THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2022-001549-GIA
[2023] UKUT 253 (AAC)
OFQUAL V INFORMATION COMMISSIONER

Decided following an oral hearing on 24 July 2023

Representatives

Ofqual	Stephen Kosmin and Khatija Hafesji of counsel
Information Commissioner	Katherine Taunton of counsel

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference:	EA/2021/0234
Decision date:	14 June 2022
Hearing:	Paper consideration

As the decision of the First-tier Tribunal involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

REASONS FOR DECISION

A. The algorithm

1. This appeal is about 'the algorithm'. Every teenager who was supposed to sit GCSEs and A levels in 2020 and 2021, their parents, schools, universities, potential employers and anyone who took even a passing interest in the news during the 2020 lockdown and the months following will surely remember what that meant. But time passes and memories fade, so a brief explanation may be in order.

2. The First-tier Tribunal set out a detailed history in its decision. These are the key events for the purposes of this appeal. On 18 March 2020, the Secretary of State for Education decided that no assessments or examinations would take place that academic year. On 31 March, he directed the Office of Qualifications and Examination

Regulation (Ofqual from now on) that: 'students should be issued with calculated results based on their exam centre's judgements of their ability in the relevant subjects, supplemented by a range of other evidence'. The process would involve a statistical standardisation using historical data for the distribution of grades in subjects for each individual education centre. This was the algorithm. It operated differently depending on the number of students taking each subject. Its purpose was two-fold. First, it was designed to reflect the distribution of grades in previous years. Second, it was designed to reduce the effect of leniency or severity by individual teachers.

3. Policy continued to develop and, on 13 August 2020, the Secretary of State directed Ofqual to allow students to appeal on the basis of having achieved a higher grade in their mock examinations. That date was the day that A level results were announced. On 16 August, Ofqual decided that students would be given the higher of the centre assessed grade or the calculated grade. On 17 August, the Secretary of State made an announcement, which contained this passage:

> Ofqual had consulted on and implemented a standardisation process for exam results this summer, but the system has resulted in too many inconsistent and unfair outcomes for A and AS level students. Over the last few days, it has become clear that the algorithm has revealed a number of anomalies that had not been anticipated by Ofqual and which severely undermined confidence in the system.

Following that statement, the results were reissued with the effect of the algorithm removed.

B. The path to the Upper Tribunal

4. This case starts with the requests made to Ofqual under the Freedom of Information Act 2000 (FOIA from now on). They were made under the name of Hedro Pedro. That person did not take any part in the proceedings before either the First-tier Tribunal or this tribunal.

5. I say 'requests' because the terms of the request were varied or clarified a number of times. The First-tier Tribunal decided that the relevant request was made on 9 October 2020:

> Just centre name; % grades up 2 grades at that centre; % grades up 1 grade; % the same grade; %-1 grade; %-2 grades; %-3 grades.

On 5 November 2020, Ofqual confirmed that it held that information, but had decided that it was exempt under section 36(2)(c) FOIA.

6. The Information Commissioner received a complaint under section 50 FOIA on 12 November 2020. On 5 August 2021, the Commissioner decided that although section 36(2)(c) was engaged, the public interest balance under section 2 required Ofqual to disclose the information. This led to Ofqual's appeal to the First-tier Tribunal. The tribunal dismissed the appeal, but I gave Ofqual permission to appeal to the Upper Tribunal.

C. The legislation

7. These are the provisions of FOIA that I refer to in this decision.

1. General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

2. Effect of the exemptions in Part II

…

(2) In respect of any information which is exempt information by virtue of any provisions of Part II, section 1(1)(b) does not apply if or the extent that-

…

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

36. Prejudice to effective conduct of public affairs

…

(2) Information to which this section applies is exempt information, if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

…

(c) would otherwise prejudice, or would otherwise be likely otherwise to prejudice, the effective conduct of public affairs.

…

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words ‘in the reasonable opinion of a qualified person’.

In this case subsection (4) applies, because the information requested was statistical.

50. Application for decision by Commissioner

(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

57. Appeal against notice served under Part IV

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

(2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.

…

58. Determination of appeals

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

D. The First-tier Tribunal's analysis of the balance of public interests

8. The tribunal analysed the factors accepted by Ofqual as relevant to the public interests balance. This is a summary. It is not intended to be comprehensive.

The public interest in favour of disclosing the information

9. Ofqual argued that there was a public interest in promoting the integrity of awarding qualifications through publication of centre-level awarding information. It argued that this should carry limited weight. The tribunal decided that no weight should be given to this factor, because the information requested would not shed any light on the behaviour and integrity of an educational centre's determination.

10. Ofqual argued that there was a public interest in disclosing information relevant to the decision-making of a public authority. It argued that this should carry low weight. The tribunal accepted that disclosure would promote transparency and openness. In general terms, those factors would carry limited weight. However, the Information Commissioner submitted that the issue was not generality, but the specific public interest in open and transparent information about the impact of the algorithm. The tribunal quoted from the Secretary of State's announcement on 17 August. Ofqual argued that the algorithm did operate fairly. Their witness did, though, concede that 'the system' had produced 'too many inconsistent outcomes' which resulted in a loss of 'public confidence'. This loss of confidence was what led Ofqual to change its approach. The tribunal concluded that the change in the method of awarding A level grades was of personal interest to a large number of students and teachers, and attracted a significant amount of interest from the public at large both in August 2020 (when the change took place) and November 2020 (when Ofqual responded to the request). The tribunal also decided that a better understanding of the fairness of the algorithm could only have enhanced the debate on the system that would be applied in 2021.

11. Ofqual argued that disclosing the requested information would add little to the debate that had already taken place. The tribunal pointed out that much of the information that had been discussed had only become public after 5 November 2020. The tribunal limited its consideration to information that was already in the public domain on that date.

12. Overall, the tribunal's conclusion was that disclosing the information would add significant value to the debate about the 2020 grading system and inform the public interest in understanding whether the algorithm operated fairly. The public interest in disclosure was very strong.

The public interest in maintaining the exemption

13. Ofqual identified four factors in favour of maintaining the exemption.

14. First, Ofqual argued that disclosure would present a misleading impression and lead to reputational damage. The tribunal accepted that reliable conclusions about the integrity of assessments by individual centres could not be drawn from the information. Irresponsible reporting could be guarded against by a simple warning. Centres could be prejudiced by such reporting, but the public were generally aware of the unique circumstances obtaining in 2020.

15. Second, Ofqual argued that disclosure would be prejudicial to students who were awarded grades in 2020. As to employers, the tribunal considered that any prejudice against students would be set against the known fact that the 2020 system had an inflationary effect on grades. As to universities, any prejudice would be remote, given their sophisticated methods of selecting candidates.

16. Third, Ofqual argued that disclosure would be prejudicial to their relationship with stakeholders (the Department for Education and the examination boards). The argument was that disclosure would undermine assurances about confidentiality of centre-level grading and undermine trust in Ofqual and its relationships with its stakeholders. In particular, the Secretary of State had made statements that there would be no publication of performance data. The tribunal accepted that there was in general a significant public interest in a relationship of trust between Ofqual and its stakeholders. This required a real-world assessment, involving how commitments would have been reasonably understood and what commitments, so understood, had been breached. The tribunal did not find it helpful to consider what was and was not performance data. The commitment meant that institutional level data that could be the basis of comparisons between different centres would not be disclosed. The disclosure of the information would not allow that. Disclosure could have a negative impact on relationships but it should not be accorded significant weight.

17. Fourth, Ofqual argued that disclosure would be prejudicial to the integrity of grading in future years. The tribunal accepted that there was a possibility that some teachers might view the disclosure as a breach of the assurance not to publish performance data and would feel under undue pressure to such an extent that it could affect the accuracy of their contribution to grading for 2021. However, the tribunal assessed the risk of this as low. The tribunal also took into account that any future system would have a quality assurance designed to ensure the integrity of the system.

The tribunal's overall conclusion

18. This was the tribunal's conclusion:

> 122. Given what we have said above, having considered the balance of public interests as of 5 November 2020 we find that the public interest in maintaining the section 36(2)(c) exemption in relation to the Requested Information, whether the matters relied upon by Ofqual are taken separately or cumulatively, is outweighed by a significant margin by the strong public interest in favour of disclosure.

E. My conclusion

19. There were four grounds of appeal, divided into nine issues. I have decided that the appeal succeeds on Issue 6 under Ground 3. I do, though, deal with two Issues that need to be resolved before the rehearing. They are Issue 1 under Ground 1 and Issue 8 under Ground 4. Otherwise, it is not necessary to deal with the other Issues; any errors that were made will be subsumed by the rehearing.

F. Ground 3, Issue 6

20. Ground 3 is:

> The FtT failed to provide any or any adequate reasons for its central finding that disclosure of the requested information would advance the public interest by adding to the public debate '*as to whether the CAG model was a fairer method of awarding A level grades in 2020 than the model used to obtain calculated grades*'.

21. Issue 6 is:

> Did the FtT provide any or any adequate reasons for its central finding that disclosure of the requested information would advance the public interest by adding to the public debate 'as to whether the CAG model was a fairer method of awarding A level grades in 2020 than the model used to obtain calculated grades'?

22. I do not consider that the tribunal's conclusion was a finding of fact. I would prefer to call it a judgment or assessment and have approached this issue on that basis. Whichever label is correct, the tribunal's reasons do not explain or justify its conclusion.

23. The tribunal made this judgment in the course of considering the factors accepted by Ofqual as favouring disclosure of the requested information. It first considered at [74]-[75] whether disclosure would promote 'the integrity of awarding qualifications through publication of centre-level awarding information.' Ofqual argued that this should be given 'limited weight'. The tribunal decided that 'on the facts of this case no weight can be attached' to it.

24. The tribunal went on to consider whether disclosure was 'relevant to the decision-making of a public authority'. Ofqual argued that the weight of this factor was low. The tribunal decided at [76] that in general terms transparency and openness were of limited weight. However, it also recorded at [76] the Information Commissioner's argument, which concerned 'the specific public interest in open and transparent information about the impact of the Algorithm.' The argument was that the information 'would add to the public debate both as to the fairness of the Algorithm and as to

whether the CAG model was a fairer method of awarding A level grades in 2020 than the model used to obtain the calculated grades.' That was recorded as the Commissioner's argument. Ofqual has treated the tribunal as accepting the argument.

25. The tribunal next referred at [77]-[78] to the Secretary of State's statement on 17 August 2020 and its criticisms of the algorithm. It noted that Ofqual did not accept that the algorithm had operated unfairly, but did accept that it had to be abandoned as a result of the loss of public confidence.

26. The tribunal decided at [79] that the method of awarding grades in 2020 was 'a matter of personal interest to a large number of students and teachers, and also attracted a significant amount of interest from the public at large' both in August 2020 and at the time of the request in November.

27. That was the end of the first part of the tribunal's analysis. It went on to consider at [80] the value of the information to the debate taking place in November 2020 about the 'mechanism for the award of A level grades in 2021'. It concluded that 'a better understanding of the fairness of the Algorithm in November 2020 would only have enhanced the consideration and debate as to an appropriate alternative mechanism for awarding A level grades in 2021, the need for which … was a possibility at the relevant date.'

28. Ofqual argued that the information would add little to the public interest in view of the information in the public domain. The tribunal referred at [84] to and commented on some of the information already in the public domain as of 5 November 2020, but rejected at [85] information that was published after that date. As to the latter, it was right to refuse to take that information into account. See my analysis of Ground 1, Issue 1 below.

29. The tribunal's overall conclusion at [86] was that the information 'would, as of 5 November 2020, have added significant value to any debate regarding the 2020 A level grading system. … [It] would help inform the public interest in understanding whether the Algorithm operated fairly. We find this public interest to be very strong.'

30. The starting point is the nature and content of the information. It is statistical, so disclosure would only show the scale and range of the changes made as a result of abandoning reliance on the algorithm. It would therefore show the effect of using the algorithm in the first place. It would thereby add content to the Secretary of State statement that the algorithm had produced 'too many inconsistent and unfair outcomes' and revealed 'a number of anomalies that had not been anticipated by Ofqual and which severely undermined confidence in the system.'

31. How did that further the public interest identified by the tribunal? The tribunal identified the only public interest as the debate on fairness. I assume that means the accuracy of the algorithm's assessment of a pupil's ability or likely performance. It is not clear to me whether the tribunal accepted the Information Commissioner's formulation in [76] or not. That probably does not matter, as that formulation is also about fairness. What the tribunal did not explain is how the statistical information about the scale of the effect of the algorithm provided a very strong public interest in disclosure. If the issue is fairness, the scale of the effect of the algorithm would only

be relevant if that effect was unfair or anomalous. But the scale of the effect would not help to show whether it was having those effects.

32. It is possible that the statistical information had value when considered in combination with other evidence in the public domain at the time. The tribunal did comment at [84] on some of that other evidence. Its comments, though, do not show how the statistical information and that other evidence in combination justified its assessment of the strength of the public interest. If the information had that effect on its own, the reason is not evident to me.

33. That is sufficient to decide this appeal. The nature and strength of the public interest in disclosure is the comparator against which the public interest in maintaining an exemption must be judged. If there was a mistake in the former, the comparison is inevitably undermined.

G. Ground 1, Issue 1

34. Ground 1 is:

> The FtT erred in rejecting absolutely the relevance of material that was not in the public domain on 5 November 2020 but was known on that date imminently to be entering the public domain.

35. Issue 1 is:

> Does *Montague v Information Commissioner and Department for International Trade* [2022] UKUT 104 (AAC) establish 'a point of generally applicable principle' with the effect that the FtT was bound to close its mind to information, which was known, as of 5 November 2020, to be entering the public domain imminently?

36. The answer to this issue depends on the interpretation and application of section 2(2)(b) FOIA.

37. *Montague v Information Commissioner* [2022] UKUT 104 (AAC) [2023] 1 WLR 1565 was a decision of a three-judge panel of the Upper Tribunal. As such, it is binding on me for any point of law it decides. If it is wrong, the mistake will have to be corrected by the Court of Appeal.

38. *Montague* dealt with two principle issues. Only the second is relevant to this case:

> 3. The second issue is the question of whether information that is disclosed after a public authority's decision on a request (for example, during the Commissioner's investigation, in the course of First-tier Tribunal proceedings or as a result of a Tribunal's decision) should be treated as in the public domain for the purpose of weighing the public interest in disclosure of any remaining requested information ('the Public Interest Timing Issue'). Included within this issue is whether a public authority's decision on a request includes any later decision on review by it of its initial decision refusing the request.

The panel's answer was:

> 5. As to the Public Interest Timing Issue, we conclude it is to be judged at the time the public authority makes its decision on the request which has been made

> to it and that decision making time does not include any later decision made by the public authority reviewing a refusal decision it has made on the request.

The parties agreed that:

> 48. … the answer to when the public interest considerations fall to be judged is to be provided by construing the relevant statutory provisions in context.

That is how the panel proceeded, reaching its conclusion that:

> 86. … The public authority is not to be judged on the balance of competing public interests on how matters stand other than at the time of the decision on the request which it has been obliged by Part I of FOIA to make.

39. Mr Kosmin emphasised the opening words of subparagraph (b): 'in all the circumstances of the case'. I accept that section 12(2)(b) refers to 'all the circumstances of the case', but that does not identify the time as at which the test must be applied. The public authority must take account of all the circumstances of the case that are relevant at that time. *Montague* decided what that time was. I accept that the factual background in that case was different from this. It is important, though, to see how the panel analysed the issue it had to decide. It was argued as an issue of statutory interpretation and that is how it was analysed by the tribunal. Which is why the tribunal referred in paragraph 48 to construing the relevant statutory provisions 'in context', a standard reference to the statutory context of section 12(2)(b). The analysis was inevitably carried out in the context of the facts of that case and expressed in terms appropriate to that context. Which is why the tribunal referred to the evidence becoming available 'well after' the time when the public authority made its decision. But that does not alter the conclusion or the principle of law for which the case is an authority. Given its analysis and conclusion, it set out the principle that the First-tier Tribunal applied in this case. There is no getting around the clarity of paragraph 86 of the panel's reasons.

40. Even if I were free to do so, I would not accept Mr Kosmin's argument that a public authority can take account of information that is known will enter the public domain imminently. On his argument, this would include both information that would be published by the public authority itself and information that would be published by another public authority. This formulation raises vague questions. What is imminent? How certain must it be that specific information will be published? What happens if, in the event, no information or different information is published? How does the requester know at the time whether the public authority correctly assessed the balance of interests on account of information that is not yet available? Questions like this render the proposed test impracticable in application.

41. To summarise, this is the position. Section 2(2)(b) has to be applied in all the circumstances of the case as at the date when a public authority decides how to respond to a request for information. On review or appeal, information can be taken into account that was not known to or not available to the public authority at that date, but only in so far as it is relevant to the decision that should have been made on that date. This approach is not novel. It applies, for example, when deciding on an appeal: (a) whether there was 'a risk of serious personal injury' under section 22(2) of the Health and Safety at Work etc Act 1974 (*HM Inspector of Health and Safety v Chevron North Sea Ltd* [2018] 1 WLR 964 at [18]); and (b) whether a circumstance was

obtaining at the time of a decision for the purposes of section 12(8)(b) of the Social Security Act 1998 (*R(DLA) 2 and 3/01*). That is the approach that the First-tier Tribunal took and that it must take at the rehearing.

H. Ground 4, Issue 8

42. Ground 4 is:

> In the context of a polycentric issue concerning prejudice to multiple and varied stakeholders, the FtT erred in failing to adopt the precautionary approach (identified in, amongst other authorities, *All Party Parliamentary Group on Extraordinary Rendition (APPGER) v Information Commissioner and The Ministry of Defence* [2011] UKUT 153 (AAC), [2011] 2 Info LR 75 ('*APPGER (No 1)*')) when assessing the weight to be attached to the evidence of the executive branch about the prejudice likely to be caused by disclosure of the requested information.

43. Issue 8 is:

> Was the FtT bound to give effect to the precautionary principle identified in All Party Parliamentary Group on Extraordinary Rendition (APPGER) v Information Commissioner and The Ministry of Defence [2011] UKUT 153 (AAC), [2011] 2 Info LR 75?

44. This ground concerns the evidence from Ofqual and the Secretary of State on the importance of the reputational damage that might occur if the information were disclosed. Mr Kosmin argued that there was information that was available to Ofqual and Secretary of State but not to the tribunal, and that the expertise or experience possessed by Ofqual and the Secretary of State was not possessed by the tribunal.

45. Mr Kosmin relied on paragraph 56 of the Upper Tribunal's decision in *APPGER (No 1)*. This is the full paragraph:

> 56. There are essentially two issues:
>
> i) would disclosure of the information be likely to prejudice international relations;
>
> ii) if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it.
>
> Both matters are for the Tribunal to determine for itself in the light of the evidence. Appropriate weight needs to be attached to evidence from the executive branch of government about the prejudice likely to be caused to particular relations by disclosure of particular information: see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153, [50]-[53] and see also *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at [131] per Master of the Rolls:
>
> > 'In practical terms, the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge, for the purpose of assessing the likely attitude and actions of foreign intelligence services as

> a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned.'

46. These are my conclusions. First, there is no precautionary principle that applies to a particular category of cases or requires a special approach to particular issues. The authorities do not support it. Second, there is no need for it. The conclusions in the cases relied on can be achieved on basic principles of assessing evidence. Third, the existence of such a principle would cause unnecessary problems.

47. The starting point is, as it always must be, the tribunal's jurisdiction and powers. Legislation may exclude specified issues from the tribunal's jurisdiction, as it does in section 4(3) of the Safeguarding Vulnerable Groups Act 2006 by excluding the issue of appropriateness (discussed in *Disclosure and Barring Service v JHB* [2023] EWCA Civ 982). Or it can limit the scope of that jurisdiction, as it does in section 36(2) FOIA by restricting its scope by reference to the 'reasonable opinion of a qualified person'. That restriction does not apply in this case because the information was statistical (see section 36(4)), but my point is that this is one of the techniques available to control the scope of a tribunal's jurisdiction.

48. In FOIA, the First-tier Tribunal's jurisdiction is governed by sections 57 and 58. Section 58 governs the issues on which the tribunal may allow an appeal. Both sections lead back to the Information Commissioner's decision notice under section 50, which in turn leads back to public authority's duty under section 2(2)(b). There is no statutory restriction on the tribunal's jurisdiction or powers requiring it to accept the view of any witness or party on any issue. It would be abdicating its judicial authority if it were to do so.

49. What the tribunal has to do is to assess the evidence and arguments. This is governed by the general law. My reading of the authorities cited is that they are no more than instances of the application of general principles to particular circumstances of those cases. This is how the Supreme Court dealt with the issue in *R (Begum) v Special Immigration Appeals Commission* [2021] AC 765, which concerned the power of the Secretary of State for the Home Department to exclude people from entry into the United Kingdom.

> 70. In considering whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. The exercise of the power conferred by section 40(2) must depend heavily upon a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety, as in the present case. Some aspects of the Secretary of State's assessment may not be justiciable, as Lord Hoffmann explained in *Rehman*. Others will depend, in many if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are

> incapable of objectively verifiable assessment, as Lord Hoffmann pointed out in *Rehman* and Lord Bingham of Cornhill reiterated in *A*, para 29. SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect, for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*, para 29.
>
> 71. Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) 'if he is satisfied that the order would make a person stateless'. Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act. In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State, as Lord Hoffmann explained in *Rehman* and Lord Bingham reiterated in *A*. In reviewing compliance with the Human Rights Act, it has to make its own independent assessment.
>
> 72. In the present proceedings, the approach of the Court of Appeal and the Divisional Court was premised on a different understanding of SIAC's jurisdiction and powers …

There is no reference to any precautionary principle in that case. There is no reference to particular categories of case or issue. The Court merely reasoned from the particular features of the case set in the context of the Commission's jurisdiction.

50. When a tribunal assesses any evidence, it must take account of any factors that enhance or detract from the quality of the evidence. Those factors include the particular advantages available to the witness that are not available to the tribunal. That factor is most frequently discussed in relation to expert evidence, where almost by definition the witness knows more than the tribunal. Despite that advantage, the tribunal is responsible for finding the facts and may reject the opinion of even the most distinguished expert, although it must have a reason for doing so (*Re B (Care: Expert Witness)* [1996] 1 FLR 667 at 670 and 674). Ultimately, the value of evidence depends on the reasoning, not the conclusion (*Kennedy v Cordia (Services) LLP* [2016] 1 WLR

597 at [48]). I accept Ms Taunton's argument that this issue is 'in substance, a weight challenge.'

51. This approach avoids any need to define principles or draw the boundaries within which they apply. It is flexible enough to take account of the potential mix and interaction of different factors that may be present. It recognises the spectrum of cases and issues that can arise. Cases like *Begum* and *APPGER (No 1)* are at one end of that spectrum, involving as they do issues of international relations and national security. At the opposite extreme is the advantage a witness in a personal injuries' action may have had by seeing a collision from a particular vantage point. The general approach to assessing evidence can take account of both extremes and the infinite variety in between. Boundaries and categories are not helpful and introduce unnecessary complications.

52. That is all I need to say. Any mistake that may have been made in assessing the evidence to which Mr Kosmin referred or in explaining that tribunal's reasoning will be subsumed by the rehearing.

Authorised for issue
on 13 October 2023

Edward Jacobs
Upper Tribunal Judge

Typographical corrections
On 23 November 2023