Security Vetting
Appeals Panel

SECURITY VETTING APPEALS PANEL

THE ROLE AND JURISDICTION OF THE PANEL

1. During recent hearings it has become apparent that there are differing views as to the approach to be adopted by SVAP when hearing an appeal. This document gives a broad summary of the approach that is applied.

2. It has been suggested that the assessment of the risk posed by a particular individual is a matter to be determined by the Government, which is in the best place to make judgments about what is necessary to protect national security, and that a decision should only be the subject of suggested variation by SVAP if it is perverse or made on the basis of incomplete information (or, alternatively, relying on material that should not have been taken into account). By contrast, it has been submitted on behalf of appellants that an appeal to SVAP is an appeal on the merits, and is not limited to a judicial review approach as submitted by some respondents.

3. SVAP is not a creature of statute. It is an advisory non-departmental public body. In a statement to Parliament on 19 June 1997 the Prime Minister said that an independent Security Vetting Appeals Panel would be established "*to hear appeals against refusal or withdrawal of clearance at Security Check (SC) or Developed Vetting (DV) levels and to advise the head of the organisation concerned*". These terms of reference were subsequently amended to include Counter Terrorist Check. By its terms of reference SVAP is to "*examine the merits of the vetting decision, taking into account the interests of national security and the rights of the individual*".

4. This is to be contrasted with the position of the Special Immigration Appeals Commission (SIAC) which was established by the Special Immigration Appeals Commission Act 1997. Its jurisdiction was further amended by the Nationality, Immigration and Asylum Act 2002.

5. In the case of *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, the Supreme Court considered in detail the jurisdiction and powers of SIAC on appeals under sections 2 and 2B of the 1997 Act. Lord Reed observed that these were "*a matter of some complexity, as a result of the interlocking of the provisions in different legislation (notably the 1997 and 2002 Acts), and the frequent amendment*

to which they have been subject. Care is therefore required in identifying the provisions in force at any relevant time, including the time when relevant authorities were decided."

6. In short, the issue before the Supreme Court in that case was whether SIAC was to decide the question before it on its merits or, rather, by the more limited application of the principles of judicial review - which had been the view taken by SIAC. The Court of Appeal had disagreed on this point, and had held that the appeals were "*full merits appeals*" such that it was for SIAC to decide for itself whether the decision of the Secretary of State in question was justified on the basis of all the evidence before it, and not simply whether the decision was a reasonable and rational one on the available material, as in a claim for judicial review.

7. Lord Reed, in the *Begum* case, observed at paragraph 46 that "*(m)odern authorities concerned with the scope of the jurisdiction of tribunals hearing appeals against discretionary decisions by administrative decision-makers have adopted varying approaches, reflecting the nature of the decision appealed against and the relevant statutory provisions*."

8. Lord Reed concluded (and the rest of the Court agreed), at paragraph 81, that SIAC was not to adopt an approach which would place *"SIAC 'in the shoes' of the decision-maker and treat it as competent to re-consider the matter de novo or to retake the decision itself*". Rather, SIAC's jurisdiction was "appellate" but, as Lord Reed pointed out, at paragraph 95, "*the constituent elements of a fair process are not absolute or fixed*". Earlier, at paragraph 69, Lord Reed observed that "*references to a supervisory jurisdiction in this context are capable of being a source of confusion. Nevertheless, the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend upon the nature of the decision under appeal and the relevant statutory provisions.* ***Different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations****, or where different statutory provisions are applicable"* (emphasis added).

9. There is no authority which addresses the specific jurisdiction of SVAP. However, it has been submitted that the jurisdiction of SVAP should be no wider than that of SIAC. Or, to put it another way, that so long as the decision to refuse/withdraw clearance can be reasonably explained by reference to material before SVAP and is not perverse, it should not be interfered with.

10. More specifically, it has been submitted that material which raises a question mark (or several question marks) about an individual's reliability must inevitably lead to the conclusion that there is a risk of unreliability. It is to be noted, as Lord Bingham explained in *A v Home Secretary* [2004] UK HL 56, at paragraph 29, that a prediction about future human behaviour is necessarily problematical, and is not necessarily wrong because a particular risk does not eventuate.

11. By contrast, it has been submitted that the Panel should approach its task by considering whether, where past acts and/or omissions were/are relied on in a respondent's assessment, such acts/omissions have been established on the civil balance of probability.

12. This latter submission was based on paragraph 22 of the speech of Lord Slynn in *Secretary of State for the Home Office v Rehman* [2001] UKHL 47, and his statement that "*when specific acts which have already occurred are relied on, fairness requires that they should be proved to the civil standard of proof*", although he went on to say "*But that is not the whole exercise*" (at paragraph 22).

13. However, in response to this, it has been pointed out that these observations of Lord Slynn were not approved by the Supreme Court in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, in which it was indicated that the approach taken by Lord Hoffman in *Rehman v Home Secretary* [2001] UKHL 47 was to be preferred. What Lord Hoffman said in that case was that "*There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied . . . that all the material before him is proved, and his conclusion is justified, to a high civil degree of probability. Establishing a degree of probability does not seem relevant to the reaching of a conclusion on whether there should be a deportation for the public good*".

14. As explained above, SVAP, unlike SIAC, is not a creature of statute, and the Panel does not hear evidence given on oath - only the statements made by each party at the hearing, together with the submitted documents. Thus an appeal before SVAP is not by way of a re-hearing. Accordingly, it would be inappropriate for SVAP to follow Lord Slynn's observation that past events need to be established to the civil standard of proof (in contrast to matters of future conduct which raise questions about the assessment of risk).

15. Particularly bearing in mind the differences of appellate approach referred to by Lord Reed in the *Begum* case, the Panel considers whether the historical facts which are

said to give rise to the risk have been established by reasonably credible evidence, even if the Panel cannot be sure as a matter of probability. What amounts to reasonably credible evidence will depend on the circumstances and the nature of the matters being considered. The more serious the allegation, the more cogent the evidence should be. In any event, the Panel is entitled to expect a respondent organisation to put the facts upon which it relies before the Panel: it is not usually sufficient for a respondent to say that it relied on material which has not been disclosed to the Panel. The Panel is entitled to assess the credibility of such material for itself.

16. For example, if the basis of a decision to refuse clearance is that the appellant's brother is a terrorist or has terrorist sympathies and that the appellant has been in regular contact with him, there must be material before the Panel which shows, or on the basis of which a decision maker could reasonably have concluded, that (a) the appellant's brother is a terrorist or has terrorist sympathies and (b) that the appellant has been in regular contact with him. The Panel is entitled to assess those matters for itself. By contrast, the assessment of the consequent risk is principally a matter for the organisation, and that is a determination that can only be challenged on judicial review principles – namely, that it was based on material which should not have been taken into account, or failed to take into account a matter which the decision maker ought to have taken into account, or is a decision that no reasonable decision maker could have made.

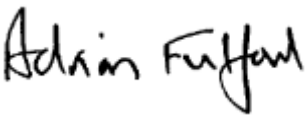
17. Thus, in the context of risk, SVAP does not apply an analysis that goes along the following lines: (a) there is a possibility that the applicant has lied, (b) therefore there is a risk that he or she might lie again. That is an argument which proceeds from a false premise. The first step, namely that the applicant has lied, must be based on material which, when considered proportionately and reasonably, leads to that conclusion – if not as a matter of probability, at least on the basis that it is reasonably credible. As already set out, the more serious the allegation, the more cogent the evidence required must be. Once that is established, all that is required is an assessment that there is a risk (which is more than fanciful) that he/she might lie again. Thus the latter step does not have to be established as a matter of fact, whether on the balance of probability or otherwise, but only as a realistic possibility. That is essentially a matter for the judgment of the organisation.

18. Putting it more broadly, in the context of an appeal to SVAP there is a two-stage process. First, there has to be established, on the basis of a reasonable and

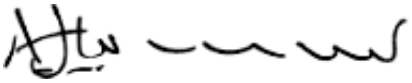
proportionate assessment based on reasonably credible material, a set of facts which gives rise to a real risk that an event harmful to national security might occur. Second, once that is established, it is not necessary for the likelihood of that harmful event occurring to be established to any particular degree of probability, rather it is then for the organisation to determine whether it presents a level of risk which is unacceptable. It is not for the Panel to substitute its own assessment of the level of risk or its acceptability. The Panel will only recommend that an assessment of risk is set aside if it is one which no reasonable decision maker could have reached or where material has been taken into account which should not have been taken into account, and *vice versa*.

19. But whilst most appeals are primarily about the existence of a risk, for the reasons earlier given, the analysis usually falls into two parts: first, as to whether an appellant demonstrated, for example, a lack of judgement or integrity in failing to disclose to the vetting authorities certain facts which he or she ought to have disclosed. Second, if so, whether allowing him or her to hold DV clearance presents unacceptable risk. In this scenario, it is for the organisation to identify on the basis of reasonably credible evidence what an appellant failed to disclose, and when.

30 May 2024



Sir Adrian Fulford
Chair, Security Vetting Appeals Panel



Sir Antony Edwards-Stuart
Deputy Chair, Security Vetting Appeals Panel