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Non è proceduralmente iniqua la notifica dell'ordinanza del Segretario di Stato per il Ministero dell'Interno del Regno Unito di privazione della cittadinanza britannica nell'interesse pubblico al Sig. Kolicaj, senza concedergli la possibilità di presentare le proprie osservazioni.

(Supreme Court of the United Kingdom, 18 Dicembre 2025, 49)

Contesto dell'appello

Il sig. Kolicaj è nato in Albania. È arrivato nel Regno Unito nel 2005 con un visto e successivamente gli è stato concesso il permesso di soggiorno a tempo indeterminato in base al suo matrimonio con una cittadina britannica. Nel 2009 ha ottenuto la cittadinanza britannica per naturalizzazione. In seguito alla rottura del matrimonio e al divorzio, nel 2013 il sig. Kolicaj ha sposato una cittadina albanese.

Il 27 febbraio 2018, dopo essersi dichiarato colpevole, il sig. Kolicaj è stato condannato per associazione a delinquere finalizzata al trasferimento dall'Inghilterra dei proventi di attività criminali. L'associazione a delinquere prevedeva che il sig. Kolicaj e suo fratello organizzassero il trasporto dal Regno Unito all'Albania di ingenti quantità di denaro contante, stimato in circa otto milioni di sterline, proveniente da attività criminali di natura indeterminata. Il sig. Kolicaj è stato condannato a sei anni di reclusione.

Nell'ottobre 2020, la National Crime Agency ("NCA") ha raccomandato al Segretario di Stato di prendere in considerazione l'utilizzo dei poteri conferitigli dalla sezione 40(2) del British Nationality Act 1981 per privare il sig. Kolicaj della cittadinanza britannica, in quanto ciò sarebbe stato nell'interesse pubblico. Nel dicembre 2020, una richiesta presentata dal servizio civile al Segretario di Stato lo invitava a prendere in considerazione l'utilizzo di tale potere a tal fine ("la richiesta del dicembre 2020"). Il Segretario di Stato ha preso una decisione di privazione in linea con la raccomandazione e con tale invito.

Il 22 gennaio 2021, in conformità con la procedura prevista dalla legge, il Segretario di Stato ha notificato al sig. Kolicaj, detenuto in carcere, un avviso di intenzione di emettere un provvedimento di privazione della cittadinanza ("l'Avviso"). Circa 30 minuti dopo, gli ha notificato un provvedimento che lo privava della cittadinanza britannica ("il Provvedimento"). Il Segretario di Stato ha deliberatamente notificato l'Avviso poco dopo l'Ordinanza, al fine di garantire che il sig. Kolicaj non avesse la possibilità di rinunciare alla cittadinanza albanese prima che gli fosse notificata l'Ordinanza. Se lo avesse fatto, infatti, secondo il regime normativo il Segretario di Stato non avrebbe potuto emettere un'ordinanza di privazione della cittadinanza britannica, poiché tale ordinanza lo avrebbe reso apolide.

Quando il Segretario di Stato ha deciso di privare il sig. Kolicaj della cittadinanza britannica, l'unica dichiarazione politica pertinente relativa all'uso del potere di cui alla sezione 40(2) disponibile al pubblico era contenuta nel capitolo 55 delle Istruzioni sulla nazionalità del

Ministero dell'Interno. Tale politica affermava che la conformità al bene pubblico "significa privare della cittadinanza nell'interesse pubblico per motivi di coinvolgimento in attività terroristiche, spionaggio, crimini organizzati gravi, crimini di guerra o comportamenti inaccettabili". Tuttavia, il 13 maggio 2020, prima che il Segretario di Stato prendesse la sua decisione, era stata presentata al Segretario di Stato un'altra memoria della pubblica amministrazione ("la memoria del maggio 2020") che raccomandava di utilizzare il potere di privazione ai sensi dell'articolo 40, paragrafo 2, nei confronti delle persone colpevoli dei casi più gravi e di alto profilo di criminalità organizzata. L'approccio proposto nella richiesta del maggio 2020 è stato approvato dal Segretario di Stato, ma non era di dominio pubblico al momento della decisione del Segretario di Stato, nel gennaio 2021, di privare il sig. Kolicaj della cittadinanza.

Il sig. Kolicaj ha presentato ricorso al First-tier Tribunal contro la decisione di privazione della cittadinanza, esercitando il proprio diritto di ricorso previsto dalla sezione 40A del British Nationality Act 1981 (Legge sulla cittadinanza britannica del 1981). Egli ha sostenuto che il suo reato non era sufficientemente grave da giustificare la privazione della cittadinanza e che i diritti suoi, della moglie e dei figli al rispetto della vita privata e familiare non erano stati adeguatamente presi in considerazione. Il First-tier Tribunal ha respinto il ricorso.

Il sig. Kolicaj ha presentato ricorso all'Upper Tribunal. L'Upper Tribunal ha accolto il ricorso, sulla base del fatto che il Segretario di Stato non aveva valutato chiaramente, come avrebbe dovuto, se avvalersi della propria discrezionalità ai sensi dell'articolo 40, paragrafo 2, nel caso del sig. Kolicaj.

Il Segretario di Stato ha presentato ricorso alla Corte d'appello. La Corte d'appello ha dato ragione al Segretario di Stato sulla base del suo motivo di ricorso, ritenendo che le prove dimostrassero che il Segretario di Stato aveva compreso di avere un potere discrezionale in merito all'emissione dell'ordine di privazione e che aveva esercitato tale potere. Tuttavia, la Corte d'appello ha confermato la decisione dell'Upper Tribunal sulla base diversa che la decisione di privazione, la Notifica e l'Ordinanza erano viziate da iniquità procedurale perché al sig. Kolicaj non era stata data la possibilità di presentare le proprie osservazioni al Segretario di Stato prima che questi prendesse la sua decisione ed emettesse la Notifica e l'Ordinanza, e il ricorso ai sensi dell'articolo 40A non soddisfaceva i requisiti di equità procedurale.

Il First-tier Tribunal, l'Upper Tribunal e la Corte d'appello hanno tutti proceduto sulla base del fatto che il ricorso del sig. Kolicaj, ai sensi della sezione 40A, riguardava solo la legittimità della decisione del Segretario di Stato nelle circostanze esistenti al momento in cui tale decisione è stata presa il 22 gennaio 2021.

Il Segretario di Stato ricorre alla Corte Suprema. Il suo ricorso solleva due questioni: se l'equità procedurale richiedesse al Segretario di Stato, al momento dell'emissione dell'avviso e dell'ordinanza, di offrire una revisione della sua decisione mediante un riesame dei meriti sulla base delle osservazioni presentate dal sig. Kolicaj, come sostenuto dalla Corte d'appello (questione 1); e se la Corte d'appello abbia commesso un errore nell'annullare l'ordinanza, non avendo il potere di farlo (questione 2).

Il sig. Kolicaj ha presentato un ricorso incidentale sostenendo che la decisione della Corte d'appello dovrebbe essere confermata per ulteriori e diversi motivi. Il suo ricorso incidentale solleva tre ulteriori questioni: se il Segretario di Stato avesse l'obbligo di indagare sulla portata del rischio che il sig. Kolicaj potesse rinunciare alla cittadinanza albanese prima di prendere la sua decisione (questione 3); se il Segretario di Stato abbia applicato al suo caso una politica non

divulgata che ha reso illegittima la sua decisione (questione 4); e se il Segretario di Stato abbia omesso di esercitare la propria discrezionalità ai sensi dell'articolo 40, paragrafo 2, come sostenuto dall'Upper Tribunal (questione 5).

Sentenza

La Corte Suprema accoglie all'unanimità il ricorso del Segretario di Stato e respinge il ricorso incidentale del sig. Kolicaj. Lord Sales pronuncia la sentenza, con il consenso di tutti i membri della Corte.

Motivi della sentenza

La Corte Suprema inizia chiarendo la natura di un ricorso ai sensi della sezione 40(A) (e, se del caso, ai sensi della sezione 2B dello Special Immigration Appeals Commission Act 1997). Il ricorso è un ricorso sul merito della causa: R (N3) contro il Segretario di Stato per il Ministero dell'Interno [2025] UKSC 6; [2023] 2 WLR 386, ai punti [38]-[40]. La giurisdizione di un tribunale o di una corte che si occupa di un ricorso ai sensi della sezione 40A (o della Commissione speciale per i ricorsi in materia di immigrazione, "SIAC", che si occupa di un ricorso ai sensi della sezione 2B) è di appello piuttosto che di controllo.

I principi giuridici applicati da un organo di appello non sono determinati dalla caratterizzazione della giurisdizione come riguardante un ricorso nel merito, ma dalla natura della decisione oggetto di ricorso e dalle disposizioni di legge pertinenti. Diversi aspetti dello stesso ricorso possono quindi comportare l'applicazione di principi diversi: R (Begum) contro Special Immigration Appeals Commission [2021] UKSC 7; [2021] AC 765, ai punti [68]-[71].

Nuove prove possono essere addotte in un ricorso ai sensi della sezione 40A o della sezione 2B: U3 v Secretary of State for the Home Department [2025] UKSC 19; [2025] 2 WLR 1041 ("U3"), al punto [44]. L'oggetto di tale ricorso è la decisione mantenuta al momento del ricorso, alla luce di eventuali nuove prove e nuove osservazioni emerse nel corso del procedimento di ricorso: U3, ai punti [20], [46]-[47] [47]-[58].

Questione 1: Il Segretario di Stato era tenuto a proporre una revisione della propria decisione mediante un riesame del merito sulla base delle osservazioni presentate dal sig. Kolicaj?

La procedura di cui alle sezioni 40 e 40A della legge del 1981 (e, se del caso, alla sezione 2B della legge del 1997 sulla Commissione speciale per i ricorsi in materia di immigrazione) mira a garantire che un individuo abbia un'equa opportunità di impugnare una decisione di privazione presa dal Segretario di Stato [59].

Non sussiste alcuna disparità di trattamento del tipo contemplato dalla Corte d'appello. Una persona interessata da una decisione di privazione ha il diritto di contestarla presentando un ricorso nel merito, nel quale può introdurre prove proprie e presentare le osservazioni che desidera. La decisione che è oggetto finale dell'esame del First-tier Tribunal (o della SIAC, a seconda dei casi) è la decisione che il Segretario di Stato intende mantenere e difendere dopo aver preso in considerazione eventuali nuove prove e osservazioni. Il First-tier Tribunal (o SIAC) non è limitato a riesaminare la decisione originariamente presa dal Segretario di Stato. Se analizzata correttamente, non sussiste quindi alcuna lacuna in termini di equità che debba essere colmata dai tribunali con l'elaborazione di una procedura aggiuntiva; contrariamente alla sentenza della Corte d'appello, non vi è alcuna giustificazione per imporre al Segretario di Stato l'obbligo di seguire tale procedura [61].

Questione 2: La Corte d'appello ha commesso un errore nell'annullare l'ordinanza?

Il Tribunale di primo grado e la SIAC hanno la giurisdizione, rispettivamente ai sensi della sezione 40A e della sezione 2B, per decidere sui ricorsi presentati ai sensi di tali disposizioni. In conformità con i normali principi di interpretazione delle leggi, essi sono investiti di tutti i poteri ragionevolmente connessi all'esercizio di tale giurisdizione. Se un ricorso contro una decisione di privazione è accolto, i poteri accessori del First-tier Tribunal e della SIAC includono il potere di emettere un'ordinanza per annullare la decisione e di annullare la notifica e l'ordinanza che derivano da tale decisione [70]. La Corte d'appello ha giurisdizione su un ricorso presentato ad essa per esercitare tutti i poteri di cui dispone il tribunale o la corte di grado inferiore (sezione 15(3) del Senior Courts Act 1981 e regola 52.20(1) delle Civil Procedure Rules). La Corte d'appello aveva quindi il potere di annullare la Notifica e l'Ordinanza [71].

Questione 3: Il Segretario di Stato aveva l'obbligo di indagare sulla portata del rischio che il sig. Kolicaj potesse rinunciare alla cittadinanza albanese?

Il dispositivo delle sezioni 40 e 40A indica che il Segretario di Stato non aveva alcun obbligo di indagare e di accertare l'esistenza di tale rischio prima di poter omettere di dare al sig. Kolicaj la possibilità di presentare le sue osservazioni sul caso e prima di prendere una decisione sulla privazione della cittadinanza. Nel regime di privazione della cittadinanza, il requisito di equità è soddisfatto dal diritto di ricorso, pertanto non giustifica la possibilità di presentare osservazioni prima che venga presa una decisione in merito alla privazione [77]. La procedura prevista dagli articoli 40 e 40A è concepita in modo tale da poter essere applicata senza che il Segretario di Stato corra il rischio di essere impedito di agire nell'interesse pubblico mediante la privazione della cittadinanza dal fatto che l'interessato, informato della possibilità di una decisione di privazione, abbia rinunciato alla propria cittadinanza straniera. Sarebbe contrario all'intenzione del Parlamento e comprometterebbe la corretta applicazione del regime affermare che il Segretario di Stato è tenuto a effettuare una valutazione del diritto straniero al fine di decidere se invitare l'interessato a presentare osservazioni prima di prendere la sua decisione [78].

Questione 4: Il Segretario di Stato ha applicato una politica non divulgata?

Contrariamente a quanto sostenuto dal Segretario di Stato, la comunicazione del maggio 2020 ha effettivamente definito una nuova politica: non si è trattato semplicemente di un approfondimento della politica esistente definita nelle Istruzioni sulla nazionalità [81].

L'obbligo di pubblicare le politiche relative all'esercizio dei poteri discrezionali deriva dal principio di equità (R (Lumba) contro Segretario di Stato per il Ministero dell'Interno [2011] UKSC 12; [2012] 1 AC 245). Se il sig. Kolicaj non fosse mai venuto a conoscenza dei criteri effettivamente applicati dal Segretario di Stato, come indicato nella presentazione del maggio 2020, nel decidere se prendere una decisione di privazione nel suo caso, e se per questo motivo fosse stato privato della possibilità di presentare osservazioni sulle ragioni per cui il suo caso non rientrava nella politica indicata in tale presentazione, avrebbe avuto buoni argomenti per sostenere che la decisione presa era illegittima [82].

Tuttavia, al momento dell'udienza di appello del sig. Kolicaj dinanzi al First-tier Tribunal, egli era a conoscenza della dichiarazione politica contenuta nella presentazione del maggio 2020: egli aveva avuto e colto l'opportunità di presentare osservazioni sul motivo per cui il suo caso non rientrava nei criteri di tale dichiarazione politica. Il principio di equità non richiedeva che egli avesse la possibilità di presentare osservazioni al momento della decisione originaria, poiché l'equità è soddisfatta dal regime previsto dalla disposizione di cui alla sezione 40(5), che prevede

la motivazione e il diritto di ricorso ai sensi della sezione 40A [83]. La questione oggetto del ricorso dinanzi al First-tier Tribunal è se debba essere accolta l'impugnazione della decisione di privazione mantenuta dal Segretario di Stato. In relazione a tale questione, il sig. Kolicaj ha avuto piena ed equa opportunità di presentare le sue argomentazioni in merito all'applicazione della politica definita nella Comunicazione del maggio 2020, con la conseguenza che la decisione di privazione della cittadinanza britannica non poteva essere annullata per motivi di iniquità. Non sussisteva alcuna questione di iniquità derivante dalla precedente mancata pubblicazione di tale politica che potesse influire sulla contestazione della decisione di privazione, poiché essa era stata mantenuta ed era oggetto del ricorso [83].

Questione 5: Il Segretario di Stato ha omesso di valutare in modo distinto se esercitare la propria discrezionalità ai sensi dell'articolo 40, paragrafo 2?

Dall'esame della memoria presentata nel dicembre 2020 e dai termini dell'avviso risulta chiaro che il Segretario di Stato ha effettivamente valutato correttamente l'esercizio del proprio potere discrezionale ai sensi dell'articolo 40, paragrafo 2 [87].

Il ricorso incidentale del sig. Kolicaj è respinto. Il ricorso del Segretario di Stato è accolto.

I riferimenti tra parentesi quadre rimandano ai paragrafi della sentenza.

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Michaelmas Term
[2025] UKSC 49

On appeal from: [2025] EWCA Civ 10

JUDGMENT

Secretary of State for the Home Department (Appellant) *v* Kolicaj (Respondent)

before

Lord Reed, President

Lord Lloyd-Jones

Lord Briggs

Lord Sales

Lord Stephens

JUDGMENT GIVEN ON

18 December 2025

Heard on 4 November 2025

Appellant
David Blundell KC
Harriet Wakeman

(Instructed by Government Legal Department)

Respondent David
Chirico KC Glen
Hodgetts

(Instructed by OTB Legal)

LORD SALES (with whom Lord Reed, Lord Lloyd-Jones, Lord Briggs and Lord Stephens agree):

1. This appeal is concerned with the way in which the principle of fairness or natural justice is satisfied in the regime for deprivation of British citizenship on the grounds that this is conducive to the public good, as set out in section 40 of the British Nationality Act 1981 (as amended) ("the 1981 Act"). That regime involves a series of steps: a decision by the Secretary of State for the Home Department that an individual should be deprived of British citizenship in circumstances where that does not result in them being rendered stateless; the giving of notice of that decision to the individual; the making of an order by the Secretary of State to deprive the individual of citizenship in accordance with that decision; and an appeal by the individual to the First-tier Tribunal ("the FTT") or the Special Immigration Appeals Commission ("SIAC"), as the case may be, to challenge the decision and order made by the Secretary of State. This case follows a series of judgments in this court which have explained how the deprivation regime operates in the context of a case where an appeal may be brought before SIAC: *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] AC 765 ("*Begum No 1*"); *R (N3) v Secretary of State for the Home Department* [2025] UKSC 6; [2025] 2 WLR 386 ("*N3*"); and *U3 v Secretary of State for the Home Department* [2025] UKSC 19; [2025] 2 WLR 1041 ("*U3*"). One of the questions which arises on this appeal concerns the extent to which the guidance given in those authorities applies in a case where the route of appeal is to the FTT rather than SIAC.

The legislative regime

(a) The power of the Secretary of State in section 40 of the 1981 Act to deprive a person of citizenship status

2. Section 40 of the 1981 Act ("section 40"), in so far as relevant, provides: "(1) In

> this section a reference to a person's 'citizenship status' is a reference to his status as—
>
> (a) a British citizen ….
>
> (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.

(3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—

(a) fraud,

(b) false representation, or

(c) concealment of a material fact.

(4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.

(4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—

(a) the citizenship status results from the person's naturalisation,

(b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and

(c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

(5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—

(a) that the Secretary of State has decided to make an order,

(b) the reasons for the order, and

(c) the person's right of appeal under section 40A (1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c 68)."

It is relevant to note here that subsection (2) uses the word "may", which confers a discretion which arises where the precondition that the Secretary of State is satisfied that deprivation is conducive to the public good has been met: *Begum No 1*, para 66.

(b) The right of appeal to the First-tier Tribunal in section 40A of the 1981 Act

3. Section 40A of the 1981 Act ("section 40A"), in so far as relevant, provides: "(1) A person—

(a) who is given notice under section 40(5) of a decision to make an order in respect of the person under section 40, or

(b) in respect of whom an order under section 40 is made without the person having been given notice under section 40(5) of the decision to make the order,

may appeal against the decision to the First-tier Tribunal.

(2) Subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public—

(a) in the interests of national security;

(b) in the interests of the relationship between the United Kingdom and another country, or

(c) otherwise in the public interest."

(c) The right of appeal to SIAC in section 2B of the Special Immigration Appeals Commission Act 1997

4. Section 2B of the Special Immigration Appeals Commission Act 1997 ("section 2B") provides that:

> "A person may appeal to the Special Immigration Appeals Commission against a decision to make an order under section 40 of the British Nationality Act 1981 (c 61) (deprivation of citizenship) if he is not entitled to appeal under section 40A(1) of that Act because of a certificate under section 40A(2) (and section 40A(3)(a) shall have effect in relation to appeals under this section)."

Factual background

(a) Mr Kolicaj's conviction

5. The respondent, Mr Gjelosh Kolicaj, was born on 24 April 1981. At birth, he was an Albanian national.

6. Mr Kolicaj arrived in the UK on 6 August 2005 on a fiancé visa which, after his marriage to a British citizen, was varied to leave to remain as a spouse. On 6 September 2007 he was granted indefinite leave to remain on the basis of that marriage. On 5 February 2009 he became a naturalised British citizen.

7. Following the breakdown of his marriage and divorce, in 2013 Mr Kolicaj married an Albanian national. There are four children of the marriage, born in 2013, 2015 and (twins) in 2022.

8. On 27 February 2018, on the basis of a guilty plea, Mr Kolicaj was convicted of conspiracy, in the period 1 October 2016 to 30 January 2018, to remove the proceeds of criminal conduct from England, contrary to section 327 of the Proceeds of Crime Act 2002. Upon sentence the judge made sentencing remarks describing the conspiracy.

9. The conspiracy involved Mr Kolicaj and his brother arranging to transport from the UK to Albania large quantities of cash generated from criminal conduct of an undetermined nature. The prosecution estimated that sums amounting to about £8 million were involved. The money was transported in suitcases taken on commercial flights mainly to Thessaloniki or Brussels, where one of Mr Kolicaj's relatives received it. Sometimes the money was taken by Mr Kolicaj or his brother, who were the organisers of the conspiracy. On other occasions it was transported by couriers under their control. Some 65 flights were taken. Interceptions were made on three occasions, when cash in the respective amounts of £180,000, £100,000 and €100,000 (carried on that occasion by Mr Kolicaj himself) was seized. As found by the judge, the operation was well planned and involved a considerable degree of sophistication. Despite his own arrest and that of others involved in the conspiracy, ie despite warnings about his behaviour, Mr Kolicaj persisted with organising and implementing the conspiracy.

10. Applying the Sentencing Guidelines on money-laundering, the sentencing judge concluded that these features of Mr Kolicaj's offending placed him in the higher culpability bracket (ie A category). The judge found that it was clear that the extent of the operation and the amount of money involved was "indicative of money laundering on a serious organised basis". The amount of cash involved in the money laundering operation placed Mr Kolicaj in category 2 in terms of the harm associated with his offending for the purposes of the Sentencing Guidelines. This gave a starting point for sentencing of eight years and six months' imprisonment which, taking account of the stage at which Mr Kolicaj pleaded guilty and mitigation including that he had no previous convictions, the judge reduced to a sentence of six years' imprisonment.

(b) The Secretary of State's policy and the May 2020 ministerial submission

11. There is an issue in this case regarding the policy applied by the Secretary of State in relation to the deprivation of citizenship. The Secretary of State's basic approach is set out in chapter 55 of the Home Office's Nationality Instructions, entitled "Deprivation and Nullity of British citizenship". Paragraph 55.4.4 states that conduciveness to the public good "means depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours".

12. On 13 May 2020 a submission was sent by a civil servant to the Secretary of State entitled "Deprivation of British Citizenship" ("the May 2020 submission"). This recommended that the Secretary of State should use her power of deprivation under section 40(2) against people guilty of serious organised crime, "but limit its use to the most serious and high-profile cases". The submission advised "focusing the policy on the highest harm offences"; expressed the expectation that "the number of serious criminality cases meeting the threshold [would] be very low"; and stated that focus would be given to "organised crime, particularly that involving violent, sexual and other high harm

offences such as trafficking, organised drug importation and child sexual exploitation". The Secretary of State accepted the recommendation set out in the submission.

(c) The December 2020 ministerial submission and the use of section 40

13. On 19 October 2020 the National Crime Agency ("the NCA") submitted a recommendation that the Secretary of State should consider using her power under section 40(2) to deprive Mr Kolicaj of his British citizenship ("the NCA recommendation"). The NCA recommendation summarised Mr Kolicaj's offending behaviour and included an assessment that it was likely that he would continue to pose a risk to the UK when released after completion of his sentence.

14. The NCA recommendation was adopted in a civil service submission dated 17 December 2020 sent to the Secretary of State to invite her to consider using her power under section 40(2) to deprive Mr Kolicaj of his British citizenship and then to deport him ("the December 2020 submission"). The NCA recommendation was annexed to the submission along with an assessment that deprivation would not leave Mr Kolicaj stateless, since he had Albanian citizenship, an assessment regarding any infringement of Convention rights set out in the Human Rights Act 1998 ("the HRA"), an assessment of the welfare of Mr Kolicaj's children in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55"), and a draft notice of intention to make a deprivation order as required by section 40(5). The December 2020 submission referred to the approach set out in the May 2020 submission to focus the use of the deprivation power on "the highest harm offences" and stated that Mr Kolicaj had been assessed to meet that standard "on the basis of his involvement in serious organised criminality".

15. The December 2020 submission referred to the opportunity which Mr Kolicaj would have to make representations to oppose deportation (as distinct from deprivation). The annexes in relation to the HRA assessment and the section 55 assessment stated that he would have the opportunity to make representations to oppose both deprivation of citizenship and deportation but did not go into detail to explain exactly when and how these could be made. The December 2020 submission predated the trio of cases in this court referred to in para 1 above and so could not include any discussion of the legal analysis they set out. So far as a deprivation decision is concerned, the position is that, as explained below, an individual has the opportunity to make representations in the course of an appeal brought under section 40A.

16. The Secretary of State accepted the recommendation in the December 2020 submission and issued a notice of intention to make a deprivation order in the form of the draft annexed to the submission ("the Notice"). The Notice stated that the Secretary of State had decided to make a deprivation order "because I am satisfied that it is conducive

to the public good to do so". It summarised Mr Kolicaj's offending and stated that the Secretary of State was satisfied that this constituted participation in serious organised crime within the meaning of para 55.4.4 of the Nationality Instructions; it also said "these are serious and organised offences, involving collusion with others". It did not refer to the approach to the exercise of the deprivation power in section 40 set out in the May 2020 submission. The Notice recorded that the Secretary of State was satisfied that making a deprivation order would not make Mr Kolicaj stateless. It also referred to the Secretary of State's consideration of the interests of Mr Kolicaj's children under section 55 and stated that, having taken those into account, her view was that the public interest in depriving Mr Kolicaj of his British citizenship "clearly outweighs any interest which they might have in [Mr Kolicaj] remaining a British citizen".

17. On 22 January 2021 the Secretary of State served the Notice on Mr Kolicaj in prison. About 30 minutes later the Secretary of State served on him an order depriving him of his British citizenship ("the Order"). Serving the Order so quickly after service of the Notice was a deliberate step to ensure that Mr Kolicaj should have no opportunity to renounce his Albanian citizenship before the Order was served on him, thereby depriving the Secretary of State of power to make the Order on the basis that to do so would render him stateless: see section 40(4) and the discussion in *N3*, paras 73–83. This was done pursuant to a practice adopted by the Secretary of State after experience in previous cases where the recipient of a notice of intention to deprive had taken such action.

18. Mr Kolicaj appealed to the FTT against the Secretary of State's deprivation decision pursuant to section 40A. While his appeal was proceeding, on 10 February 2021 he was served by the Secretary of State with what is referred to as a Stage 1 decision to make a deportation order, advising him of his liability to deportation. On 8 July 2021 he was served with a Stage 2 decision, which set out the reasons for making a deportation order against him, together with the deportation order which had been made. On 16 July 2021 Mr Kolicaj applied to revoke the deportation order and applied for asylum. The proceedings in relation to those applications remain on foot.

(d) The tribunal decisions on Mr Kolicaj's appeal

19. In the course of the appeal in the FTT the Secretary of State disclosed the December 2020 submission with its annexes. This led those acting for Mr Kolicaj to request disclosure of the May 2020 submission as well, which was provided to him.

20. Mr Kolicaj filed a witness statement from himself and evidence relating to his private and family life in the UK. He also filed evidence regarding his risk of reoffending, in the form of an initial assessment dated 26 March 2021 by the London and Thames Valley Community Rehabilitation Company for the Probation Service following his release from prison which assessed that risk as low ("the March 2021 risk assessment").

21. Mr Kolicaj and the Secretary of State served skeleton arguments. Both sides took the position that the appeal was concerned with the question whether the Secretary of State's decision to deprive was lawful as at the time she served the Notice on 22 January 2021, assessed by reference to the materials available to her at that time, or bearing upon a public law error committed by her at that time. In doing so they appear to have considered that they were following guidance given by the Upper Tribunal in *Ciceri (deprivation of citizenship appeals: principles)* [2021] UKUT 238 (IAC) at paras 29 and 30(1), (6) and (7). It seems that this was a common approach at about this time, as indicated by the guidance given subsequently by the Upper Tribunal in *Chimi v Secretary of State for the Home Department (Deprivation appeals; scope and evidence) (Cameroon)* [2023] UKUT 115 (IAC) at para 61, based on its reading of paras 67–71 of *Begum No 1*. As I explain below, as appears from the decisions of this court in *N3* and *U3* this was a mistake. It was a mistake which affected the conduct of the hearing in terms of the FTT's approach to the March 2021 risk assessment. One of Mr Kolicaj's principal contentions set out in the written submissions on his behalf was that his offending did not meet the standard of seriousness set out in the May 2020 submission, which he contended constituted a policy of the Secretary of State which she should have followed in his case.

22. The FTT (Judges Holmes and Hughes) heard the appeal on 5 April 2022. At the start of the hearing Mr Kolicaj's representative (Mr Sellwood) indicated that, despite the evidence filed by Mr Kolicaj in the course of preparing for the hearing, no evidence would in fact be given by him or adduced on his behalf and that, instead, the appeal was to be conducted on the basis of submissions alone. Mr Kolicaj did not go into the witness box to face cross-examination. Accordingly, as the FTT recorded, it was not invited to make any findings of fact, since there were no disputed issues of fact.

23. The FTT was satisfied that it was Mr Kolicaj's conviction and the judge's sentencing remarks which formed the basis for the Secretary of State's conclusion that he was a participant in "serious organised crime" within the meaning of that term in para 55.4.4 of the Nationality Instructions and that it was the finding that he had colluded with others to commit a serious crime of removing criminal property from the country which formed the basis of the Secretary of State's consideration of whether or not to exercise her discretion under section 40(2): para 38.

24. The FTT dismissed Mr Kolicaj's submission that the deprivation decision breached his rights under article 8 of the European Convention on Human Rights (right to respect for private and family life), or those of his wife and children: paras 39–53.

25. The FTT then turned to a series of wider public law arguments made on behalf of Mr Kolicaj:

(i) That the Secretary of State failed to make a proper assessment of his propensity to commit further offences, including by pursuing inquiries pursuant to a duty said to arise on the basis of *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 ("*Tameside*") which might have revealed at the time the Secretary of State made her decision (that is, before March 2021) that there was a view held by a relevant public authority, as later set out in the March 2021 risk assessment, that the risk of further offending by Mr Kolicaj was low.

(ii) That the Secretary of State's deprivation decision was procedurally flawed because she unfairly failed to notify Mr Kolicaj that she was considering the exercise of her discretion pursuant to section 40(2) and thus failed to provide him with an opportunity to offer evidence in response, including evidence to establish a lack of any propensity to re-offend (again, on the basis that the opinion in the March 2021 risk assessment could have been obtained if questions had been asked of the rehabilitation team in January 2021).

(iii) That the Secretary of State failed to follow her own policy as set out in the May 2020 submission, in that Mr Kolicaj's offending was not in the category of the most serious and high-profile cases referred to in that document.

26. The FTT dismissed each of these submissions, as follows:

(i) There had been no failure to consider Mr Kolicaj's propensity to offend again, since it was covered by the assessment of the NCA in the NCA recommendation and there was a proper basis for that assessment in view of the nature of Mr Kolicaj's offending and his determination to continue with it even after his arrest. There was no requirement for the Secretary of State to embark on a train of inquiry to determine what other agencies or individuals might think. Since it was common ground (see para 21 above) that the issues on the appeal were to be addressed as at the time of the Secretary of State's decision on 22 January 2021, she could not be criticised for not taking into account the March 2021 risk assessment, which did not exist at that time: para 61. And in any event, applying the judgment of the Court of Appeal in *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064; [2019] 1 WLR 2070 ("*Pham No 2*"), it was not necessary for the Secretary of State to consider or assess that there was a propensity to re-offend before she was entitled to find that it was conducive to the public good to make a deprivation decision in relation to someone guilty of very serious offending, as she did here: paras 62–65 and 67.

(ii) There was no procedural unfairness. Parliament had set out the relevant statutory procedure in section 40(5) and there was no scope for writing into that

procedure additional requirements based on arguments of fairness, especially where to give Mr Kolicaj advance notice of the decision proposed to be taken in his case could undermine the deprivation process by affording him an opportunity to try to disclaim his Albanian citizenship and thus, on grounds of leaving him stateless, prevent the Secretary of State from taking the deprivation decision she considered to be in the public interest: paras 68–69.

(iii) Although it was common ground that the May 2020 submission, read with para 55.4.4 of the Nationality Instructions, set out the Secretary of State's policy (as the FTT recorded at para 70), the Secretary of State was entitled to assess that Mr Kolicaj's offending met the standard set out in the May 2020 submission and acted rationally in doing so: paras 80 and 84.

27. Mr Kolicaj appealed to the Upper Tribunal (Dove J and Mr Ockleton). From this time he was represented by Mr David Chirico. Again, as in the FTT, the parties and the tribunal all proceeded on the mistaken assumption that an appeal under section 40A is concerned only with the circumstances as they existed as at the time of the Secretary of State's decision on 22 January 2021. On the appeal, Mr Chirico submitted that it did not appear from the Secretary of State's decision that she had ever addressed the exercise of her discretion under section 40(2) as a matter distinct from simply forming the view that it was conducive to the public good that Mr Kolicaj should be deprived of his citizenship (the precondition for that discretion to arise). Mr Chirico also repeated the substance of the submissions made to the FTT. He added the submission that the May 2020 submission set out a secret policy which was not in the public domain at the time the Secretary of State took her decision in January 2021, so that reliance on it made that decision unlawful according to the guidance given in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 ("*Lumba*"); and further, the Secretary of State had not explained why Mr Kolicaj's offending was to be characterised as being the most serious and high profile so as to qualify for deprivation according to that policy. In relation to these latter points the Secretary of State submitted that the May 2020 submission did not set out a policy and that adequate reasons had been set out in the Notice.

28. The Upper Tribunal accepted the Secretary of State's submission that the May 2020 submission did not set out a policy. According to them it simply set out "a discussion or explanation of the substance of the current policy" (ie that in para 55.4.4 of the Nationality Instructions), meaning that there was no substance in the argument that the Secretary of State's decision was the result of the application of an unpublished policy: para 53. The Secretary of State had been entitled to conclude that Mr Kolicaj's offending fell within the scope of para 55.4.4: para 54.

29. The Upper Tribunal agreed with the FTT that the Secretary of State was entitled to find, following *Pham No 2* [2019] 1 WLR 2070, paras 52 and 53 (Arden LJ), that it

was conducive to the public good that Mr Kolicaj should be deprived of his citizenship simply on the basis of his conviction for a serious crime, without being required to take account of the future risk of harm: para 56.

30. In relation to Mr Kolicaj's complaint of procedural impropriety and unfairness, the Upper Tribunal cited a passage from the judgment of Lord Neuberger of Abbotsbury in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 ("*Bank Mellat*"), at para 179 (as quoted in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] 1 WLR 4647, para 59), where he said:

> "the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity".

The Upper Tribunal held that in the circumstances of Mr Kolicaj's case the risk of the entire decision-making process being frustrated by him renouncing his Albanian citizenship and so disabling the Secretary of State from making a deprivation decision on the ground that he would be made stateless meant that she was justified in proceeding without affording him an opportunity to make representations, which would have tipped him off in advance and thus would have given him an opportunity to try to take such a step: para 58. Although the Upper Tribunal did not say so in terms, it seems that it reached this conclusion on the basis that on the particular facts of the case it was impractical for the Secretary of State to give prior notice, within limb (ii) of Lord Neuberger's statement of principle.

31. However, the Upper Tribunal allowed Mr Kolicaj's appeal on the grounds that, as Mr Chirico submitted, the Secretary of State had only concluded that the condition precedent for the existence of her power of deprivation was met (namely, that it was conducive to the public good) but had not then considered whether, in the exercise of the discretion conferred on her by section 40(2) (see para 2 above), she should make use of that power in Mr Kolicaj's case: paras 62–63. The effect of this was that the decision had to be remitted to the Secretary of State.

(e) The judgment of the Court of Appeal

32. The Secretary of State appealed to the Court of Appeal (Underhill, Dingemans and Edis LJJ), contending that the Upper Tribunal had erred in holding that the Secretary of

State had failed properly to exercise her discretion under section 40(2). Mr Kolicaj filed a respondent's notice in which he argued that the Upper Tribunal's decision should be upheld on two grounds which were wrongly rejected by that tribunal and by the FTT: (i) the Order was made following a process which was procedurally unfair because Mr Kolicaj was not given an opportunity to make representations to the Secretary of State before she made her decision; and (ii) the Order was unlawful because it was made by the application of a secret policy, as set out in the May 2020 submission. Edis LJ gave the lead judgment, with which Underhill and Dingemans LJJ agreed: [2025] EWCA Civ 10. Underhill LJ made some additional observations.

33. The Court of Appeal found for the Secretary of State on her ground of appeal: paras 37–40. Edis LJ considered that the Notice was not well drafted. But it did state that the Secretary of State had had regard to the interests of Mr Kolicaj's children pursuant to section 55 and had weighed them against the public interest in depriving him of his British citizenship, which indicated that the Secretary of State had appreciated that she had a discretion whether to make the deprivation order and had exercised that discretion. The December 2020 submission and the documents annexed to it were clear. They were directed to briefing the Secretary of State that she had a discretion whether to make a deprivation order and to advising her how she might exercise that discretion.

34. However, the Court of Appeal upheld the decision of the Upper Tribunal and dismissed the Secretary of State's appeal on the basis of Mr Kolicaj's ground (i) above (procedural unfairness). The court did not find it necessary to address his ground (ii) (secret policy), since the case would have to be remitted to the Secretary of State to make a new decision and would do so by applying a new policy which she had by this time published: para 19. The court's judgment post-dated *Begum No 1* [2021] AC 765, but was delivered before the judgments of this court in *U3* [2025] 2 WLR 1041 and *N3* [2025] 2 WLR 386 were handed down.

35. The Court of Appeal considered that the deprivation decision and the Order were affected by procedural unfairness because Mr Kolicaj was not given an opportunity to make representations to the Secretary of State before she made her decision and issued the Order, while at the same time the appeal under section 40A which was available to him did not afford a fair opportunity to do so either. This was because (as the Court of Appeal thought) the focus of that appeal was on the information available to the Secretary of State and the circumstances obtaining at the time she made her decision on 22 January 2021, in so far as these gave rise to a public law challenge to that decision judged as at that time. As has been mentioned, this had been common ground between the parties and had been assumed (erroneously) to be the position by the FTT and the Upper Tribunal. The Court of Appeal proceeded on the same assumption. It thought that the judgment of this court in *Begum No 1* supported it. Edis LJ said (para 15) that *Begum No 1* "restricts the scope of an appeal to the FTT against a deprivation decision under section 40(2) to a review of the decision on public law grounds. This does not allow new material to be

placed before the FTT and involves no right to make representations to the FTT of the kind which might affect the merits of the decision".

36. According to the analysis of the Court of Appeal, proceeding on the basis of that assumption, the practice adopted by the Secretary of State of serving a deprivation order within minutes after service of a notice under section 40(5), to obviate the risk of an individual renouncing their foreign citizenship, left a gap in what fairness required, and the right of appeal was too limited in its scope to be able to fill that gap: para 15. Nor did any right to make representations in relation to any human rights appeal based on article 8 of the European Convention fill the gap: ibid.

37. The gap in fairness meant that there was no scope for Mr Kolicaj to make a range of representations or provide evidence which he might have wished to present to seek to persuade the Secretary of State not to exercise her discretion under section 40(2) to deprive him of citizenship. For example, he was not able to make representations about the extent of his criminality, including setting out a factual case about that, and did not have the opportunity to contend that it did not fall within the published policy in the Nationality Instructions "as refined by the acceptance by the Secretary of State of [the May 2020 submission]": para 15. That was also the result of Mr Kolicaj not knowing about the May 2020 submission until it was disclosed to his lawyers shortly before the FTT hearing: para 15(iii). The gap also meant that Mr Kolicaj was deprived of the opportunity of referring to and relying on the March 2021 risk assessment as information potentially relevant to the exercise of the Secretary of State's discretion under section 40(2), since it did not exist at the time of the Secretary of State's decision on 22 January 2021 and (on the court's approach to the ambit of an appeal under section 40A) could not be brought into account subsequent to that in the course of the appeal to the FTT: para 17.

38. As Edis LJ pointed out (para 19), the result of this analysis was that Mr Kolicaj had been deprived of his British citizenship without at any stage being able to advance reasons why that should not happen. It also led him to say (para 11) that the references in the annexes to the December 2020 submission to the opportunity to make representations about the deprivation of his citizenship were "misleading".

39. Applying the statement of principle in *Bank Mellat* (para 30 above), Edis LJ held that the 1981 Act did not exclude the right to make representations either expressly or by implication: para 27. He observed that the purpose of section 40(5) "is to enable a person who is the subject of a decision to make a deprivation order to bring an effective appeal before the order is made" and that, although the Act did not mandate a procedure for making the original decision, section 40(5) indicates that Parliament intended "to place a high value on procedural fairness": para 27.

40. In support of this Edis LJ said (para 27) that at the time when the 1981 Act was originally enacted, the appeal under section 40(2) was understood to be an "appeal on the merits". I think he used this term in order to contrast this with a review on public law grounds, as referred to in para 15 by reference to *Begum No 1*. I comment below on the confusion in terminology and the associated conceptual confusion which has crept into this area. I should also point out that it is not correct to say that section 40 in its original form provided for an appeal on the merits. It did not provide for any appeal at all, but rather for an opportunity for the individual concerned to make representations to a committee of inquiry which would give its opinion on the case for the Secretary of State to consider before making any deprivation order (see section 40(6)–(7) of the 1981 Act as originally enacted). Having said this, however, I do not think this error affects what this court has to decide. I agree with Edis LJ that section 40(5) shows that Parliament was concerned with procedural fairness. The question is, how did Parliament intend that procedural fairness should be achieved? As I explain below, it is achieved through the availability of an appeal to the FTT. Such an appeal is not so limited in its ambit and effect as the Court of Appeal took it to be.

41. Turning to the second principle identified in *Bank Mellat* [2014] AC 700 (para 30 above), Edis LJ rejected the Secretary of State's submission that it would be impossible, impractical or pointless to afford an opportunity to Mr Kolicaj to make representations, on the grounds that to do so would give him an opportunity to renounce his Albanian citizenship and in that way prevent her from issuing a deprivation order in his case: paras 28–31. Edis LJ accepted that it was legitimate to operate a system in which the Secretary of State informs the individual of the deprivation only after the decision (and, presumably, after the order) is made because of that risk; but in his view, "in the absence of a full appeal on the merits to the FTT", it was incumbent on her to say at that time that she is willing to review her decision by conducting a merits based evaluation in the light of any representations the individual might make: para 29. According to Edis LJ it is no good answer to this to point to the right of appeal under section 40A, because of the inability of an individual bringing an appeal "to challenge the decision to find that deprivation would be conducive to the public good or the exercise of discretion to deprive, save on public law grounds and on the basis of the material before the Secretary of State": para 29.

42. As appears from this passage, this part of the Court of Appeal's reasoning reflects the (erroneous) common ground between the parties that an appeal is concerned only to examine the circumstances existing at the time of the Secretary of State's decision and again depends on its (erroneous) view of the limited nature of an appeal under section 40A. On the basis of these points, it is readily understandable that the court considered that there is a fairness gap in the regime. It was to fill that gap that the court posited the requirement on the Secretary of State to offer to consider representations made by an individual outside the appeal process, after exercising her power under section 40(2) in such a way as not to afford the individual an opportunity of renouncing his or her foreign citizenship.

The issues on the appeal and on the cross-appeal

43. The Secretary of State appeals to this court, raising two issues:

(i) On the footing that the Secretary of State was entitled to decide to make an order depriving Mr Kolicaj of his British citizenship, and then to make that order, without first giving him the opportunity to make representations, did the principles of procedural fairness (natural justice) require that the Secretary of State should when making the order have offered to review that decision by way of a reconsideration of the merits on the basis of representations made by him, failing which the issuing and maintaining in place of the Notice and the Order were procedurally unfair? ("Issue 1")

(ii) In any event, did the Court of Appeal err in quashing the Order? ("Issue 2")

44. Mr Kolicaj cross-appeals, seeking to uphold the decision of the Court of Appeal on additional or alternative grounds as follows:

(i) Where the Secretary of State had adduced no evidence about the process for renunciation of Albanian citizenship or in support of her assertion that an individual could immediately renounce their Albanian citizenship if they wished to, did the Court of Appeal err in concluding that it was legitimate for her to operate a system to exercise her discretion under section 40(2) without first providing Mr Kolicaj with an opportunity to make representations? ("Issue 3")

(ii) Was the making of the Order unfair for the additional reason that it was made by applying a policy as set out in the May 2020 submission which was not published and was not made available to Mr Kolicaj until after the Order was made? ("Issue 4")

(iii) Did the Court of Appeal err in rejecting the Upper Tribunal's conclusion that, in making her decision, the Secretary of State had failed to consider the exercise of her discretion under section 40(2)? ("Issue 5")

The judgments in *Begum No 1*, *N3* and *U3*

45. Before turning to discuss each of the issues in the appeal, it is convenient first to set out what has been established in these judgments of this court.

(a) Begum No 1 and N3

46. So far as is relevant for this case, *Begum No 1* [2021] AC 765 concerned an appeal against a deprivation decision to SIAC under section 2B. That was the route of appeal because the Secretary of State had relied upon information which had to be kept secret on grounds of national security. Lord Reed noted that section 2B confers a right of appeal, rather than review; and that appeals involving questions of fact as well as points of law were contemplated: para 65. In deciding whether an appeal should succeed under section 2B on any particular ground, it is necessary to be clear about the nature of the issue to be determined under that ground: paras 68–71. The jurisdiction of SIAC is appellate, and it would be a mistake to describe it as supervisory (ie in the sense that a court exercises a supervisory jurisdiction in judicial review proceedings): para 69.

47. Nevertheless, as Lord Reed was careful to explain, "the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply"; the legal principles to be applied "depend upon the nature of the decision under appeal and the relevant statutory provisions" and "different principles may … apply to the same decision, where it has a number of aspects which give rise to different considerations, or where different statutory provisions are applicable": para 69. The same basic point about the variability in the legal principles to be applied by SIAC on an appeal under section 2B depending on "the extent to which, … on a statutory appeal, the court is competent to reassess the balance which the decision-maker was called on to make given the subject matter" was made by Lord Sumption in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591, para 107. In *Begum No 1* Lord Reed explained (para 75) that the error committed by SIAC in an earlier decision, *Al Jedda v Secretary of State for the Home Department* (Appeal No SC/66/2008) (unreported) 7 April 2009, was to assume "that SIAC's jurisdiction [under section 2B] is uniform, without regard to the nature of the particular decision under appeal or the terms of the relevant statutory provisions"; and he explained (at paras 29, 72 and 73) how the Court of Appeal (also sitting as a Divisional Court) in *Begum No 1* had, in following the approach in *Al Jedda*, made the same mistake.

48. An example of this variation of legal principle to be applied in relation to an appeal against a deprivation decision is where a challenge is made on the question whether the requirements of section 40(2) have been met, on the one hand, and where by contrast a challenge is made to the compatibility of the decision with Convention rights under section 6 of the HRA: para 69. SIAC would have to determine the latter issue objectively according to its own assessment: [2021] AC 765, paras 37, 69 and 71 (but with due regard to any applicable margin of appreciation). As regards the former issue, section 40(2) confers a discretion on the Secretary of State (para 66), but only where a precondition is met that "the Secretary of State is satisfied that deprivation is conducive to the public good" (para 67). On those issues, having regard to their nature and the terms of the statute, which make it clear that the Secretary of State is the primary decision-maker and that SIAC is dealing with matters in respect of which the Secretary of State has the democratic

authority to decide and institutional expertise which is superior to SIAC's, the principles SIAC is required to apply in the exercise of its appellate jurisdiction are "largely the same as those applicable in administrative law" (para 69) (that is to say, they are largely the same as would be applied in judicial review proceedings): paras 69–70 and 118–119.

49. As appears from *Begum No 1* and the analysis in *N3* [2025] 2 WLR 386, an example of yet another different approach being required on an appeal under section 2B is in relation to a challenge that the Secretary of State's deprivation decision has in fact made the individual stateless, on which SIAC has to make findings for itself on the evidence before it. That is what SIAC had done in *Begum No 1* on the basis of expert evidence adduced in the appeal under section 2B (see para 116).

50. The approach to be adopted to the question of statelessness by each of the Secretary of State and SIAC on an appeal under section 2B was a central issue in *N3*. This court again pointed out that it is for SIAC to make findings of its own about statelessness on the basis of the evidence adduced on the appeal: [2025] 2 WLR 386, paras 34–40, 48 and 90 (where the nature of SIAC's role on an appeal in relation to the issue whether an individual will be rendered stateless by a deprivation order is explained in detail) (see also *U3* [2025] 2 WLR 1041, para 51). In *N3* this court pointed out that another example of an issue on which SIAC is required to make its own findings is whether naturalisation was obtained by fraud, applying section 40(3)(a): para 34.

51. It is not correct to say, as the Court of Appeal and the tribunals in the present case and in other cases appear to have thought, that an appeal to SIAC under section 2B is limited to public law grounds rather than the merits of the case. The appeal is always on the merits of the case (see *N3*, paras 34–38), it is just that different principles are applicable to determine those merits depending on each particular aspect of the decision which is under challenge. On some aspects, for reasons of constitutional principle, SIAC has to accord the Secretary of State's judgment a degree of respect equivalent to that in judicial review proceedings. This does not mean that there is any gap in the appellate jurisdiction or the control being exercised by SIAC; it just means that the appropriate test to determine whether a ground of appeal on such a point has been made out is of this more limited character. On other aspects of a deprivation decision, SIAC may have to make its own findings (eg on statelessness or obtaining naturalisation by fraud) and its own determinations (eg on questions of proportionality in relation to Convention rights: see *Begum No 1*, para 37, and *R (Shvidler) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] UKSC 30; [2025] 3 WLR 346, paras 120–124). If an appeal is successful on any ground, the Secretary of State is simply bound by that result (subject to any further appeal); SIAC does not make an order to quash her decision as would happen in judicial review proceedings: *N3*, paras 38–40.

52. It should be noted that in *Begum No 1* it was not suggested that there had been any significant change in the evidence available to the Secretary of State at the time he took

the deprivation decision in issue and the evidence available on the appeal to SIAC. The appeal to this court arose before the national security case had come on for examination in SIAC: see para 110. Therefore, the question whether the appeal under section 2B was confined to examination of circumstances as they existed at the time the Secretary of State took his decision, excluding consideration of circumstances as they existed by the time of the appeal before SIAC, was not directly in issue before the court. However, Lord Reed's account of the different issues which could arise on such an appeal indicates that new evidence could be introduced in SIAC which had not been available to the Secretary of State: [2021] AC 765, paras 65, 71 and 119. It was not necessary to explore in detail what this might mean if new information was produced in the course of the appeal proceedings which could have a bearing on the Secretary of State's exercise of discretion under section
40(2). That was done first in *N3* and then in more detail in *U3*, discussed below.

53. In *N3* this court explained that SIAC would be likely on an appeal to have more information available to it than had been available to the Secretary of State when she took her decision under section 40(2) and that SIAC would make its own decision on the basis of all the facts in evidence before it: [2025] 2 WLR 386, paras 34–38. This court emphasised (para 38) that SIAC is not given the task of fulfilling a judicial review function: "it does not examine the lawfulness of the Secretary of State's deprivation decision on public law grounds". These features of SIAC's appellate jurisdiction make it clear that SIAC is not required simply to consider the lawfulness of the Secretary of State's decision by reference to the circumstances as they existed at the time of the decision and in light of the evidence available to her.

54. Although *N3* was a case involving an appeal to SIAC under section 2B, this court made it expressly clear that its discussion of the nature of an appeal to SIAC also covered an appeal to the FTT under section 40A: paras 34–40 (under the heading "The nature of an appeal to the First-tier Tribunal or to SIAC"). This is because there is no relevant difference between the role of SIAC and the role of the FTT, respectively, on an appeal under these provisions. There is an appeal to SIAC where the Secretary of State's decision has been taken in reliance on secret information which cannot be disclosed. The only significance of an appeal being to SIAC under section 2B, rather than to the FTT under section 40A, is that SIAC adopts elaborate procedures (involving special advocates) to compensate so far as possible for the fact that the individual appellant and his lawyers are not able to see all the evidence in the case.

55. In *Begum No 1* this court also explained that where the Secretary of State applies a statement of her own policy in taking a decision, and a challenge is brought in relation to that aspect of the decision on an appeal under section 2B, the question is whether the Secretary of State has made a rational assessment regarding that application: paras 118– 124 and 129–130. After pointing out the various ways in which a failure by a public authority to follow its own policy can provide a ground of challenge in public law which would also be relevant on an appeal under section 2B, Lord Reed said (para 124): "the

question how the 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".

(b) U3

56. Like *Begum No 1* and *N3*, so far as is relevant to this appeal *U3* [2025] 2 WLR 1041 concerned a deprivation of citizenship decision and an appeal to SIAC under section 2B. However, as explained at para 54 above, that is not a significant point of difference from the present case, where the appeal is to the FTT under section 40A.

57. The Secretary of State made a deprivation decision based on her assessment that the appellant in the case had travelled to Syria in circumstances which indicated that she was aligned with a terrorist organisation, ISIL, and presented a threat to national security. In her appeal under section 2B the appellant adduced evidence to explain her reasons for travelling to Syria which had not been available to the Secretary of State when she took the deprivation decision. The critical issue in the case concerned SIAC's role in relation to the Secretary of State's assessment of the risk posed by the appellant.

58. This court again spelled out that an appeal to SIAC under section 2B is a substantive appeal on the merits ("an appeal in reality as well as in form") and is not equivalent to an application for judicial review: [2025] 2 WLR 1041, para 43. SIAC is, accordingly, "not necessarily confined to the application of administrative law principles": ibid (which is to say that the legal principles to be applied on the appeal will vary depending on the nature of the issue and that sometimes this will involve the application of administrative law principles and sometimes not). New evidence can be adduced on an appeal: para 44. SIAC is not confined to considering material which was or ought to have been available to the Secretary of State when she took her decision, but can consider other material, including evidence which has only subsequently come into existence: para 45.

59. In *U3* this gave rise to the question, what happens when new evidence is presented to SIAC which was not available to the Secretary of State? Lord Reed explained that the Secretary of State (typically acting by her officials by operation of the principle in *Carltona Ltd v Comrs of Works* [1943] 2 All ER 560) keeps the deprivation decision under review throughout the appeal process in light of the new evidence and any new submissions and, if the decision is maintained, it is the decision as so maintained which is treated as being under challenge in the appeal: [2025] 2 WLR 1041, paras 20 and 46–
47. Lord Reed again emphasised, as in *Begum No 1* [2021] AC 765, para 69, that an appeal under section 2B "can raise different issues, to which different legal principles apply": [2025] 2 WLR 1041, para 50 (see also *U3* [2025] 2 WLR 1041, para 60). He gave examples of this at paras 51–68. In relation to the assessment of the risk to national security posed by the appellant, there were institutional and constitutional reasons why

SIAC should attach considerable weight to the Secretary of State's assessment, having regard to the nature of that issue, meaning that the substance of the principles to be applied to that issue was the same as in ordinary administrative or public law: paras 63–68.

Issue (1): was the Secretary of State obliged to offer to reconsider her decision on the merits?

60. The procedure set out in sections 40 and 40A of the 1981 Act (and, where appropriate, under section 2B) is concerned with ensuring that an individual has a fair opportunity to challenge a deprivation decision made by the Secretary of State. Section 40A and section 2B (paras 3 and 4 above, respectively) each provide for a right of appeal against the "decision" made by the Secretary of State, rather than the order which follows from it, and the notice required to be given under section 40(5) (para 2 above) is directed to provision of a statement that the Secretary of State "has decided to make an order" and the reasons for doing so, as well as notifying the individual of their right of appeal to challenge that decision. This legislative scheme, with its focus on the decision rather than the order and on the giving of notice after the deprivation decision has been taken rather than before it is taken, indicates that the requirement of fairness in relation to the decision to make an order is intended to be addressed by the appeal which is provided.

61. Of course, as a separate point, where the appeal against a deprivation decision is allowed, that will necessarily deprive the associated order of effect as well: see the discussion in *N3*, [2025] 2 WLR 386, paras 48, 50–51, 90 and 92–93. This is subject to the limited carve-out from that effect described in paras 60 and 90 of *N3* and is qualified by recent legislation which now postpones this consequence until the end of any applicable process of appeal from the FTT up through the senior courts: see the amendments to section 40A introduced by the Deprivation of Citizenship Orders (Effect during Appeal) Act 2025, which came into force on 27 October 2025 ("the 2025 Act").

62. The analysis in *Begum No 1*, *N3* and, in particular, *U3* as explained above, shows that there is no fairness gap of the kind contemplated by the Court of Appeal, to which its judgment was a response. An individual affected by a deprivation decision has the right to challenge it by an appeal in which they can introduce evidence of their own and make any representations they wish. The decision which is the ultimate subject of consideration by the FTT (or by SIAC, as the case may be) is the decision which the Secretary of State seeks to maintain and defend after taking account of any such new evidence and any such representations: see *U3* (paras 56–59 above). The FTT (or SIAC) is not limited to a review of the decision as originally made by the Secretary of State. According to this analysis there is no fairness gap which has to be filled by the courts devising an additional procedure which the Secretary of State is required to follow and, contrary to the judgment of the Court of Appeal, there is no justification for imposing an obligation on the Secretary of State to follow such a procedure. In my view, therefore, this ground of appeal of the Secretary of State has been made out. There was no procedural unfairness involved in the

Secretary of State making the deprivation decision and continuing to maintain that decision in the course of the appeal to the FTT.

63. Mr Chirico sought to suggest that there is a basis for distinguishing the trio of judgments from this court, *Begum No 1*, *N3* and *U3*, on the grounds that they concerned appeals to SIAC under section 2B rather than appeals to the FTT under section 40A. I do not accept that submission. The fundamental nature of an appeal against a deprivation decision is the same in both cases, as was emphasised in *N3*. The procedural differences between an appeal in the FTT and an appeal in SIAC exist solely to enable SIAC to be in a position to examine sensitive secret information relied upon by the Secretary of State which cannot be made public: see para 54 above.

64. Two additional comments may be made. First, Mr Chirico complained about the position adopted by the Secretary of State regarding the disclosure required to be given by her in the course of an appeal against a deprivation decision. He maintained that the disclosure obligation accepted by her was framed in unduly narrow terms. This was not identified as an issue in the appeal or the cross-appeal. We did not hear full argument on it and it is not necessary to rule on it for the purposes of determining the appeal and the cross-appeal. Nonetheless, it is relevant to observe that, however the disclosure obligation is framed, it will be incumbent on the Secretary of State to ensure that the FTT is provided with a complete picture of the evidence relied on by the Secretary of State and her reasoning in responding to the appeal and fairness will obviously require that in the FTT proceedings (where the special SIAC procedure is not applicable) the appellant is provided with the same information. The extent of this obligation may vary depending on the nature of the particular issues which arise on the appeal, some of which (such as statelessness and fraud) are more akin to issues which arise in ordinary adversarial litigation rather than judicial review.

65. Secondly, the analysis above indicates that the March 2021 risk assessment for the Probation Service should have been admitted in the FTT as evidence in support of Mr Kolicaj's appeal. Applying the reasoning in *U3* and contrary to the reasoning of the FTT (para 26(i) above), it did not matter that it was not information available when the Secretary of State made her original decision. It was not relevant to analyse the merits on Mr Kolicaj's appeal in the FTT in terms of application of any *Tameside* duty as at the date of the original decision by the Secretary of State. But, as explained above, the fact that the March 2021 risk assessment was excluded from the appeal reflected the error in approach by the parties, which was common ground between them in the FTT: para 21 above. The non-admission of the risk assessment as evidence in Mr Kolicaj's appeal has not been raised as a ground of appeal in the appeal and cross-appeal in this court and was not an issue in the Court of Appeal.

66. If that point had been raised, it is very doubtful, to put it no higher, that it could have made any difference. As the FTT held (para 29 above), it was permissible for the

Secretary of State to decide that it was conducive to the public good for Mr Kolicaj to be deprived of British citizenship (with a view to his deportation) simply on the basis of the seriousness of the offending for which he was convicted, even if he presented no future risk of offending: see *Pham No 2* [2019] 1 WLR 2070, paras 52–53. Furthermore, Mr Kolicaj did not give evidence about his offending to support the expression of opinion in the March 2021 risk assessment, and was not prepared to face cross-examination about this, so it was not possible for the FTT to place any weight on the risk assessment in reaching its own view about the risk posed by him. There was much about which he could have been asked in cross-examination, since his pattern of offending showed determination on his part to offend and makes it difficult to say that there was no risk that he would continue to offend in future. By contrast, the NCA recommendation included an assessment based on the established facts of the case that there was a risk that Mr Kolicaj would offend again.

Issue (2): did the Court of Appeal err in quashing the Order?

67. The order made by the Court of Appeal included the following:

> "1. [The Secretary of State's] appeal against the decision of the Upper Tribunal is allowed.
>
> 2. [Mr Kolicaj's] first ground [in his respondent's notice] is upheld.
>
> 3. [The Secretary of State's] Notice and Deprivation Order of 22 January 2021 are quashed."

(Strictly speaking, the order should have said that the Secretary of State's appeal was dismissed by reason of the ground relied on by Mr Kolicaj in his respondent's notice, but the sense of paragraphs 1 and 2 is clear enough.)

68. The Secretary of State takes issue with paragraph 3. She contends that none of the FTT, the Upper Tribunal or the Court of Appeal had power to quash the Notice and the Order and that this paragraph of the Court of Appeal's order was included in error. The suggestion is that the Court of Appeal should simply have made an order in the terms of paragraphs 1 and 2 (or dismissing the Secretary of State's appeal), leaving the court's judgment to speak for itself, since the Secretary of State would be bound by the court's rulings, as was determined in *N3*.

69. If the Secretary of State's appeal to this court is allowed, as I consider it should be, this issue does not arise. Also, it is not an issue which appears to have any substantive implications, since the Secretary of State accepts that she would be bound by the Court of Appeal's ruling in its judgment in any event and that in the light of that ruling she could not have treated the Notice or Order as effective. However, the court heard submissions on it and it is desirable that we should address it, to clear up some confusion which appears to have arisen. The confusion is related to the points made above about the nature of an appeal under section 40A or under section 2B.

70. As explained above, an appeal under either of those provisions is a full appeal. It is not a form of judicial review confined to examining the Secretary of State's deprivation decision in light of the circumstances existing at the time it was taken. That is so even though the principles of law to be applied on appeal are, in relation to some issues, equivalent to ordinary public law principles. If an appeal against the deprivation order in question is allowed, the consequences which follow are those appropriate for a successful appeal, not judicial review. To that extent I agree with the submission of the Secretary of State that it is not accurate to say that the deprivation order is quashed.

71. However, the FTT and SIAC are given jurisdiction by section 40A and section 2B respectively to determine such an appeal. In accordance with normal principles of statutory interpretation, they are clothed with all powers reasonably incidental to the exercise of that jurisdiction. As it was put by Lord Selborne LC in *Attorney General v Great Eastern Railway Company* (1880) 5 App Cas 473, 478, the doctrine of ultra vires "ought to be reasonably, and not unreasonably, understood and applied, and … whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires." In my view, if an appeal against a deprivation decision is allowed, the incidental powers of the FTT and SIAC include the power to make an order to set aside (rather than "quash") the decision and to set aside the notice and order which flow from that decision.

72. The Court of Appeal has jurisdiction on an appeal to it to exercise all the powers which the inferior court or tribunal has: section 15(3) of the Senior Courts Act 1981 and rule 52.20(1) of the Civil Procedure Rules. Therefore, paragraph 3 of the order made by the Court of Appeal would have been unobjectionable if it had said that the Notice and the Order were set aside.

73. In *N3* this court had to consider the position where SIAC issues a judgment allowing an appeal but (in accordance with what we were told is SIAC's usual practice) makes no order in light of that judgment and simply leaves it to speak for itself. As explained in *N3*, in such a case the Secretary of State is bound to respect SIAC's ruling and to treat the deprivation decision and the order associated with it as having no effect, notwithstanding the absence of an order stating this: see *N3* [2025] 2 WLR 386, para 92.

That is why in *N3* this court said (para 93) that as a matter of good practice and for good order the Secretary of State herself should formally withdraw the deprivation order.

74. However, the FTT (under section 40A) and SIAC (under section 2B) each has the power to make appropriate orders to reflect the rulings set out in its judgment, including the power to set aside the notice given under section 40(5) and the order made in consequence of the deprivation decision. For the same reasons as given in *N3* at para 93 in relation to the Secretary of State, in my view it is desirable that in the exercise of their jurisdiction the FTT and SIAC, respectively, should make clear in the form of an order precisely what effect its judgment has. If an appeal is allowed against a decision to make a deprivation order, it follows that the deprivation order should not have been made and is itself unlawful. It is liable to cause confusion to leave an unlawful deprivation order in place, and accordingly it is desirable that an order should be made setting it aside.

75. The precise position regarding the status of the decision to make a deprivation order and of the order made as a result of that decision is somewhat complicated in light of the way that section 40 falls to be interpreted as explained in *N3* and in light of the amendments made to section 40A by the 2025 Act, but this can be reflected in any order made by the FTT or SIAC by suitable drafting, including by cross-reference to that judgment and the amended statutory provisions. The complications which exist seem to me to make it still more desirable to explain the resulting legal position with precision in an order.

Issue (3): Was the Secretary of State under an obligation to investigate the extent of the risk that Mr Kolicaj might be able to renounce his Albanian citizenship?

76. Mr Chirico submits that the Court of Appeal should have upheld Mr Kolicaj's appeal against the deprivation decision on the grounds that the Secretary of State could only omit to give him an opportunity to make representations before making that decision if there was a real risk that he might renounce his Albanian citizenship if he were given such an opportunity, and she had failed to demonstrate that there was any such risk. The Secretary of State had not investigated what provision Albanian law made for renunciation of citizenship. Mr Chirico points out that the Court of Appeal held that the 1981 Act did not expressly or impliedly exclude a requirement that Mr Kolicaj should be given an opportunity to make representations in advance of the deprivation decision (limb
(i) in *Bank Mellat* [2014] AC 700, para 179: para 30 above) and that the Secretary of State had not sought to establish by investigation or evidence that it was impossible, impractical or pointless to give him that opportunity (limb (ii) in *Bank Mellat*, para 179).

77. In my view, this ground of cross-appeal should be dismissed. Contrary to the opinion of the Court of Appeal, I consider that the scheme of sections 40 and 40A indicates that the Secretary of State was not under any obligation to seek representations

from Mr Kolicaj before making the deprivation decision; that is to say, this is a case in which limb (i) of the guidance in *Bank Mellat*, para 179, applies. These provisions of the 1981 Act set out the procedure to be followed by the Secretary of State in relation to the making of a deprivation decision. They are directed to enabling the individual in question to mount an appeal, not to allowing them to make representations before the decision is made. The Secretary of State has to give notice that a deprivation decision *has* been taken (section 40(5)(a): para 2 above), setting out her reasons for the order (ie her final reasons formulated after her consideration of the case) (section 40(5)(b)) and specifying the individual's right of appeal (which could only exist in relation to a decision which has already been taken) (section 40(5)(c)). As explained above, it is the right of appeal which satisfies the requirement of fairness in the operation of the deprivation regime.

78. Having regard to these specific and elaborate provisions and to the ambit of such an appeal, which shows that there is no fairness gap, it is not possible to infer that Parliament intended that there should be, in addition, an opportunity to make representations before a deprivation decision is made. On the contrary, it would plainly jeopardise the ability of the Secretary of State to take the swift and decisive action of a kind which the regime is intended to allow (see *N3* [2025] 2 WLR 386, para 60) if she first had to investigate in detail what might be a very complex legal position under foreign law to decide if there was a risk of renunciation of citizenship according to that foreign law and, depending on the answer (which could itself be unclear and in relation to which a mistake might be made), might have to give the individual concerned an opportunity to make representations.

79. This is a point of general application which underlies the legislative provisions and governs their interpretation in all cases. Parliament legislated with an appreciation that renunciation of foreign citizenship was possible in at least some, possibly many cases, which would lead to the Secretary of State being prevented from taking action in the public interest by way of deprivation of citizenship. The procedure specified by Parliament in section 40(5) and section 40A is deliberately simple and is capable of being operated without taking that risk, while the provision of a right of appeal satisfies the requirement of fairness. It would be contrary to the intention of Parliament and would undermine the proper application of the regime to say that the Secretary of State is required to make an evaluative assessment of foreign law in order to decide whether to invite the individual to make representations.

80. In *Begum v Secretary of State for the Home Department* [2024] EWCA Civ 152; [2024] 1 WLR 4269 (in the proceedings involving Ms Begum which followed on from *Begum No 1*) the Court of Appeal examined this question in relation to a case concerning an individual outside the UK, a deprivation decision made on national security grounds and an appeal to SIAC under section 2B. It concluded that section 40(5) and section 2B, read together, contained an exhaustive procedural framework for making and appealing against deprivation decisions taken on the grounds of national security, which impliedly excluded any obligation to invite representations from the individual concerned before

making such a decision: paras 103–113. It may be noted that the FTT came to the same conclusion in the present proceedings: para 26(ii) above. The court observed that the fact that some deprivation decisions involve persons who are already in the UK or are made pursuant to section 40(3) for reasons not involving national security makes no difference to the basic analysis: para 107. I agree. The basic procedural framework is, so far as is relevant, the same in cases of deprivation where there is an appeal to the FTT under section 40A, rather than to SIAC under section 2B. In the context of an appeal to the FTT under section 40A the inference is the same, that Parliament impliedly intended to exclude any requirement on the Secretary of State to give an opportunity to make representations before a deprivation decision is made.

Issue (4): did the Secretary of State apply an undisclosed policy?

81. At the time the Secretary of State took her original decision the only statement of policy regarding the use of the deprivation power in section 40 in the public domain was that in para 55.4.4 of the Nationality Instructions (para 11 above). The May 2020 submission was not in the public domain. Mr Chirico contends that the May 2020 submission set out an unpublished statement of policy. Relying on *Lumba* [2012] 1 AC 245, in which this court held that making a decision on the basis of an unpublished policy was unlawful, he submits that the deprivation decision by the Secretary of State, which followed the approach in the May 2020 submission, must be set aside.

82. Mr David Blundell KC, for the Secretary of State, responds to this by submitting that the May 2020 submission did not set out any new policy, but was merely a development of the existing policy in para 55.4.4 of the Nationality Instructions, which had been published. This is a departure from the position adopted by the Secretary of State in the FTT, where it was common ground that the approach set out in the May 2020 submission did constitute a policy which she applied: see para 26(ii) above. I cannot accept Mr Blundell's contention. The May 2020 submission recommended a proposed approach to the exercise of the Secretary of State's discretion under section 40(2) (para 12 above), which was accepted and followed by the Secretary of State, which was materially different from that in the Nationality Instructions. The criteria for exercise of the discretion were narrower than appeared from the Nationality Instructions. Anyone who was unaware of the approach set out in the May 2020 submission was disabled from making representations to argue that their case did not fall within the criteria stated in that document, so that the power in section 40(2) should for that reason not be applied in relation to them.

83. As Lord Dyson said in *Lumba*, para 38, subject to certain limits which are not relevant here, a policy statement in relation to the exercise of a discretionary power which may be used with detrimental impact on a person is required to be published: "what must
… be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker

before a decision is made". The requirement of publication stems from the application of the principle of fairness in the context of the operation of a policy to determine how a discretionary power will be used. If Mr Kolicaj had never learned of the criteria in fact being applied by the Secretary of State in deciding whether to make a deprivation decision in his case, and had for that reason been deprived of the opportunity to make representations why his case fell outside the policy so that no deprivation decision should be made in relation to him, he would have had a good argument that the decision made was unlawful.

84. The difficulty for Mr Kolicaj, however, is that by the time of the hearing of his appeal in the FTT he did know about the policy statement in the May 2020 submission and had an opportunity, which he took, to make submissions why his case fell outside the criteria in that policy statement. It does not matter that he did not know about that policy statement at the time the Secretary of State made her original decision in January 2021 because, as explained above, the principle of fairness did not require that he have an opportunity to make representations at that stage, since it was satisfied under the regime by the provision of a notice under section 40(5) giving reasons and a right of appeal. As also explained above, particularly with reference to *U3*, the issue on an appeal to the FTT is whether the challenge to the deprivation decision as maintained by the Secretary of State in the course of the appeal should be allowed. In relation to that issue Mr Kolicaj had a full and fair opportunity to present his case regarding the application of the policy set out in the May 2020 submission, with the result that the deprivation decision could not be set aside on the ground of unfairness. There was no question of unfairness arising from the previous non-publication of that policy which could affect the challenge to the deprivation decision as it was maintained and was in issue on the appeal. This ground of cross-appeal therefore falls to be dismissed.

85. Mr Kolicaj does not contend in the appeal to this court that the Secretary of State could not properly decide that his offending met the standard set out in the policy in the May 2020 submission. That was a point made on his behalf before the FTT, but it ruled against him, holding that the Secretary of State was rationally entitled to find that his offending did meet that standard: para 26(iii) above. As *Begum No 1* makes clear (para 55 above), in reaching that conclusion the FTT applied the proper legal test.

86. As a footnote to this discussion, I should observe that the reasons set out in the Notice (para 16 above) were defective. They referred only to the policy in the Nationality Instructions and did not explain that the Secretary of State had also applied the narrower policy set out in the May 2020 submission. This was capable of producing unfairness, in that if Mr Kolicaj had not appealed he would not have learned about the policy applied in his case and would have been deprived of the opportunity to make representations why his case did not fall within it. The Notice should have referred to the policy in the May 2020 submission, not just that in the Nationality Instructions, and should have explained that the Secretary of State considered that his case fell within it. However, as events transpired no unfairness occurred. Mr Kolicaj did appeal; in the course of the appeal the

Secretary of State fully explained her reasoning; and Mr Kolicaj had the opportunity to contest that reasoning with full knowledge of the relevant policies applied in his case.

Issue (5): Did the Secretary of State fail to consider whether to exercise her discretion under section 40(2)?

87. As explained above (para 2), where the "conducive" precondition in section 40(2) is met, that gives rise to a discretionary power which the Secretary of State may choose to exercise or not. The Upper Tribunal took the view that the Secretary of State had only considered whether the precondition was satisfied and had assumed that this was sufficient for her to make her deprivation decision, without considering whether as a matter of discretion it was appropriate to do so.

88. In my view, however, it is clear from the terms of the December 2020 submission and from the terms of the Notice that the Secretary of State properly considered the exercise of the discretion arising under section 40(2). The December 2020 decision set out a number of matters which were relevant to the exercise of discretion, rather than to the question of satisfaction of the precondition. These included the discussion of whether deprivation would be in accordance with the policy in the May 2020 submission, the impact of section 55 in relation to the decision and the application of the HRA and article 8 of the European Convention. The Court of Appeal was right to allow the Secretary of State's appeal on this point. This ground in Mr Kolicaj's cross-appeal falls to be dismissed.

Conclusion

89. For the reasons given above I would allow the Secretary of State's appeal to this court and hold that Mr Kolicaj's cross-appeal in respect of the deprivation decision in his case should be dismissed.