SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **SC/176/2020**
SC/177/2020
SC/178/2020
Hearing Date: 03.05.2023 - 12.05.2023
Date of Judgment: 13th October 2023

Before

THE HONOURABLE MR JUSTICE JOHNSON
UPPER TRIBUNAL JUDGE SMITH
MR ROGER GOLLAND

Between

D5, D6 & D7

Appellant/Applicant

And

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Mr Edward Grieves KC, Ms Emma Fitzsimons, Ms Helen Foot, Ms Grainne Mellon (instructed by **Duncan Lewis Solicitors**) appeared on behalf of the Appellants and the Applicant

Mr David Blundell KC and Mr Will Hays (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

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

Introduction

1. D5, D6 and D7 are nationals of Afghanistan. D6 and D7 are brothers. D5 is their paternal uncle. They each came to the United Kingdom between 2001 and 2007. They each claimed asylum. D5 and D6 were subsequently granted British citizenship.

2. On 3 September 2020, when D7 was outside the UK, the Secretary of State decided to exclude D7 from the UK on the grounds that this would be conducive to the public good. On 30 November 2020, when D5 and D6 were outside the UK, the Secretary of State decided to deprive D5 and D6 of their British citizenship because it was assessed that was conducive to the public good having regard to their involvement in serious and organised crime. The Secretary of State certified that in making each of these decisions she had taken account of information which, in her opinion, should not be made public in the public interest.

3. D7 applies to the Special Immigration Appeals Commission ("SIAC") for a review of his exclusion. D5 and D6 appeal to SIAC against the deprivation of their citizenship. D7's application, and the appeals of D5 and D6, are closely linked and raise common issues. They have been heard together. We refer to D5, D6 and D7 as "the appellants" (even though D7 is, strictly, an applicant).

4. Following the Secretary of State's decisions, D5 and D6 unlawfully entered the UK. They are each serving custodial terms for conspiring to enter the UK illegally (and, in D6's case, for a broader conspiracy to assist unlawful immigration to the UK).

The hearing

5. We heard evidence, on behalf of the appellants and the applicant, from D5 and D6, and from N (D5's wife), J (D5's daughter, and cousin of D6 and D7), T (D5's nephew, and cousin of D6 and D7), K (D5's nephew, and cousin to D6 and D7), O (D5's nephew and brother to D6 and D7), F and B (a distant relative of D6 – their respective grandmothers are cousins). Each of these witnesses was cross-examined on behalf of the Secretary of State. We were also provided with witness statements from A (brother of D6 and D7), U, V and W (D5's children), L (nephew of D5 and cousin of D6 and D7), X (a distant relative of the appellants), H (who worked for D7) and Bahar Ata (a Chartered Legal Executive working for the appellants' solicitors). We have taken their evidence into account. For the reasons we set out below, and leaving aside Ms Ata (whose evidence amounts to the formal production of documentation), we are satisfied that D5 and D6, and the witnesses they called to give oral evidence, lied on material issues. Their witness evidence (except where subject to credible independent support) is not reliable. No reliance can be placed on their evidence that they were not involved in the conduct that is alleged against them.

6. We heard evidence, on behalf of the Secretary of State, from XT, an officer of the National Crime Agency. Officer XT had provided a witness statement, and he also adopted a statement provided by his predecessor in post. He gave evidence in a public hearing and was cross-examined on behalf of the appellants. He indicated that he would wish to expand on a number of his answers in a CLOSED hearing. He gave further evidence during a CLOSED hearing in the absence of the appellants and their representatives. He was cross-examined, during the CLOSED hearing, by the Special Advocate. In the course of the closed hearing there was reference to 100 suitcases being found during a police search of D5's home. The Special Advocates considered that the disclosure of this information would not be damaging to the public interest. We agreed. So did the Secretary of State. Disclosure was

therefore made to the appellants of this information, and they were given time to respond. D5 and N filed supplementary statements. They said that the figure of "100" suitcases was a gross exaggeration. D5 said that, at most, there were 30-35 suitcases. He says this is not unusual for a large family who regularly travel long-distance. There were also a large number of bin bags containing clothing. This had been collected for charitable donations.

7. Officer XT was not directly involved in any of the underlying events. He was presenting the evidence to us as an officer of the National Crime Agency who is experienced in the collation and assessment of intelligence. We set out in the CLOSED judgment some observations about the way in which the NCA assessed the intelligence and presented it to the Secretary of State. Subject to those observations, we consider that Officer XT himself was a patently truthful and careful witness. He made some appropriate concessions, but otherwise provided cogent reasons to justify the central assessments that were made by the NCA.

8. We heard closing submissions from the appellants, the Secretary of State and the Special Advocates. We were also provided with detailed written opening and closing submissions in both OPEN and CLOSED. We are grateful to all advocates, and their juniors, and those instructing them for the immense amount of work that went into the written and oral presentations of their respective cases.

The factual background

D5, D6 and D7

9. D5 has five siblings. He arrived in the UK in 2001. His wife and children remained in Afghanistan (subsequently moving to Pakistan). D5 claimed asylum in the UK. He said (untruthfully) that he had two sisters and no brothers. N said that D5 started to send her £500 a month soon after he arrived in the UK. She was unable to explain where the money came from. Initially, she said he had a business. When it was pointed out that on her account the money started to be sent before he had been given leave to remain in the UK (and so permitted to work), she said that he might have borrowed the money from a friend, but that she did not know where the money came from.

10. D6 arrived in the UK, from Afghanistan, in 2004. N was in Pakistan at this point. She discussed the travel of D6 to the UK with his family, and passed on the information to D5. She said that D6 was close to D5 and he looked up to him like a father. He helped them to arrive and stay in the UK. He involved D6 (and his other nephews) in his businesses and helped them to establish their own businesses.

11. D7 was encountered by the Home Office on 13 February 2007. He said that he had entered the UK clandestinely three days earlier. He claimed asylum on the basis that he was at risk from the Taliban in Afghanistan. He was granted discretionary leave to remain on 12 October 2011. On 17 July 2018 he was granted indefinite leave to remain. D7 has a wife and children who are living in Afghanistan. On 7 November 2019 D7 made an application for entry clearance for his wife and children to come to the UK. The applications were refused on the basis that an impersonator had sat the required English test in place of D7's wife, and it was suspected that D7's claimed salary had been artificially inflated for the purposes of the application. The Secretary of State assesses that D7 left the UK on 31 January 2020. His last known location is Finland.

Other relatives/associates of D5, D6 and D7 who have come to the UK

12. C is the son of D5's brother, E. D5 says that C called him in late 2006 to say that he had arrived in the UK. He was aged 15. There is no evidence that he arrived lawfully (and, as with the others set out below, it can be inferred that he arrived unlawfully). He stayed with D5. D5 took him to the solicitor's offices and then to the Home Office for an asylum interview. D5 says that in order to remain consistent with the untruthful account that D5 had given, C was introduced as a relative of D5's wife. D5 says that he enrolled C in college but that he was more interested in working and earning money. There is no evidence that he was lawfully entitled to work.

13. X (in a statement disclosed by the appellants, although not positively relied on by them) says that he was sent to the UK by his family when he was aged 12 in 2006. He arrived unlawfully. His family gave him D5's contact details and told him that D5's wife's mother was X's grandmother's cousin. X contacted D5 and lived with him.

14. K also came to the UK unlawfully at the age of 13. His guardian was M. In 2014, when he was in his 20s, he worked in D5's shop.

15. O arrived in the UK unlawfully from Afghanistan in February 2009 when he was about 14. He said that before he left Afghanistan his mother gave him D5's phone number. When he arrived, D5 helped him to claim asylum and was present at one of the interviews. He says that he did not know that D5 had lied about not having any brothers, but he knew that D6 had said that his father was dead. He knew that if he referred to his father then that would expose D6's lie. So he, too, said that his father was dead. D5 supported him so that he could go to school and college. He did not, however, go to college. He spent a lot of time with the appellants. He worked at D5's shop. In 2015, he set up his own business.

16. F arrived in the UK unlawfully in 2019 when he was aged 14. In his witness statement he said he lived with D7 (and D7, in his statement, says that he was living from 2016 at the address that F gives as his address from 2019), but in his oral evidence he appeared to suggest that D7 was not living with him. On 12 February 2020 (so when he was 14) he was seen using a broom in a shop.

17. H arrived in the UK unlawfully in 2015 when he was aged 15. There is evidence that he initially stayed at D6's address, before later moving in with D7. At some point he started working at D7's shop.

18. B arrived in the UK unlawfully in 2018 at the age of 16. He made contact with D6 who took him to solicitors to claim asylum. D6 is related to B but D6 and B misrepresented this connection so as not to expose his lie that D7 was dead.

19. A arrived in the UK unlawfully in January 2012 at the age of 12. On arrival, he contacted D6 who became his guardian.

20. T said that he arrived in the UK in 2004 when he was aged 14 or 15. The arrangements were made by his family in Afghanistan and D5. When he arrived in the UK he contacted D5 using a number that his family had been provided. D5 had not known he was coming. D5 looked after him. He went to D5's shop as (he said) school work experience. He would go after school and at weekends to do work experience with D5. He was not paid. He did that for about 3 hours a week.

The lies of D5 and D6

21. D5 admits that he lied about his family when he claimed asylum, saying that he had no brothers when in fact he does. If D6 had told the truth and said that he was the son of D5's brother, then D5's lie would have been exposed. Instead, D6 accepts that he also lied and said he was the son of D5's sister (rather than the son of D5's brother). Others lied about their connections to D5 and D6, but in a way that avoided D5's original lie being exposed.

22. D5 and D6 sought to blame interpreters for the lies that they told about their family. D5 claims that they advised him that this would be beneficial for his claim. He also seemed to blame the interpreters for the lies that other members of his family told. D6 denies that D5 told him to lie, and says that it was the interpreters who gave him the idea that he should do so.

23. We do not accept the evidence of D5 and D6. There is no plausible reason why different interpreters should have told them and their family to tell lies on these issues. D5 had a motive to ensure that others told lies that did not expose the lie that he had told. He was in a position to influence them in the accounts that they gave – he had contact with each of them and in many cases took them to solicitors and to Home Office asylum interviews. We are satisfied that D5 helped to orchestrate the untruthful accounts that were given by others.

24. The fact that lies were told does not, of course, mean that the appellants were necessarily engaged in the conduct that the Secretary of State alleges. It does, however, impact on the credibility of the appellants more generally.

9 July 2018: Execution of search warrants

25. D6 and J say that on 8 July 2018 D6 gave J approximately £5,000 to look after. J said that D6 was going on vacation and he asked her to look after the money until he returned. D6 said that this represented takings from his business, and that he tended to carry the cash around with him.

26. On 9 July 2018 the Metropolitan Police executed search warrants at the home addresses of D5 and D6. On the same day, police attended two shops. The police made nine arrests for immigration offences, and one for possession with intent to supply drugs. They seized £12,000 in cash (including the approximately £5,000 recovered from J), and 30 mobile phones.

27. K and A were arrested for offences relating to the indecent imagery of children. K said that an indecent video found on his phone was sent to him by a third party and that the images related to a circumcision ceremony of his nephew. A second set of images were, he said, automatically saved on his phone when they were sent to him via WhatsApp. He said that he had tried to delete them, but although they were deleted from his WhatsApp account, they remained on his phone's storage. He said he had forgotten who had sent him the images, but that they had been sent to a group chat.

28. H was found in D7's shop during the search.

27 September 2019: police stop of K and O

29. On 2 September 2019, police stopped a vehicle that was being driven by K. O was the front seat passenger. The police report of the incident says that O attempted to conceal a number of bank cards and about £800 in cash down the side of his seat. He was also in possession of money transfer receipts relating to the family. The transfers included a sum in excess of

£4,000 over a one week period in August 2019, the largest individual transfer was £2,850. K was in possession of a letter in which he said he was sending an individual to "come and collect his money at the prison."

30. K says that when he was arrested the police seized around £250 from him. He had then been taken to Wormwood Scrubs prison. After he was released he went to the police station and was not aware of how to retrieve his money. He went back to the prison but the relevant person was not available. He did not go the following day because he had a headache. He arranged for the money to be collected by a 16-year-old boy. That person was subsequently prosecuted for paying cash to smuggle people into the UK.

31. K was not aware that O had £800 with him. He did not see the police seize the money and O did not mention it. He had not known anything about it. He became aware of the issue from O shortly before giving evidence to us. He asked O, shortly before giving evidence, why the police had stopped him, and they discussed the arrest. He asked O what questions he was likely to be asked, but he was not discussing the evidence, and he was not trying to get his story straight.

32. O initially said that the £800 was money from the shop that he was taking to deposit at the Post Office. After being pressed, he said that the money came from his brother, not the business. His brother had given him the money when his brother went to Afghanistan and said that he would take it back when he returned to the UK. O did not know where his brother had got the money from. He did not remember the reason for the £2,850 transfer.

Social services records

33. The social services records show that there were persistent suspicions that D5 and D6 were engaged in the exploitation of children and young people (potentially including sexual abuse) for whom they were responsible. There was extensive and intensive monitoring and engagement over a period of years. Not a single complaint has been made by anybody that they were sexually abused by D5 or D6. None of those who were looked after by D5 or D6 have alleged that they were sexually abused by anybody else. Despite the level of social services involvement over a lengthy period of time, the OPEN evidence does not contain any evidence that D5 or D6 were involved in sexual abuse.

12 February 2020: police attend shops

34. On 12 February 2020 the police and representatives from the local authority attended 5 shops. In one of those shops, which was run by D5, F was seen using a broom. In his evidence, F denied knowing D5. He said that he had finished school at 3.10pm and had gone to the shop. There were 3 employees working. There was one other person waiting. F was waiting too. He was in a hurry because he was going to play cricket. He says that he told the employees that he could clean the place for them so that they could serve him more quickly. He picked up a broom. And it was at that moment that the police came into the premises. He said that he had not been working and nobody had forced him to work.

35. H was at D5's shop when the police arrived.

May 2020: Interim Sexual Risk Order

36. A phone that was attributed to A was seized by police. A single indecent image was found on the phone. A was arrested in February 2019 and another device was seized. An officer examined the phone and noted an indecent video of a child. An interim sexual risk order

was sought and granted. When further investigative work was undertaken the indecent image could not be found, and it was thought that this was because it had been stored in the cloud rather than the device. The interim sexual risk order was withdrawn.

Undercover police operation

37. The NCA initiated an undercover operation, involving two undercover officers, "George" and "Mark", who posed as intercontinental lorry drivers.

38. On 11 February 2020 Mark attended a shop owned by D5. He met D5 and D6. On 11 March 2020 George met D6 at the shop. Mark was there at the same time. Mark and George discussed how the Covid pandemic was affecting their work as lorry drivers. George returned to the shop on 22 July 2020 and spoke to D6 about supplying him with a television for the shop. On 17 September 2020 George visited the shop and met D6. D5 came into the shop for a short period of time, but then left. George was served. Afterwards, George told D6 that the load he had talked to him about (meaning televisions) was coming the following week and that he had had to bring something else. D6 ushered George out of the shop and then asked George if he knew anyone who could bring people back into the UK. George said that he did and they agreed to discuss it the following week.

39. On 24 September 2020 George and Mark went to a service station where they had arranged to meet D6 to purchase a television. D5 and D6 arrived by car at the service station. D5 initially remained in the car. D6 spoke to Mark and George and purchased a television for £180. In the course of the negotiations D5 got out of the car and was briefly involved in the conversation, before returning to the car. George said to D6 "you mentioned to us some other business". D6 said "come to the shop and we'll talk." George said "…what people business" and D6 said "yeah, this is business." George returned to the shop on 8 October 2020. He and D6 then went to a rear storage room. D6 said that he wanted George to smuggle people from mainland Europe into the UK, that it would be 1-3 people on each run, with 2-3 runs a month and with a payment of £2,500 per person smuggled. D6 would meet the immigrants off the lorry and would pay George himself. D6 said that he was making good money. On 13 October 2020 George and Mark saw D6 again. George provided a new telephone number and D6 said he would pass that to those in Belgium and France who would be assisting in the coordination of the trips. D6 said that he had a new telephone number which he would send to George. He asked where the illegal immigrants would be stowed and he was told they would be stowed in the trailer. D6 said that it should be 2-3 on each trip, and that 5 was too many. He said that Albanians would be paying for the trip, they would pay D6 and then D6 would pay George and Mark. On 29 October 2020, D6 told Mark that he had been to Belgium and that two people were ready to travel. A plan was made for the first run to take place on 9 November 2020, and a collection address in Belgium, and drop-off address in Kent, were arranged. D6 asked questions about evading CO_2 checks at the border. In the event, D6 cancelled the arrangements because, he said, the other party had failed to pay the money up front.

40. In his evidence to us, D5 simply would not accept that D6 bore responsibility for the criminal conduct that resulted in a 8 year custodial sentence. He said "someone had put him in a dream and they gave him an injection and they say whatever coming in his mouth."

41. In his evidence to us, D6 suggested that it was George that first raised the question of people smuggling. That was not something that he had raised before, either in his written statement or (so far as we can tell) in the Crown Court proceedings. It was just another lie.

D5 and D6 leave the United Kingdom

42. D5 and D6 left the UK on 8 November 2020. They flew to Kabul, via Dubai. D5 was due to return on 3 December 2021, and D6 was due to return on 24 December 2021.

D7: Exclusion decision

43. On 19 August 2020 the NCA sent a submission to the Home Office explaining that D7 was involved in serious and organised crime, that his presence in the UK was non-conducive to the public good and that his exclusion from the UK would be justified on the grounds of criminality, in particular:

    (1) Trafficking for labour exploitation: it was said that D7 was a member of an organised crime group ("OCG") that was involved in trafficking young, and vulnerable, people into the UK for the purpose of labour exploitation, and that it used children for labour within its businesses.

    (2) Trafficking for sexual exploitation: it was assessed that the OCG was involved in trafficking young and vulnerable people in the UK for the purposes of sexual exploitation and abuse.

    (3) Money laundering: it was assessed that the OCG was involved in money laundering. D7 had made (relatively small) payments (between £80 and £1,000) to recipients in France, Serbia and Bulgaria, and the payments were collected by individuals with identity documents from Italy and Iran (the use of documents issued in a different country from where the activity is occurring was said to be an indicator of suspicious activity). Reference was also made to the events of 27 September 2019.

44. Reference was made to the law enforcement activity on 9 July 2018 and 12 February 2020.

45. Submissions were also made by the NCA recommending that D5 and D6 be deprived of their British nationality. These included the same underlying allegations as those made in respect of D7, namely that D5 and D6 were part of an OCG that was involved in the trafficking of people for exploitation. Reference was made to the undercover police operation, including the events of 24 September 2020.

46. The Home Office put a submission to the Secretary of State. This stated that D7 was "involved in organised immigration crime such as trafficking and smuggling vulnerable people and children to the UK for modern slavery and sexual exploitation."

47. On 3 September 2020 the Secretary of State decided to exclude D7 from the UK. A letter dated 22 September 2020 says "after the most careful consideration the Home Secretary has personally directed that you should be excluded from the United Kingdom on the grounds that your presence here would not be conducive to the public good." No further reasons were given. It was explained that the Secretary of State had certified the decision under s2C SIAC Act 1997, and that any review would be undertaken by SIAC.

D5 and D6: Deprivation decisions

48. On 30 November 2020 orders were made under s40(2) British Nationality Act 1981 ("BNA") depriving D5 and D6 of their British citizenship "on grounds of conduciveness to the public good". No further explanation was given, save that the Secretary of State was satisfied that D5 and D6 would not be rendered stateless.

D5 and D6 return to United Kingdom

49. On 20 December 2020 D6 told George that he was in Belgium, and had travelled there from Afghanistan. He asked when George would be ready to bring two people from Belgium to the UK.

50. On the same day D5 was refused entry by coach to the United Kingdom from the passenger control point at Coquelles. D5 and D6 spoke to George on 9 March 2021. Arrangements were made for D5 and D6 to be smuggled into the United Kingdom and an attempt took place on 21-22 April 2021. This attempt failed. Both D5 and D6 subsequently entered the UK clandestinely, D6 in June 2021 and D5 in September 2021.

Prosecution

51. The undercover police operation resulted in D5 and D6 being charged with immigration offences. Count 1 charged D6 with a conspiracy to assist unlawful immigration to the UK. The prosecution relied on the conversations between D6 and George and Mark in January – July 2020. Count 2 charged D6 with a conspiracy to assist D5's unlawful entry into the UK. Count 3 charged D5 with entering the UK illegally.

52. In her sentencing remarks, HHJ Plaschkes KC said in respect of the conspiracy charged as count 1:

> "(a) This was a sophisticated enterprise which included: arrangements for pick up and drop-off points, organisation of migrants being loaded, stowed and unloaded, consideration of border checks and CO2 probes and arrangements for the exchange of money. The conspiracy involved the use of drivers and others outside the UK.
>
> (b) The exact numbers of those to be trafficked into the UK remains unknown, but D6 discussed the UCOs bringing 4-9 people into the UK on a regular monthly basis. UCO George was just one of the lorry drivers.
>
> (c) The offence was committed for significant financial gain. Each migrant would pay some £8,000 - £9,000 to be brought into the country. Approximately £2,500 of that would be paid to the lorry driver.
>
> (d) The illegal entry was for strangers not close family members.
>
> (e) The period on the indictment spans approximately 6 weeks.
>
> (f) The intention to use burner phones to conceal the criminal conspiracy and destroy evidence."

53. D6 was sentenced to 8 years' imprisonment in respect of count 1, and a consecutive 2 year term in respect of count 2, making a total sentence of 10 years' imprisonment. D5 was sentenced to 5 years' imprisonment.

The legal framework

Deprivation

54. The Secretary of State may deprive a person of their British nationality if she is satisfied that it is conducive to the public good: s40(2) BNA. Ordinarily, an appeal against such a decision lies to the First-tier Tribunal: s40A(1) BNA. Where the Secretary of State certifies that she relied on information which should not, on public interest grounds, be made public

then that right of appeal is excluded: s40A(2) BNA. In such a case, a right of appeal lies to the Special Immigration Appeals Commission: s2B SIAC Act 1997.

Exclusion

55. A person who is not a British citizen may not, generally, enter the UK unless given leave to do so: s3(1)(a) Immigration Act 1971. The Secretary of State has a prerogative power to direct that a foreign national should be excluded from the United Kingdom. Where the Secretary of State has personally made such a direction, any application for leave to enter the UK made by the excluded person must be refused: paragraph 9.2.1 Immigration Rules. Where the Secretary of State certifies that she relied on information which should not, on public interest grounds, be made public then there is a right to apply to SIAC to set aside the direction: s2C(2) SIAC Act. In deciding whether to set aside the direction, SIAC must apply judicial review principles: s2C(3) SIAC Act.

Policy framework

56. The Secretary of State has published policy guidance on the meaning of "conduciveness to the public good" for the purpose of s40(2) BNA. This is set out in chapter 55 of the Secretary of State's Nationality Instructions, "Deprivation and Nullity of British Citizenship." This states that it means "depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours."

57. On 13 May 2020 a Home Office official wrote a submission entitled "deprivation of British Citizenship". The submission recommended that the Secretary of State should use the deprivation power against individuals involved in serious organised crime, but limit that use to the most serious and high-profile cases. In the course of these proceedings, and in response to a letter from the appellants' solicitors, the Government Legal Department stated that this submission could be taken to reflect Home Office policy. In *Kolicaj v Secretary of State for the Home Department* (DC/100013/2021) the Tribunal recorded that the Secretary of State had accepted that the propositions advanced in this submission were policy.

58. Policy guidance on the exercise of the prerogative power of exclusion is set out in the document "Exclusion from the UK". It states that the grounds for exclusion include "criminality" in respect of which "exclusion will not usually be necessary, unless the level of criminality, or the threat posed by the person is so serious that it warrants exclusion". The guidance gives as examples "a notorious and dangerous criminal" and "a foreign national offender." The guidance states:

> "A recommendation to exclude… must be based on reliable evidence. This could include where the recommendation is to exclude the person on the basis of criminality in the UK or overseas that has been confirmed through criminal record checks. In other cases, the evidence may not be so straightforward and a greater degree of scrutiny and assessment may be required.
>
> You must give appropriate weight to evidence when deciding whether to recommend exclusion: for example, rumours or uncorroborated tip-offs by members of the public are likely to carry less weight than an assessment provided by a professional body or evidence supplied by another government department. However, where evidence has already been assessed by law enforcement agencies or similar organisations, it will usually be reasonable to rely on that assessment without undertaking your own consideration of the reliability of the underlying evidence…

An exclusion decision must be reasonable, consistent with decisions taken in similar circumstances, and proportionate. There must be a rational connection between exclusion of the individual and the legitimate aim being pursued, for example safeguarding public security or tackling serious crime…"

The National Crime Agency

59. The National Crime Agency is a statutory body that was created in 2013: s1(1) Crime and Courts Act 2013. It has the function of securing that efficient and effective activities are carried out to combat organised crime and serious crime: s1(4). It also has the function of gathering, storing, processing, analysing and disseminating information that is relevant to (among other matters) activities to combat organised crime or serious crime: s1(5). The Secretary of State has statutory responsibility for setting the NCA's strategic priorities: s3. One such strategic priority is "Organised Immigration Crime" which comprises the "movement of persons across borders without legal permission with the assistance of an organised crime group."

Trafficking

60. Section 2 of the Modern Slavery Act 2015 creates the offence of human trafficking. The offence is committed if a person arranges or facilitates the travel of another person with a view to that person being exploited: s2(1). Consent to travel is irrelevant to the offence: s2(2). Exploitation includes a requirement to perform forced or compulsory labour: s3(2)(a) read with s1(1)(b). It also includes something that is done which involves the commission of an offence under s1(1)(a) Protection of Children Act 1978 (indecent photographs of children) or part 1 of the Sexual Offences Act 2003: s3(3)(a). A person convicted on indictment of trafficking is liable to life imprisonment: s5(1)(a).

61. The material that has been put before the Commission demonstrates the difficulties and complexities of investigating potential cases of trafficking. The Secretary of State's Modern Slavery: Statutory Guidance dispels a number of myths around trafficking. It explains that the fact that a person does not take opportunities to escape does not mean that they are not being coerced, and that there are "many reasons why someone might choose not to escape an exploitative situation", including "fear of reprisal… vulnerability… Stockholm syndrome (psychological dependence on the person exploiting them) or grooming… lack of knowledge of their environment… violence or threats of violence… not knowing how or where to seek help." It also explains, in the case of sexual exploitation, that "due to unequal power, victims create a false emotional or psychological attachment to their controller". For all these reasons, victims of trafficking may not report the fact to the authorities, even if they have the opportunity to do so.

The exercise of SIAC's jurisdiction

Ambit of appeal

62. We received extensive argument on the ambit of SIAC's jurisdiction when determining an appeal under s2B SIAC Act. The ambit of that jurisdiction has been considered by the courts in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765 and *Secretary of State for the Home Department v P3* [2021] EWCA Civ 1642; [2022] 1 WLR 2869. SIAC has recently considered the issue in *B4 v Secretary of State for the Home* Department (SC/159/2018, 1 November 2022), *U3 v Secretary of State for the Home Department*

(SC/153/2018 and 2021, 4 March 2022) and in *Begum* itself (SC/163/2019 22 February 2023). An appeal from the decision in *U3* was heard by the Court of Appeal on 28 April 2023. The Upper Tribunal has also considered the impact of the Supreme Court's decision in *Begum* to appeals against decisions to deprive a person of British citizenship where the decision is not taken on national security grounds: *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 00238 (IAC).

63. *Rehman* concerned a deportation decision made on the grounds that deportation was conducive to the public good, in the interests of national security. Lord Slynn (at [22]) and Lord Hoffmann (at [50]) observed that such a decision involves a question of evaluative assessment that is entrusted to the executive. It is not open to SIAC to decide whether a person's deportation is or is not conducive to the public good, in the interests of national security. Rather, SIAC's role in such a case is to determine whether or not there was any factual basis for the Secretary of State's opinion or whether the Secretary of State's opinion was one which no reasonable minister could reasonably have held, or whether the decision is compatible with Convention rights (as defined by the Human Rights Act 1998). Lord Hoffmann said that when deciding if there was a factual basis for the Secretary of State's opinion the concept of a standard of proof was not apt, because the issue concerned future risk rather than past facts. By contrast, Lord Slynn said that where the assessment is made on the basis of "specific facts which have already occurred" then those facts must be proved to the civil standard of proof. Mr Grieves KC, for the appellants, says that it follows that in the present case the Secretary of State must prove the underlying facts on which she relied for her assessment.

64. In *Begum* the Secretary of State deprived the claimant of her British citizenship on the grounds that deprivation was conducive to the public good because she posed a risk to national security. The Secretary of State certified that she had relied on information which, in the interests of national security, should not be disclosed. The claimant appealed to SIAC, and there were subsequent appeals to the Court of Appeal and the Supreme Court. Lord Reed PSC, giving the judgment of the Supreme Court, drew attention to the "contrast" between Lord Slynn's "hybrid approach" (requiring the factual underpinning for the Secretary of State's assessment to be proved, and then, in the light of the facts as they are found to be, requiring the Secretary of State's assessment to be reviewed on public law grounds) and Lord Hoffmann's "more orthodox" identification of the issues. Lord Reed observed that section 4 of the SIAC Act (which required an appeal to be allowed if SIAC considered the decision was not in accordance with the law or that a discretion should have been exercised differently) had been repealed since the decision in *Rehman*. It was that provision that explained Lord Slynn's conclusion that the underlying facts should be proved. In the light of the repeal of section 4, Lord Reed considered (at [59]) that Lord Hoffmann's approach "is now the more relevant." It followed that SIAC's role on an appeal is to decide whether the Secretary of State acted in a way in which no reasonable decision-maker could have acted, or took account of an irrelevant matter, or failed to take account of a relevant matter, or erred in law. In other words, SIAC's role is to carry out a public law review of the Secretary of State's decision rather than to carry out a full merits-based appeal.

65. In *Begum* SIAC repeated eight propositions that had been derived from the authorities by SIAC in *B4*. They can be summarised as follows:

(1) Even when exercising the appeal jurisdiction under section 2B of the 1997 Act (rather than the reviewing jurisdiction under section 2C) SIAC applies the familiar public law *Wednesbury* ([1948] KB 223) principles.

(2) Where a national security question is justiciable, but entails an evaluative judgment that is not capable of objective assessment, SIAC applies the familiar public law principles (rather than carrying out a full merits-based appeal).

(3) All public law grounds are available, including an unjustified failure to apply established principle, a failure to take account of a relevant consideration, or a failure to make an adequate inquiry, a failure to provide the decision-maker with adequate information and a fair and balanced account of the case as a whole, and an error of established fact.

(4) A public law error must be material in the sense that it may have made a difference to the outcome.

(5) Evidence that post-dates the decision is admissible if and only if it relates to events that pre-date the decision.

(6) SIAC may take account of material that was not before the Secretary of State.

(7) The Secretary of State must keep her decision under review in the light of material that comes to light during an appeal.

(8) SIAC's role is limited to allowing or dismissing an appeal.

66. Mr Grieves KC submits, correctly, that *Rehman* and *Begum* were national security cases. He says that it is this feature that results in the application of judicial review principles and the exclusion of a merits based appeal. That is because the assessment made by the Secretary of State in such cases concerns the evaluation of future risk to national security. Conversely, the present case does not raise any question of national security and instead concerns whether the appellants have been involved in serious and organised crime. That depends on past events rather than future risk. It is therefore necessary for the Secretary of State to establish the facts on which she relies for the decisions she has made to deprive D5 and D6 of their nationality (as well as the decision to exclude D7 from the UK).

67. We disagree. The principles identified in *Begum*, and summarised in *B4*, apply to the present case. This is because:

(1) The decision under challenge in each case is whether deprivation of citizenship (or exclusion from the UK in the case of D7) is conducive to the public good.

(2) The statutory power to deprive a person of their citizenship makes no distinction between cases where the decision is founded on the interests of national security, and those that are founded on other public interest considerations (such as addressing serious and organised crime).

(3) The statutory provision for the allocation of appeals to SIAC makes no distinction between cases where the Secretary of State has taken account of material which (in her opinion) should be withheld in the interests of national security and those cases where she has taken account of material which should be withheld in the public interest.

(4) The ultimate question for the Secretary of State is whether the action taken is conducive to the public good. Concepts of national security, international relations and

the broader public interest may feed into a decision as to whether action should be taken on the grounds that it is conducive to the public good. But these concepts are not disjunctive or mutually exclusive. They overlap. It is not necessary for the Secretary of State to "pin [her] colours to one mast and be bound by [her] choice": *Rehman* at [17] *per* Lord Slynn.

(5) The conducive decision is entrusted to the Secretary of State, not SIAC.

(6) The limited role of an appellate court derives from a combination of the fact that the decision is entrusted to the Secretary of State, the absence of any statutory power for SIAC to reach its own conducive decision, and the principles of democratic accountability and institutional capacity (sometimes referred to as institutional competence): *Rehman* at [57], *Begum* at [60], [70] and [109].

(7) The principle of democratic accountability applies as much in the context of decisions made to address serious and organised crime as it does to decisions made in the interests of national security. Parliament has given the Secretary of State the relevant power to deprive a person of their citizenship, and she is accountable to Parliament, and ultimately the public, for the decisions she makes in the exercise of that power, whatever the underlying reasons for the decision. In the specific context of serious and organised crime, the Secretary of State has a statutory obligation to determine the strategic priorities for combatting serious and organised crime: s3(1) and s1(4) Crime and Courts Act 2013. She is responsible for selecting and appointing the Director General of the National Crime Agency, the statutory body responsible for securing that efficient and effective activities are carried out to combat serious and organised crime: s1(4) and schedule 1 paragraph 1 of the 2013 Act. The Director General requires the Secretary of State's consent before issuing a statutory annual plan setting out the NCA's strategic priorities: schedule 1 paragraph 4. Again, the Secretary of State is accountable to Parliament, and ultimately the public, for the decisions she makes in the exercise of all of these powers.

(8) The principle of institutional capacity likewise applies. The National Crime Agency exercises its functions on behalf of the Crown: s1, and schedule 1 paragraph 1. The Director General must be capable of effectively exercising operational powers. He must keep the Secretary of State informed of any information obtained by the NCA in the exercise of its functions which may be relevant to the exercise by the Secretary of State of her power to deprive a person of their citizenship: 2013 Act, schedule 3, paragraph 6(1) and paragraph 7. The NCA provide detailed annual plans and strategic assessments. Its staff have considerable experience and expertise in the assessment of intelligence relating to serious and organised crime, and identifying efficient and effective measures to combat serious and organised crime. By way of example, the NCA witness in the present case, Officer XT, has worked for the NCA since its inception (aside from 2018-2020 when he was working for Her Majesty's Revenue and Customs). Before that, he worked for the Serious Organised Crime Agency (the statutory predecessor of the NCA) since 2006.

(9) There is not the sharp distinction between national security cases, and cases of serious and organised crime, that Mr Grieves suggests (that is, that the former is concerned with future risk, and the latter with past events). In both cases the issue is whether deprivation is conducive to the public good. A non-conducive decision might be reached on the grounds of future risk of involvement in serious and organised crime,

just as it might be reached on the grounds of future risk to national security. In both cases, future risks are likely to be assessed in the light of information relating to past events. The nature of the risks is similar in both cases. The nature of the information is also similar in both cases, as is the process of the collection of the information and its assessment.

(10) The authorities support a consistent approach to deprivation appeals, irrespective of the underlying reasons for the decision (and irrespective of whether the deprivation decision is made on conducive grounds, or because the Secretary of State is satisfied that registration or naturalisation was obtained by fraud: section 40(3)(a) BNA). The observations of Lord Slynn in *Rehman* at [17] (see sub-paragraph (4) above) show that it would be anomalous to draw sharp distinctions between conducive decisions that are made on the grounds of national security, and those made on other public interest grounds. In *Begum*, the Supreme Court started its consideration of the principles by reference to section 40(3) cases (rather than cases concerned with national security). In *Ciceri* the Upper Tribunal applied *Begum* to a deprivation appeal in a fraud case. The Court of Appeal refused an application for permission to appeal in *Ciceri*.

68. We therefore reject the appellants' submissions that the Secretary of State must prove the facts on the balance of probabilities. What is at issue is a holistic assessment as to whether action would be conducive to the public good. That assessment falls to be reviewed on public law grounds in order to determine whether it was outside the range of assessments that a reasonable decision maker could make, or whether irrelevant factors were taken into account, or whether relevant factors were left out of account, or whether there was some other public law error.

69. Mr Grieves referred to passages in *P3* and *U3* which explain the narrow appellate jurisdiction explained in *Begum* by reference to the fact that national security issues were engaged. However, both *P3* and *U3* were themselves national security cases and so the reference to national security in those cases cannot be taken as excluding the application of the same approach in other types of case. Nothing in *P3* or *U3* suggest that the application of *Begum* is limited to national security cases. For the reasons set out above, the approach explained in *Begum* is founded not simply on the basis that national security is involved, but on the nature of the decision that is made, the statutory framework, and the twin principles of democratic accountability and institutional capacity.

Human Rights

70. SIAC must decide for itself whether the Secretary of State has acted compatibly with Convention rights (see paragraph 63 above).

71. The jurisdictional ambit of the European Convention on Human Rights, and hence the Human Rights Act 1998, is essentially territorial. Here, at the time of the decisions, the appellants were all outside the United Kingdom. The immediate family of D6 and D7 were also outside the jurisdiction. Exceptions to a strict territorial approach to jurisdiction can be made where the state exercises certain types of extra-territorial control over a person. The deprivation of citizenship does not amount to such an act of control, and is the "antithesis of the exercise of control necessary to found jurisdiction under [the Convention]": *S1, T1, U1 and V1 v Secretary of State for the Home Department* [2016] EWCA Civ 560 *per* Burnett LJ at [102]. So far as D6 and D7 are concerned, there is no jurisdictional basis for a challenge to the Secretary of State's decision based on the Human Rights Act 1998.

72. D5 has not identified any reason why the deprivation order in itself amounts to an interference with any Convention right. D5's wife and children are within the United Kingdom. If D5 were prevented from entering the UK, so as to live with his wife and children, then that would amount to an interference with their rights to respect for family life. However, the deprivation order did not, in itself, prevent D5 from entering the UK. He was entitled to enter the UK lawfully by first securing entry clearance. He was entitled to seek entry clearance. If he had done so, then the Entry Clearance Officer would have been required to act compatibly with the Convention rights of his family. This is the appropriate point at which Convention rights fall to be considered: *R3 v Secretary of State for the Home Department* [2023] EWCA Civ 169 *per* Elisabeth Laing LJ at [103] – [106] and *E5 v Secretary of State for the Home Department* (SC/184/21). D5 seeks to distinguish *R3* and *E5* on the facts, but the generality of the reasoning in those cases shows that the principles are not fact sensitive.

73. It follows that the Secretary of State's decisions are not open to challenge on the ground that they are incompatible with Convention rights.

Basis for Secretary of State's assessment

74. The OPEN material provides a sufficient basis for the assessment that D5, D6 and D7 were members of an OCG that was engaged in the smuggling of people to the UK in breach of immigration rules:

    (1) D6's conviction post-dates the deprivation order, but count 1 concerned events that pre-date the order. The conviction means that it was established, to the criminal standard of proof, that he was involved in a criminal and commercial conspiracy to smuggle people to the United Kingdom.

    (2) D5 was not prosecuted for any offence relating to events that pre-date the deprivation order, and he is not directly implicated in any inculpatory conversation with George or Mark that took place before November 2020. He was, however, present (although not in earshot) when some of the conversations took place, and he went to the service station with D6 to meet George and Mark after D6 had established that George and Mark were willing to discuss a people smuggling operation. Officer XT assesses that this shows D5 "sizing up" George and Mark before any arrangements were made, and that the fact that he was not himself directly involved in the conversation demonstrates that D6 occupied a subordinate role in the conspiracy.

    (3) There is an inference that each of the appellants was involved in the unlawful smuggling of individuals to the UK, in the light of:

        (a) The sheer number of people with connections to the appellants who have come to the UK unlawfully.

        (b) The number of lies told by those who came to the UK unlawfully which fitted in with the lies that had been told by the appellants.

        (c) The fact that many of those who came to the UK unlawfully then lived with one or other of the appellants.

        (d) The fact that many of those who came to the UK unlawfully ended up working in shops that were owned or controlled by D5.

75. We have not considered it necessary to make any finding in respect of the 100 suitcases point, but the finding of a large number of suitcases (whether 35 or 100) is not inconsistent with involvement in people smuggling.

76. The evidence convincingly demonstrates involvement by the appellants and their associates in organised immigration crime. This is not sufficient to justify the Secretary of State's ultimate decisions. The real gravamen of the submissions before the Secretary of State concerned the appellants' involvement in "trafficking and smuggling vulnerable people and children to the UK for modern slavery and sexual exploitation." If there were no sufficient basis to support these allegations then (recognising the correct legal approach as explained in *Begum*) it would not be open to us to uphold the Secretary of State's decisions on the basis of people smuggling and money laundering. In that event, it would be necessary to quash the decision in respect of D7, and allow the appeals in respect of D5 and D6 (but on the basis that it would be open to the Secretary of State to reconsider the matter).

77. For similar reasons, it is not necessary separately to consider the detail of the evidence in respect of money laundering. The allegations of money laundering are largely parasitic on the allegations of forced labour and sexual exploitation. If those allegations fall away, then it is not open to the Secretary of State to justify her decisions on the basis of alleged money laundering. Conversely, in the event that the underlying intelligence case was sufficient to justify the assessments in respect of trafficking, it is inevitable that it was also sufficient to justify the assessments in respect of money laundering. The two largely go hand in hand.

78. It is thus sufficient to record that the OPEN material provides a basis for the assessment of involvement in money laundering. The police activity resulted in the recovery of large sums of money which have not been plausibly explained, and there is evidence of the regular transfer of sums of money abroad which, again, have not been plausibly explained.

79. The OPEN material does not, in itself, provide a basis for the assessment that D5, D6 or D7 were involved in the exploitation of others. So far as the sexual exploitation of minors is concerned, there is evidence that D5, D6 and D7 were involved in the smuggling of large numbers of young people, and there is evidence that K and A had indecent images of children on their mobile phones, resulting in the imposition of an interim sexual risk order in the case of the latter (which was then subsequently discharged in the circumstances explained above). These separate factors do not, however, provide a basis for concluding that any of the appellants were involved in sexual exploitation, or that the smuggling of people by the organised crime group was undertaken for the purpose of sexual exploitation. Nor do the suspicions that are expressed in the social services papers.

80. So far as labour exploitation is concerned, the evidence shows that many individuals who were smuggled into the UK ended up working in shops operated by the appellants and their associates. In a number of cases, this took place when the individuals were still well under the age of 18. We do not believe F's account that he had just picked up a broom when the police attended and that he was hoping to be served sooner. It is too much of a coincidence. His account is not credible. The material provides grounds to suspect that F and others were being subject to labour exploitation. However, the Secretary of State was not entitled to conclude, on the OPEN material alone, that such exploitation was taking place. The evidence does not go that far.

81. In considering the assessments that might permissibly be made on the basis of the CLOSED material, read together with the OPEN evidence, we have taken account of all of the OPEN

evidence and the submissions advanced by the parties in OPEN as well as CLOSED. We have, in particular, taken account of the powerful arguments advanced on behalf the appellants as to:

(1) the sheer number of people who were brought into the UK, and the likelihood that if they had been exploited then at least one of them would have made a complaint to that effect;

(2) the period of time covered by the evidence;

(3) the monitoring that took place by social services which did not indicate any basis for concluding that exploitation was taking place;

(4) the fact that social services remained willing for children to remain within the care of the appellants.

82. We have also taken account of the inherent difficulties in investigating suspicions of trafficking.

83. Giving full weight to all these matters, the totality of the material that is before us and which relates to the period before the deprivation orders were made provides a sufficient basis on which the Secretary of State was entitled to reach the central assessments that formed the basis of the deprivation and exclusion decisions. That is, that each of the appellants was involved in an organised criminal group that trafficked people to the UK for the purpose of labour and sexual exploitation. We set out, in our CLOSED judgment, the reasons for that conclusion.

84. Against that background, we turn to the individual grounds of challenge.

Ground 1: Natural justice / procedural fairness

85. D5, D6 and D7 were not given an opportunity to make representations before the Secretary of State made the decisions that are under challenge. They each say that this amounted to a breach of the rules of natural justice, and that the Secretary of State adopted an unfair process, and that the decisions should accordingly be quashed.

Submissions

86. The appellants point out that after the Secretary of State's decisions were made, they have, in the course of these proceedings, been in a position to make extensive detailed and persuasive representations. The opening skeleton argument for the appellants, with appendices, runs to over 100 pages. If they had been given an opportunity to make representations so as to inform the Secretary of State's decisions, these representations could, in principle, have been advanced before the decisions were made. Only by being given that opportunity could a fair process be ensured.

87. The Secretary of State points out that the practical reality is that it took the appellants 13 months to prepare their submissions, following the service of the Secretary of State's material in July 2021, and this required the instruction of a team of 6 from the instructing solicitors firm, and 4 barristers. The Secretary of State contends that the requirements of procedural fairness are fact and context specific. In the present case, the Secretary of State was justified in making her decisions without first seeking representations because it would have been impossible, impracticable and pointless to do so.

Discussion

88. The Secretary of State was entitled to make deprivation decisions when D5 and D6 were outside the jurisdiction: *L1 v Secretary of State for the Home Department* [2015] EWCA Civ 1410.

89. There is a presumption that the Secretary of State must exercise her powers to deprive people of their citizenship, and to exclude people from the United Kingdom, in a manner that is fair: *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 *per* Lord Mustill at 560D. Fairness often requires that a person who may be adversely affected by the decision will have an opportunity to make representations before the decision is made. That did not happen in these cases. However, the requirements of fairness depend on context. There is no implied requirement to seek representations where the circumstances in which a power is to be exercised would render it impossible, impracticable or pointless to do so: *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 38; [2014] AC 700. It is, in this context, impossible or impracticable to given an opportunity to make representations if that would be contrary to the national security of the UK: *Begum No 2* at [341]. The same applies if doing so would be contrary to the interests of combatting serious and organised crime.

90. In *Begum No 2* it was observed that where an individual is outside the United Kingdom, giving an opportunity to make representations may run an unacceptable risk of precipitating his early return to the UK. On the facts, that is the position here. The appellants were able to return to the UK. If they had been given advance notice of the fact that the Secretary of State was considering exercising powers of deprivation / exclusion then there would have been a clear and immediate risk that they would have sought to thwart the exercise of those powers by returning to the UK (and it is striking that D5 and D6 have unlawfully returned to the UK even after the deprivation orders were made). On the basis of the material that was before the Secretary of State, and on the basis of the assessment that she ultimately made, that then gave rise to a risk that they would engage in serious and organised crime from within the UK. Thus, the giving of an opportunity to make representations would directly increase the risk of serious and organised crime from within the UK. The criminality, in question, involved (on the basis of that assessment) the trafficking of young and vulnerable people to the UK for the purpose of labour and sexual exploitation.

91. The appellants submit that instead of being deprived of their citizenship or excluded from the United Kingdom they could simply have been arrested, and the harm to the public interest feared by the Secretary of State would then have been avoided. There is no merit in this submission. At the time the orders were made the appellants were outside the UK so they could not have been arrested. In any event, the grounds on which the Secretary of State assesses that deprivation/exclusion is conducive to the public good depend on material that cannot be disclosed without damaging the public interest. Arrest would have been no answer at all. Nor is there merit in the suggestion that further investigation should have been carried out. Extensive investigation had been carried out over a period of years, culminating in an undercover police investigation. It is not realistic to suppose that further investigation would have revealed significant further OPEN evidence supporting the Secretary of State's assessment of involvement in trafficking. It follows that this is a case where it was impossible and/or impracticable for the Secretary of State to offer a right to make representations. The process that was adopted was therefore not unfair.

92. It was also pointless to offer a right to make representations. In order for the appellants to be able to advance meaningful representations, they needed to know the case that they faced.

The OPEN evidence does not establish any case against the appellants in respect of labour or sexual exploitation, which is the real gravamen of the case against them, and is the foundation of the Secretary of State's decisions. The basis for that assessment is contained only in the CLOSED evidence. By its very nature, the Secretary of State is not able to disclose the CLOSED evidence without causing damage to the public interest. She was not therefore in a position to disclose to the appellants the case that they faced. So, the appellants would not have been in a position to advance meaningful representations that engaged with the case against them. An opportunity to make representations would, in reality, have been pointless.

93. So far as D7 is concerned, the NCA considered that if he were permitted to return to the UK then he would resume his criminal activities, including organised immigration crime, modern slavery, child sexual exploitation and abuse, and money laundering. The Secretary of State was told that allowing him to enter the UK would have that consequence. Giving D7 advance notification that his exclusion was being considered would have the effect that the whole rationale for exclusion could be thwarted, by D7 entering the country before a decision had been made. Exclusion is a prerogative power that is designed to be taken when the individual in question is outside the jurisdiction. Allowing an opportunity to make representations would have been self-defeating.

94. Further, it is necessary to assess fairness by having regard to the overall process. The appellants had no opportunity to make representations in advance of the decisions being made. However, subject to the statutory constraints that prevent the disclosure of material that would be damaging to the public interest, they have had a very full opportunity to do so in the context of these proceedings. They have taken that opportunity: they have provided extensive evidence, and detailed written submissions amounting (including appendices) to more than 100 pages. The Special Advocates have likewise, acting in the appellants' interests, made extensive representations. If any material error were shown in the decision making process then, in principle, the appellants would be entitled to an order that the decisions be quashed. So, the lack of an opportunity to make representations in advance of the decision is counterbalanced by the appeal/review process. It has not been shown that the Secretary of State's decisions were flawed on the grounds of unfairness.

Ground 2: Policy

Submissions

95. The appellants say that the May 2020 submission (see paragraph 57 above) is a statement of policy that the Secretary of State was required to apply unless there was good reason to depart from it. She did not take the May 2020 submission into account and, in particular, did not address the question of whether D5 and D6 fell within the scope of the "most serious and high profile cases". She therefore did not apply her own policy. She has not identified any justification for departing from her policy. It follows that the decisions were flawed on pubic law grounds. As to D7, it is said that the Secretary of State failed to have regard to the policy guidance, and that she should have subjected the evidence relied on by the NCA to "a greater degree of scrutiny and assessment."

96. The Secretary of State submits that the May 2020 submission is not itself a formal policy that can found a public law claim. Rather, it is a submission containing a recommendation that the Secretary of State apply the published policy.

Discussion

97. The relevant policy is that set out at paragraph 58 above. That is published in a formal document that is publicly identified as the applicable policy. The decisions that were made in this case were compatible with this policy, because they were made on the basis of involvement in serious organised crime, which the policy explicitly recognises as a ground for making a non-conducive decision.

98. The submission that the appellants rely on "reflects" that policy and it contains propositions that accurately state the Government's policy. It is not, however, itself a formal statement of Government policy. The correspondence from the Government Legal Department, and the submission apparently made in a previous appeal, do not suggest otherwise. It is not therefore capable of forming the basis of a public law policy challenge. In any event, there is no departure from the recommendation made in the May 2020 submission. The trafficking of children and young men for the purposes of forced labour and sexual exploitation on any view falls within the scope of "the most serious cases".

99. Similarly, there was no departure, in D7's case, from the policy requirements. The applicable policy states that it is usually reasonable to rely on the assessment of a law enforcement agency. Here, there was a clear assessment from the NCA. The Secretary of State relied on that assessment. That was consistent with the policy, not a departure from it.

Ground 3: Error of approach and fact / failure to consider material facts

Submissions

100. The appellants submit that the factual case that was presented to the Secretary of State was flawed, in that key facts were withheld, suspicions were presented in a partial and prejudicial manner, and inaccurate facts were put forward. In particular, it was a "key factual assertion" in the NCA's assessment that none of the children who were brought to the UK were related to the appellants. It can be convincingly shown that is untrue and that a number of the children were related to the appellants.

101. Further, relevant material was omitted from the submission. The Secretary of State was not told about a 2007 police investigation which did not result in any action adverse to the appellants, or about the extent of the involvement of and monitoring by social services, or that the appellants had taken children to school and to medical appointments (it being asserted that it is not plausible that children were being exploited if they were being sent to school), or that the children had attended Home Office interviews, or that when police raids were carried out they did not discover any evidence of human trafficking (instead the Secretary of State was told that 3 children were taken into police protection, without being told that they returned home shortly afterwards). It had been misleading to tell the Secretary of State about what had been seized during the police raids (and about arrests for immigration offences) because none of the material that was discovered was probative of any allegation of trafficking. Reference was made to the finding of indecent images of children, without the Secretary of State being told that these were thought to be "in bad taste" but not indecent, and that they did not relate to any children that were associated with the appellants. A reference was made to a person being referred to the National Referral Mechanism as a potential victim of trafficking without it being made clear that the referral was made by the asylum decision maker rather than as a result of the police raid. Nor was the Secretary of State told that that the person in question had been interviewed by police and social workers who had concluded that there were no immediate concerns and that he did not present as a victim of crime or exploitation.

102. The Secretary of State responds that she, acting on advice from the NCA, reached a number of high-level conclusions which were based on a range of evidence which, overall, established a powerful circumstantial case. The nature of the SIAC jurisdiction is, says the Secretary of State, such that the appellants would have to meet a high threshold to found a public law challenge to the Secretary of State's factual assessment. It is suggested that what would be required is something akin to the "incontrovertible" demonstration that the entire case were based on mis-identification, and that even then it would only be "likely" that the decision would be unsound. The errors alleged by the appellants do not come close to reaching that threshold, and are wholly peripheral.

Discussion

103. The applicable legal test is set out at paragraph 65 above. The appellants must demonstrate a public law error in the Secretary of State's decisions. On the other hand, the Secretary of State's approach risks putting the test too high. The example given is tantamount to requiring the defendants to prove, to the criminal standard, that they are not guilty of the conduct that is alleged against them. But this is not a merits-based appeal. It is sufficient for the appellants to show that the Secretary of State failed to have regard to relevant factors, or had regard to irrelevant factors, or reached a conclusion that was not open to her on the facts.

104. For the reasons given in our CLOSED judgment, the Secretary of State was entitled to conclude, on the material that was put before her, that the appellants were members of an OCG that was involved in the trafficking of children and young men for the purposes of exploitation. The flaws that are claimed by the appellants must be assessed in that context, with a view to deciding whether they invalidated the Secretary of State's decisions on public law grounds. This must be assessed by reference to the totality of the OPEN and CLOSED evidence. The errors asserted by the appellants do not, individually or cumulatively, invalidate the Secretary of State's decision.

105. Perhaps the primary asserted error concerns the fact that the NCA had stated that "it was thought that" none of the children for who the appellants had claimed guardianship were actually related to the appellants at all. The appellants say that almost all of those who came to the UK were related in some way to them. There is compelling evidence to support what the appellants say, including DNA evidence. The NCA were therefore wrong to think that none of the children were related to the appellants. This was not, however, material to the assessment. The central element of that assessment was that children had been trafficked for the purpose of forced labour or sexual abuse. This did not depend in any way on the question of whether the children were or were not related to the appellants. That is so whether or not the appellants are right to say that the NCA ought to have appreciated that there were familial relationships.

106. It would, of course, have been possible for the Secretary of State to be provided with more detail about the various investigations that had taken place. However, there was a balance to be struck, and the material that was placed before the Secretary of State was sufficient, and was provided in sufficient detail, and in a fair manner, for the Secretary of State to make the decisions. The material did not give an unfair or skewed account of the material that was critical for the Secretary of State to make her decisions. It accurately recorded the NCA's assessment, and fairly set out the basic factors that underpinned that assessment. The Secretary of State was aware that a local authority Children's Services had been involved, that trafficking concerns had arisen, but that no action had ever been taken

to prevent the appellants from fostering children. It was not necessary for the Secretary of State to be told details about school attendance or medical appointments. Nor was it necessary for her to be told that the children taken into police protection had subsequently been returned (consistent with what she had been told about no action being taken to prevent the appellants from fostering children). The imagery on the phones does not begin to establish the trafficking allegations, and the Secretary of State's decision did not depend on the reference to that imagery. In any event, it was not presented in a misleading way. The reference to a person being referred to the National Referral Mechanism was accurate, and within the broad context of the submission that was being made, it was sufficiently presented.

107. It follows that the appellants have not established that the material was put before the Secretary of State in such a way as to invalidate the decisions that she made.

Ground 4: Errors concerning intelligence gathered by undercover NCA operation

Submissions

108. The appellants state that the material relating to the undercover operation was presented in a manner that was materially inaccurate. In particular, it was said that D5 "was present at meetings on 16 and 24 September 2020 between D6 and NCA officers" when, in fact, D5 had not been within earshot of the critical parts of the conversation. The Secretary of State contends that what was said about D5 being present was factually accurate and that there was no material misdirection.

Discussion

109. The evidence indicates that D5 was physically present in the general location when D6 spoke to George, but it also positively shows that he was not in the immediate location when and where the incriminating parts of the conversation took place. Although it is possible for the reference to D5 being "present at meetings" to be read, in isolation, as indicating that D5 was implicated in respect of everything that was said, when the material is read as a whole it was not unfairly or misleadingly presented. In particular, the submission that was put before the Secretary of State says that D6 believed that the true purpose of the meeting was "to arrange the facilitation of migrants into the UK." The same is not directly said in respect of D5. Further, the NCA assessed that D5 and D6 were acting in concert. That was a reasonable assessment to make in the circumstances. D6 had himself initiated a conversation with George about people smuggling. He then went to meet George at a service station. He took D5 with him to that meeting. It would be surprising, and reckless, for D6 to do that if D5 was not signed up to the possibility that people smuggling would be discussed.

Ground 5: Unreasonable / irrational / disproportionate / arbitrary / breach of Convention rights

110. The appellants submit that the Commission should make primary findings of fact, on the balance of probabilities, and should conclude, on the basis of those findings, that the Secretary of State's decisions were unreasonable or irrational or disproportionate or arbitrary, and/or that they are incompatible with Convention rights.

111. For the reasons given above:

(1)The Secretary of State's decisions were not incompatible with Convention rights (see paragraphs 70 – 73 above).

(2)So far as the broader public law challenges to the Secretary of State's decisions are concerned, it is not the Commission's role to make its own decision. The question is whether the Secretary of State's decisions were flawed, applying judicial review principles.

(3)The Secretary of State was entitled to accept the NCA's assessment that the appellants were members of an organised crime group that was responsible for trafficking children and vulnerable young men to the UK for the purposes of labour and sexual exploitation.

112. Given the nature and gravity of the assessment made in respect of the appellants, it is quite impossible to conclude that the Secretary of State was not entitled to form the view that it was conducive to the public good to make deprivation orders in respect of D5 and D6, and an exclusion order in respect of D7.

Postscript

113. On 14 July 2023, the Court of Appeal gave judgment in *U3 v Secretary of State for the Home Department* [2023] EWCA Civ 811. That was after this determination had been prepared in draft, but before it was handed down. We invited written submissions from the parties as to the impact of *U3*, and we are grateful to the parties for their full and helpful written submissions. The appellants contend that the judgment in *U3* shows that the principles established in *Rehman* and *Begum* are confined to the national security context, and do not apply in cases (like the present) that are concerned with serious and organised crime. They rely on the observation of Elisabeth Laing LJ at [168] that "the authorities do not require SIAC to apply the *Rehman* approach to other aspects of a section 2B appeal, apart from a challenge to the assessment of national security.

114. We do not accept that these words convey (or were intended to convey) the meaning that the appellants suggest. The sentence distinguishes between that part of an appeal which is concerned with assessment (assessment of national security, or, as in this case, assessment of risks from serious and organised crime) from "other aspects of a section 2B appeal" (such as whether the appellant is stateless). They do not suggest that a different approach is required in cases concerning serious and organised crime, as compared to cases that concern national security. The Court of Appeal did not address that question, because it did not arise on the facts of *U3*.

115. *U3* makes it clear that SIAC can, on a section 2B appeal, make findings of fact on the balance of probabilities where it considered it appropriate to do so, as long as it does not use such findings as a platform for substituting its own view as to the risk to national security (or, as in this case, the risks from serious and organised crime) – see *per* Elisabeth Laing LJ at [173] – [178]. That reflects the approach we have taken: we have, where we considered it appropriate to do so, made findings of fact – see, for example, at [5], [12], [23], [75]-[80]. Save for adding this postscript, and making a change to the last sentence of paragraph [64] (a change that was necessary, irrespective of *U3*, because the sentence had been poorly expressed), we have not considered it necessary to revise the draft determination that was circulated to the parties, or to reopen the appeals, in the light of the judgment of the Court of Appeal in *U3*.

Outcome

116. The Secretary of State had material on which she was entitled to conclude that each of the appellants was involved in serious organised crime such that it was conducive to the public good that D5 and D6 be deprived of their citizenship, and D7 be excluded from the UK. It would have been impossible, impracticable and pointless to give any of them a right to make representations before making the deprivation and exclusion decisions. There was no breach of policy. The material was not put before the Secretary of State in an unfair or misleading way. Applying judicial review principles, it has not been shown that the Secretary of State's decisions were otherwise flawed on public law grounds.

117. The appeals of D5 and D6 are dismissed. D7's review of the Secretary of State's decision is refused.