whether, or not, there were material public law errors in the submissions to the respondent. Mr Gould had relevant expertise to answer questions about the assessments, the conflicting views held by FCDO officials and the 2022 note (Annex

F). Mr Gould's evidence would enable SIAC to make any necessary factual determinations.

146. We make no professional criticism of Mr Gould. He holds a senior and responsible position within the FCDO in respect of a part of the world which is currently in crisis and which, accordingly, demands his fullest attention. It is not for SIAC to assume what priority Mr Gould or any other official should accord to the business of giving evidence to it. SIAC must, nevertheless, assess the quality of that evidence in its own terms, in order to decide if it serves to defeat the appellant's public law challenge. For the reasons which follow, we find it does not.

147. It was apparent in cross-examination that Mr Gould had little knowledge of the circumstances surrounding the decision-making in 2018 and 2022 and that he had not undertaken any investigation into them. He could shed no relevant light on the reasons why Annex F had been framed as it had or what evidence or other materials had informed the submission.

148. We have already observed that the standard of review in respect of a *Tameside* duty of investigation will be more intensive, where fundamental human rights are in play. The respondent did not suggest that the position was otherwise because, as matters transpired, the appellant was not subjected to detention, let alone ill-treatment, whilst in Sudan without his British citizenship. Any such suggestion would, of course, have been misconceived. The issue is the assessment of risk as at March 2018. Evidence of what did or did not happen to an individual at the relevant time, which comes to light afterwards, may play a part in considering the legality of the risk assessment undertaken at that time. In the present case, however, such evidence is of very limited significance, as regards the issue of lawfulness of the 2018 decision. The part it may

play in guiding SIAC's exercise of its discretion to dismiss the appeal, even if the decision was materially flawed, will be considered later.

149. The reason why SIAC takes this view about the significance or otherwise of the appellant's experiences in Sudan at the time of deprivation and afterwards, is that, as we have already seen, the 2018 submission decision, properly read, did assume that there was a real risk of detention (other than because of deprivation) and therefore addressed the relevance of having British citizenship, if the appellant were to be detained. The decision then gave what we have found to be an entirely incoherent explanation for concluding that possessing British citizenship would not make a difference to the nature of the appellant's detention. Accordingly, the fact that the accepted risk of detention did not, in the event, result in the appellant actually being detained does not affect the materiality of the public law error in the 2018 decision. It did not mean that there had been no such risk. The respondent cannot rely on the benefit of hindsight to absolve the error.

150. As a result, attention focuses on the 2022 submission. The nature of SIAC's *Tameside* review remains intensive, for the reasons we have given. It is also the case that the nature of the *Tameside* duty will be context specific. As we have seen, one of the main drivers behind the decision to ask the respondent to take the 2022 decision was the making by the FCDO of "statements contradicting the 2018" ministerial submission "and suggesting that British citizenship might make a difference to risk of mistreatment". These statements came from Lucy Cowan, David Lelliott and the desk officer.

151. What Mr Gould's evidence demonstrated was that, remarkably, no attempt was made to contact these individuals (who remain within the FCDO) in order to give them an

opportunity to further explain their thinking on this crucial issue. Mr Lelliott, in particular, as the official then "on the ground" in Khartoum, could and should have been asked for information underpinning his view, and whether he continued to maintain it, having regard to any information which may have subsequently come to light, bearing on the position in March 2018.

152. Faced with this obvious difficulty, Mr Gould sought to emphasise that the desk officer was only temporarily in post when he made his comment and that he (Mr Gould) was the senior official, being the Head of the Department with responsibility for Sudan and South Sudan. That serves, however, only to emphasise the significance of the failure of Mr Gould or, indeed, anyone in the FCDO to contact any of the three individuals; particularly, Mr Lelliott. It was also apparent from Mr Gould's evidence that he knew little of the details concerning diplomatic efforts in Sudan with regard to the detention of dual nationals.

153. The respondent sought to characterise the three dissenting voices as tentative in nature. The setting in motion of the 2022 submissions exercise shows, however, that the FCDO regarded the views as dissenting from or contradicting what the respondent had been told in the 2018 submission, to the point where the decision was taken to recommend that the respondent should not withdraw her earlier decision.

154. It is true that the email from Mr Lelliott said "We never got access and there is no evidence that our dual nationals received preferential treatment or earlier release than others". This was, however, immediately followed by his statement that dual nationality "undoubtedly gave us a locus to intervene in the case of dual nationals in different ways to how we could for other detainees". Mr Lelliott then referred to this enabling the FCDO and others to mobilise greater parliamentary and civil society

interest, increasing pressure on the Government of Sudan to release not just dual nationals but "others". Insofar as there is a tension between these two statements, it serves only to increase the necessity of asking Mr Lelliott for further and better particulars. The last sentence of Mr Lelliott's email is, in any event, categoric. He did not think that he could agree that British citizenship made no "material difference to the risk of mistreatment by the Sudanese authorities".

155. Any doubt there might be concerning the irrationality of not investigating these matters with the officials who had expressed the dissenting views is dispelled by the clarification/correction to para.6 of Annex F. This clarification or correction records that there "are some examples of access to dual nationals being given in police custody early in their detention". The clarification came about because Mr Gould had only very recently been given to understand that in the period 2018 to 2023, such access was afforded in five out of 43 cases involving dual British/Sudanese nationals in detention.

156. SIAC agrees with Mr Jaffey KC that the fact that this clarification/correction is put forward by way of an amendment to Annex F demonstrates that the information provided to the respondent, upon which she made her decision not to withdraw the 2018 decision, was materially incomplete and that the respondent, accordingly, failed to have regard to all relevant circumstances. As presented to the respondent, para.6 was concerned with "consular visits", an undefined expression which, only in Mr Gould's oral evidence, was explained as meaning a visit in which a UK embassy official had access to the detainee which enabled the latter to speak to the official privately, in confidence. However, as we have seen from the account given by Mr Cox, other forms of consular "contact" are capable of making a material difference to the position of an individual in detention. We should add here that we have not seen or

heard anything that suggests there is no real risk of serious ill-treatment at the hands of the police in the Sudan; but only at the hands of the NISS. By proffering the clarification/correction to para.6, the respondent must be taken to acknowledge that police detention is relevant to the issues with which this appeal is concerned. That is unsurprising; if only because police detention can lead to detention by NISS.

157. The fact that Mr Cox was a mono-British citizen does not destroy the relevance of his evidence on this matter. On the contrary, the case of Mr Cox was put forward by the officials drafting the 2018 submission as an example of the irrelevance of British citizenship. Since it was the respondent who first relied on Mr Cox as a relevant comparator with the position of the appellant, we consider that Mr Jaffey KC was entitled to point to the correlation between the mono-national, Mr Cox – detained on the basis that he was looking for evidence of illegal chemical weapons being deployed by the Sudanese regime – and the position of a dual British/Sudanese national, suspected of much less grave activity. This serves to undermine the submission at para.8 of Annex F, in which it is asserted that the Sudanese authorities would not have bowed to diplomatic pressure to release the appellant, as a dual national, were he to be detained, unlike the case of Mr Cox.

158. The belated disclosure of the statistics relating to diplomatic access to dual nationals in police custody is, regrettably, of a piece with other failings concerning the 2022 submission. If seeking early access in police custody is an entirely pointless activity, the obvious unanswered question is why time and effort was expended in doing it. We also note that Mr Gould had no satisfactory answer to the suggestion from Mr

Jaffey KC that letting the Sudanese authorities know that the United Kingdom embassy was aware of the British citizen's detention could lessen the risk of the detainee being moved to a "ghost" prison or otherwise merely to disappear.

159. We refer to what we have said regarding the 2018 assessment and the error in assuming that, because article 3 ill-treatment may have occurred in detention, a person who avoids further such ill-treatment by being released earlier than might otherwise have occurred, does not thereby engage the respondent's article 2/3 policy. In the light of Mr Gould's evidence, we find that a similar error is present in Annex F. Although para.6, even as proposed to be amended, refers to there being "no evidence to suggest that being a dual national has in any way impacted on treatment or detention times …", Mr Gould did not suggest that the reference to detention times came from anything other than the passage in the email from Mr Lelliott, in which he said that there was "no evidence that our dual nationals received … earlier release than others". That passage from the email, however, demanded investigation and elucidation. Accordingly, it is a legally-impermissible basis for the statement in para.6 of Annex F.

160. Mr Gould's answers in cross-examination also suggested that, insofar as his views might coincide with the authors of Annex F, the contention that British citizenship would not prevent ill-treatment in detention was predicated on the view that, if article 3 ill-treatment did occur, then it was somehow irrelevant whether being British might deter the Sudanese authorities from grosser forms of such treatment. That cannot, however, be a correct reading of the policy. Insofar as British citizenship might have a protective effect in preventing grosser forms of ill-treatment, such as to give rise to permanent disability, permanent ill-health or risk of death, the policy is plainly engaged, for the same reason as in paragraph 124 above.

161. The second clarification/correction is to para.10 of Annex F. This concerns the risk to non-Arab Darfuris in Sudan. As presented to the respondent, para.10 stated in terms that the "FCDO do not dispute that non-Arab Darfuri ethnicity gives rise to a risk of mistreatment in Sudan, and did so at the time of deprivation". The paragraph then went on to say that British nationality and the possession of a British passport did not, however, afford individuals protection from the Sudanese authorities, including in the cases of dual British-Sudanese nationals of non-Arab Darfuri ethnicity.

162. Paragraph 11 of Annex F expressed disagreement with the Country Guidance cases of the Immigration Appeal Tribunal and the Upper Tribunal, Immigration and Asylum Chamber, which suggested that British nationality did offer protection against mistreatment.

163. As we have seen, the proposed clarification/correction is that the FCDO do not dispute that non-Arab Darfuri ethnicity gives rise to a risk of mistreatment in Darfur and did so at the time of deprivation. However, the FCDO do not, according to the clarification/correction, accept that non-Arab Darfuri ethnicity gives rise to a risk of mistreatment in Khartoum; both at the present time and at the time of deprivation in 2018.

164. This clarification/correction to para.10 of Annex F generated questioning of both Mr Gould and Ms O'Reilly about the position in 2018 of non-Arab Darfuris in Khartoum. It led the respondent to take issue, not just with the finding in *IM and AI* at para.187, that possession of a British passport afforded its holder some degree of protection from the Sudanese authorities, but also the Country Guidance in *AA (non-Arab Darfurians – Relocation)* (Sudan CG) [2009] UK AIT 00056 that all non-Arab

Darfuris were at risk of persecution in Darfur and could not reasonably be expected to locate elsewhere in Sudan. That finding was extended by the Upper Tribunal in *MM (Darfuris)* Sudan CG [2015] UKUT 00010(IAC), whereby the expression "Darfuri" was to be treated as an ethnic term relating to origins and was not limited to a geographical location. That these Country Guidance findings were unaffected by the Country Guidance given in *IM and AI* is made pellucid by paras.216 and 217 of the Tribunal's determination in that case.

165. Where a written submission is provided to a Secretary of State, who makes a decision in accordance with the recommendation contained in the submission, the Secretary of State is to be taken as having acted for the reasons contained in the submission, in the absence of any evidence to the contrary. In the present case, the respondent made the decision not to withdraw the 2018 decision to deprive the appellant of British citizenship. In so doing, there being no evidence to the contrary, the respondent is to be taken as having acted for the reasons set out in the submission and the accompanying materials, including Annex F.

166. The respondent, therefore, took the 2022 decision on the basis that, as a non-Arab Darfuri, the appellant was at risk of mistreatment in Sudan. There was no suggestion made to the respondent that she should disregard the statement in the second sentence of para.10, whether on the basis that the appellant would not (or could be expected not to) go to Darfur; or that he would be able to avoid a risk of mistreatment by remaining in Khartoum, irrespective of the thrust of the Country Guidance. Indeed, if the position were otherwise, there would have been no need for the submission to deal with the key issue of whether British citizenship would confer protection on the appellant in the event of his detention by the Sudanese authorities, for the simple reason that there would be no real risk of such detention.

167. So far as para.11 is concerned, the FCDO's disagreement with para.187 of *IM and AI* did not involve taking issue with the "Country Guidance" in that case. Paragraph 187 did not form part of the Country Guidance, as defined in para.12.2 of the Practice Directions of the Immigration and Asylum Chambers. That does not, however, assist the respondent because the reasoning for the disagreement with para.187 about the significance of holding a British passport in Sudan is precisely the reasoning in the earlier paragraphs of Annex F, which SIAC finds to be deficient in public law terms.

168. The proposed clarification/correction to para.10, accordingly, constitutes an attempt to re-write the 2022 submission on a matter of highly-material significance. Whilst the respondent was entitled to take a view contrary to that in the Country Guidance of *AA* and *MM*, she simply did not do so in accepting the recommendation of December 2022.

169. SIAC has considered the submissions made in respect of Mr Hari, Mr Cox's producer/translator, who was detained along with Mr Cox, but released earlier, as a result of what appears to be diplomatic pressure from the US authorities. We are not persuaded by the respondent that this issue falls to be disregarded on the basis that it was not formally pleaded. We accept what Mr Jaffey KC said in that regard.

170. Nevertheless, we do not consider the issue of Mr Hari takes matters further, one way or the other. Whilst we accept that the fact there is no evidence that Mr Hari was a US citizen shows that diplomatic pressure can be successfully applied, even in the case of mono-Sudanese nationals, the relationship between Sudan and the USA at the relevant time may have had an impact.

171. In conclusion, SIAC finds that there are public law errors in both the 2018 submission decision and the 2022 submission decision. Since section 31(2A) of the Senior Courts Act 1981 does not apply in respect of these proceedings, the test to be applied in determining if defects were immaterial is that contained in *Simplex GE (Holdings) v. Secretary of State for the Environment* (1988) 57 P&CR 306. SIAC must ask whether the deprivation decision would inevitably have been the same, regardless of the public law errors.

172. SIAC is in no doubt that the *Simplex* test is not made out. In particular, because of the breach of the *Tameside* duty, we simply do not know what the outcome would have been of interrogating the views of those who expressed dissenting opinions in 2018. Nor do we know how the respondent would have reacted to the information about consular contact, which belatedly emerged at the hearing.

173. We therefore turn to the last basis upon which the respondent puts her case; namely, that SIAC should exercise its discretion to dismiss the appeal in any event.

174. The respondent seeks to invoke the judgment of Elisabeth Laing LJ in *U3* at para.170, where she held that section 2B of the SIAC Act "confers an apparently unqualified right of appeal. This is relatively unusual in this field …" From this, the respondent says it follows that SIAC has a broad discretion to dismiss an appeal, even where there has been a material public law error. The respondent relied, in this regard, upon SIAC's judgment in *Al-Jedda v. Secretary of State for the Home Department* (SC/66/2008) where, at para.36, SIAC stated that, had it decided that the respondent's decision breached article 3 of the ECHR, SIAC would, nonetheless, not have allowed the appeal. In the event, the appellant had not been subjected to ill-treatment. If he endured a risk, "it was a risk of an event which did not occur". Accordingly, SIAC concluded that, if the Secretary of State's decision had been a breach of the ECHR,

"we would have been under no obligation to allow an appeal against a fully-justified decision because of a purely technical infringement of section 6 of the Human Rights Act 1998".

175. We are not persuaded by these submissions. Taking the cases in reverse order, in *Al-Jedda*, it is clear from reading the judgment that SIAC took a view of the scope of a section 2B appeal, including as to the issue of whether deprivation would be conducive to the public good, which cannot be reconciled with the judgment of the Supreme Court in *Begum*. It is nevertheless true that the passage in para.36 of the judgment, upon which the respondent relies, is *obiter dicta* on the separate issue of whether the Secretary of State's decision to deprive Mr Al-Jedda whilst he was outside the United Kingdom breached article 3 of the ECHR. As we now know, however, the ECHR has no direct application in these circumstances, which is the reason why the respondent has her article 2/3 policy. That policy falls to be reviewed on public law grounds, not by reference to whether SIAC would have come to a different conclusion than the respondent on the article 2/3 issue. This emerges plainly from the judgment of Lord Reed.

176. For these reasons, we do not consider that *Al-Jedda* assists the respondent.

177. So far as *U3* is concerned, Elisabeth Laing LJ's reference to "an apparently unqualified right of appeal" was made in the context of her conclusion that such a right of appeal "gives SIAC power to decide questions of fact and law". As she went on to explain in that paragraph and para.171, however, this fact-finding function, expressed metaphorically in terms of SIAC's "powerful microscope", will lead to findings of fact which "are the material to which SIAC must apply the test set out in *Rehman* and *Begum* when it considers the challenge to the Secretary of State's

assessment of national security": para.174.

178. In no sense, therefore, does *U3* empower SIAC to usurp the respondent's functions of assessment in the national security sphere, by substituting its own assessment for that of the respondent. Although section 2B proceedings are in the nature of an appeal rather than a judicial review, the limitation on a section 2B appeal, identified in the judgment of Lord Reed, must be observed. As Elisabeth Laing LJ put it in para.176:-

> "Authority which binds this court is clear that, on a section 2B appeal, Parliament has conferred the power to make two discretionary decisions on the Secretary of State, and that the decision whether deprivation is conducive to the public good depends on knowledge and expertise which even SIAC lacks, and political accountability, which SIAC obviously also lacks".

179. We have already explained why we do not consider the fact that the appellant did not, in the event, suffer detention and consequent ill-treatment has anything significant to say about the legality of the 2018 decision to deprive. Nevertheless, the issue needs to be examined again in the context of the respondent's appeal to SIAC to exercise its discretion to dismiss the appeal, regardless of the material public law errors we have identified.

180. The problem for the respondent at this stage is that any appeal to discretion must look not just at the position as it was in 2018, but at the position as it is today. In order to exercise its discretion to leave the flawed deprivation decision in place, SIAC would need to take account of the appellant's present circumstances. Crucially, it would need to know the respondent's position on whether and, if so, why, deprivation is considered today to be conducive to the public good, including by reference to any current national security assessment.

181. However, even if SIAC had all relevant assessments and evidence, it would be contrary to the statutory scheme, as explained in *Begum*, for SIAC in effect to bypass the respondent's

functions by deciding that the requirements of section 40 of the British Nationality Act 1981 are met at the present time. The fact that it is the respondent who is urging this course upon us is immaterial. For these reasons, SIAC declines to exercise discretion to dismiss the appeal.

182. SIAC's conclusions in its OPEN judgment are supported by the CLOSED materials.

183. The appeal is, accordingly, allowed.

MR JUSTICE LANE .....

Date: 20th December 2023