Ahmed and Others (deprivation of citizenship) [2017] UKUT 00118 (IAC)

Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House, London
On 09 January 2017
Further written submissions completed on 25 January 2017

Date Promulgated: 10 February 2017

Before

The Hon. Mr Justice McCloskey, President
Deputy Upper Tribunal Judge Holmes

Between

Shabir Ahmed
Adil Khan
Qari Abdul Rauf
Abdul Aziz

Appellants

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellants: Shabir Ahmed: Mr R Sharma, of counsel, instructed by Platt Halpern Solicitors (by written submission only)
Adil Khan, Qari Abdul Rauf and Abdul Aziz: Mr Z Jafferji, of Counsel Instructed by Burton & Burton Solicitors

For the Respondent: Ms C McGahey QC and Mr V Mandalia, of counsel, instructed by The Government Legal Department

(i) *While the two fold duties enshrined in section 55 of the Borders, Citizenship and Immigration Act 2009 are imposed on the Secretary of State, the onus of making representations and providing relevant evidence relating to a child's best interests rests on the appropriate parental figure.*

(ii) *A failure to discharge this onus may well defeat any argument that there was a proactive duty of enquiry on the Secretary of State in a given context.*

(iii) *In deprivation of citizenship cases, section 55 issues arise at two stages: at the deprivation of citizen stage and at the later stage of proposed removal or deportation.*

(iv) *As the subject of national citizenship lies exclusively within the competence of Member States, EU law has no role to play in deprivation cases: G1 v SSHD [2012] EWCA Civ 867 applied.*

(v) *The Secretary of State's deprivation of citizenship policy confers a wide margin of appreciation on the decision maker.*

(vi) *Part 5A of the Nationality, Immigration and Asylum Act 2002 does not apply to deprivation of citizenship decisions as such decisions are not made under the Immigration Acts.*

(vii) *There would be a considerable saving of human and financial resources with consequential reduced delay if deprivation of citizenship and deportation or removal decisions were to be made jointly.*

DECISION

Introduction

1. This is the decision of the panel to which both members have contributed.

2. All of the Appellants are of Pakistani nationality and have acquired British citizenship by naturalisation. Their conjoined appeals have their origins in a series of decisions made by the Secretary of State for the Home Department (the "*Secretary of State*") proposing to deprive the Appellants of their British citizenship under section 40(2) of the British Nationality Act 1981. The First-tier Tribunal (the "*FtT*") dismissed the Appellants' ensuing appeals. The Appellants appeal to the Upper Tribunal pursuant to my order granting permission to do so dated 05 August 2016.

3. As recorded in the permission order, these are four inter-related appeals in a case of some notoriety arising out of certain highly publicised prosecutions and ensuing convictions. The Appellants were convicted of various inter-related offences: the trafficking of children for sexual exploitation, rape, conspiracy to engage in sexual activity with children and sexual coercion. Their sentences ranged from 6 to 19 years imprisonment. The sentencing judge highlighted the scale and gravity of the

offending, the protracted period involved (2008 – 2010), the ages of the victims – they were young teenagers – and the factors of callous, vicious and violent rape, humiliation and financial gain.

The Appellants' Criminality

4. On 9 May 2012 HHJ Clifton sentenced the four Appellants, together with five others, following their conviction by a jury of very grave sexual offences, undertaken in the context of a conspiracy to commit them, between the spring of 2008 and the spring of 2010. That criminal behaviour can be summarised briefly as the grooming and sexual exploitation of a number of girls in their early teens, in the area of Rochdale and Oldham. As the sentencing Judge observed, this summary risks hiding the appalling character of their behaviour. The Appellants were all many years older than their victims. In some cases, girls were raped callously and viciously and in others they were forced to have sex with paying customers. The sentencing Judge noted that some of the Appellants acted to satiate their lust, others did so for financial gain and some had both motivations. All were condemned as having treated their victims as worthless and undeserving of basic respect and dignity. Their offences were shocking, brutal and repulsive.

5. Individually the Appellants were punished as follows:

   (i) Shabir Ahmed was convicted of the rape of a girl of 15 on several occasions and of giving her to a young man that he referred to as his nephew who also raped her. There was a second rape conviction. He was described as the leader of the conspiracy. For the rape convictions he was sentenced to 19 and 22 years' imprisonment respectively. For the convictions for trafficking, conspiracy and sexual assault he was sentenced to two further terms of eight years and one of six months. All sentences were ordered to be served concurrently. He remains incarcerated.

   (ii) Adil Khan was convicted of conspiracy to engage in sexual activity with a child by penetrative sex, and of trafficking for sexual exploitation two 15 year old girls. He had sex with them both, and used violence towards one whom he coerced. For the conviction for trafficking he was sentenced to eight years' imprisonment with a further term of eight years to be served concurrently for the conspiracy conviction. He has been released on licence.

   (iii) Qari Abdul Rauf was convicted of conspiracy to engage in sexual activity with a child by penetrative sex and of trafficking for sexual exploitation a 15 year old girl. He had sex with that girl in his taxi, and he and others also had sex with her at a flat in Rochdale. For the convictions for trafficking he was sentenced to six years' imprisonment with a further term of six years to be served concurrently for the conspiracy conviction. He has been released on licence.

   (iv) Abdul Aziz was convicted of conspiracy to engage in sexual activity with a child by penetrative sex and of trafficking for sexual exploitation a 15 year old

girl. He had taken over the running of the conspiracy from Shabir Ahmed and whilst he was not convicted of having sexual intercourse with a child himself, his further convictions were coercing girls into having sex with men who paid him, including the coercion of one girl into having anal sex when she was menstruating. For the trafficking convictions he was sentenced to nine years' imprisonment with a further term of nine years to be served concurrently for the conspiracy conviction. He has been released on licence.

There were other convicted offenders who are not involved in these appeals.

Statutory Framework

6. Section 40 of the British Nationality Act (the "1981 Act"), under the rubric of "Deprivation of Citizenship", provides:

"(1) In this section a reference to a person's "citizenship status" is a reference to his status as—

(a) a British citizen,

(b) a British overseas territories citizen,

(c) a British Overseas citizen,

(d) a British National (Overseas),

(e) a British protected person, or

(f) a British subject.

(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.

...

(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.

(6) Where a person acquired a citizenship status by the operation of a law which applied to him because of his registration or naturalisation under an enactment having effect before commencement, the Secretary of State may by order deprive the person of the citizenship status 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."

The Secretary of State's decisions were all made under section 40(2) and (5).

The Secretary of State's Decisions

7. The Appellants' convictions were the sole impetus for the Secretary of State's decisions made under section 40. Decisions to that end were initially made on 31 July 2015. The Appellants exercised their right of appeal under section 40A of the 1981 Act. Unusually, in the events which occurred, the Secretary of State's decision-making process and the process of the FtT then merged to a certain extent. As this sounds on at least one of the grounds of appeal, it is necessary to outline what transpired between 31 July 2015 and the ultimate disposal of the appeals by the FtT. In short:

(i) The appeals having been registered, a hearing date of 22 September 2015 was arranged initially. This was then re-arranged to 28 October 2015 and, in the course of a phase of active case management, this arrangement was revised.

(ii) By letter dated 28 October 2015, the Secretary of State's representative withdrew the decisions of 31 July 2015 in the cases of Messrs Khan, Rauf and Aziz.

(iii) In each of the aforementioned three cases fresh decisions, dated 02 December 2015, followed.

(iv) Messrs Khan, Rauf and Aziz then lodged appeals with the FtT against the fresh decisions. Those appeals were linked to the appeal of Mr Ahmed and all four appeals were then heard together.

The FtT promulgated its decisions on 07 April 2016. In each case the FtT upheld the decisions of the Secretary of State.

8. At this juncture it is convenient to record that the aforementioned three Appellants – Messrs Khan, Rauf and Aziz – are each the fathers of children aged under 18 years. This realisation was the impetus for the substitution of the original decisions by replacement decisions. This does not apply to the first Appellant, Mr Ahmed, whose children were adults at all material times. We shall elaborate on this distinction *infra.*

9. The format of the Secretary of State's decisions in all four cases is identical, with the exception that in the case of the first Appellant there is (as explained above) no mention of children. The content of the decisions varies only minimally, reflecting the different names and dates of birth of the Appellants, their differing family circumstances and the different dates upon which they had received their certificates of nationalisation as British citizens.

10. The Secretary of State's decisions in all four cases noted the Appellants' British citizenship status, their convictions and some of the observations of the sentencing judge. Each of the decisions describes the Appellants' criminality as involving "*serious and organised offences*". In the cases of Messrs Ahmed and Aziz, it is stated that these Appellants had "*a leading role*" in the criminality. In the cases of Messrs Khan and Rauf, the different terminology of "*collusion with others*" is employed. In the cases of the three Appellants who have children, there is a separate paragraph dedicated to this issue which we shall address at a later stage of this judgment.

11. In all four cases, the Secretary of State's decisions contain the following passages:

> "*In accordance with section 40(5) of the British Nationality Act 1981, the Secretary of State gives notice of her decision to make an order to deprive you* [name] *of British citizenship under section 40(2) ….*
>
> *This is because the Secretary of State is satisfied that it would be conducive to the public good to do so….*
>
> *Having considered all relevant circumstances, the Secretary of State considers deprivation of your British citizenship to be reasonable and proportionate ….*
>
> *In accord* [sic] *with section 40(4) …. the Secretary of State is satisfied that such an order will not make you stateless. You still hold Pakistani nationality as Pakistan Nationality law allows for a person to hold dual nationality.*"

In all four cases, under the rubric "*right of appeal*", the Secretary of State's decisions also stated:

> "*You may appeal to the Asylum and Immigration Tribunal against the decision to deprive you of your citizenship, under section 40A (1) ….*
>
> *In the eventuality that you are deprived of your British citizenship, the Secretary of State will also give consideration to pursuing your removal or deportation from the United Kingdom. You will be receiving a separate notification if such a decision is made ….*
>
> *Should any appeal in respect of the notice to deprive you of your British citizenship be dismissed, the deprivation order under section 40(2) … depriving you of your British citizenship will be served on you.*"

The Secretary of State's Decisions Analysed

12. The correct analysis of the Secretary of State's decisions, considered in their statutory context, is in our judgment the following:

    (a) By the impugned decisions the Secretary of State conveyed to the Appellants that an order depriving them of their British citizenship under section 40(2) of the 1981 Act was forthcoming: a classic "minded to decide" notification or notice of intention. The language of section 40(5) is "notice".

    (b) Simultaneously, the Secretary of State notified an intention to defer making such an order in the event of an appeal being pursued: this was a voluntary act, not mandated by the statute.

    (c) The pursuit of an unsuccessful appeal would give rise to the making of a deprivation of citizenship order (and a further notification to this effect): this is portrayed as a virtual inevitability.

    (d) In the event of an order being made, the Secretary of State would give consideration to removing or deporting the Appellants from the United Kingdom.

13. The course adopted by the Secretary of State's decision-making process in these cases therefore contemplates two further stages. First, the making of a formal deprivation of British Citizenship order in each case, in the event of an unsuccessful appeal. Second, further to the latter order, a removal decision or deportation order. We observe that if the second further stage is reached in any of the Appellants' cases, it will involve all of the formalities, procedures, rights and protections which decisions of this kind entail. We shall revisit the significance of this *infra*.

14. Given the factual and legal context outlined above, it is unnecessary to consider the hypothetical question of whether a deprivation of citizenship order may lawfully be

made in circumstances where an appeal to the tribunal against a "notice of intention" decision is pending.

Permission to Appeal

15. Permission to appeal to the Upper Tribunal has been granted to each of the Appellants on the following five grounds:

    (i) The Respondent's decision was vitiated by a failure to discharge her duty under s. 55 of the Borders, Citizenship and Immigration Act 2009;

    (ii) The First-tier Tribunal ["FtT"] failed to acknowledge the factor of EU law rights, failed to carry out a proper proportionality balancing exercise and failed to evaluate the factors specified in Articles 27 and 28 of the Charter;

    (iii) The FtT erred in its construction of the statutory criterion of "serious organised crime" and failed to take into account the Respondent's policy on the issue;

    (iv) The FtT erred in its application of Article 8 ECHR and, specifically, failed to appreciate that the Article 8 claim focused on the deprivation of citizenship, not proposed deportation;

    (v) The FtT erred in law in applying Part 5A of the Nationality, Immigration and Asylum Act 2002.

We shall address each of the permitted grounds of appeal *seriatim.*

GROUND 1: THE SECTION 55 ISSUE

16. As noted above, this ground of appeal does not arise in the case of the first Appellant, Mr Ahmed. Section 55 of the Borders, Citizenship and Immigration Act 2009 (the "*2009 Act*") provides:

> *"(1) The Secretary of State must make arrangements for ensuring that –*
>
> *(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom; and*
>
> *(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.*
>
> *(2) The functions referred to in subsection (1) are –*

(a) *any function of the Secretary of State in relation to immigration, asylum **or nationality;***
(b) *any function conferred by or by virtue of the Immigration Acts on an immigration officer;*
(c) *any general customs function of the Secretary of State;*
(d) *any customs function conferred on a designated customs official.*

(3) *A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).*"

[Our emphasis]

It is common case that section 55 applied to the decisions of the Secretary of State under challenge.

17. At this stage we revisit the chronology of the Secretary of State's decision-making: see especially [6] – [8] above. It is common case that the Secretary of State's decisions concerning the three Appellants (second, third and fourth) who have children aged under 18 years were withdrawn and substituted to address the *lacuna* that the section 55 duty had not been considered in the original decisions. The substituted decisions sought to rectify this omission. Of the second, third and fourth Appellants the substituted (operative) decisions all contain a passage beginning with an acknowledgement of the Secretary of State's awareness that the Appellant concerned either has British citizen children whose ages are noted (in two cases) or that the relevant Appellant has "*dependents under 18 who are British citizens*" (the Khan case). In all three cases, this passage continues:

> "*Deprivation of your citizenship (as distinct from deportation) will not, in itself, have a significant effect on the best interests of your children. It will neither impact on their or your wife's status in the United Kingdom, nor is there any evidence that it will impact on their education, housing, financial support or contact with you. The Secretary of State acknowledges that deprivation may have an emotional impact on your children. However, having taken into account the best interests of your children as a primary consideration in discharge of her section 55 duty, the Secretary of State considers that the public interest in depriving you of citizenship clearly outweighs any interest your children might have in your remaining a British citizen. British citizenship is a privilege that confers particular entitlements and benefits, including the right to a British passport and the right to vote in general elections. It is not in the public interest that individuals who engage in serious and/or organised crime, which constitutes a flagrant abuse of British values, enjoy those entitlements and benefits …*
>
> *Having considered all relevant circumstances, the Secretary of State considers deprivation of your British citizenship to be reasonable and proportionate.*"

The essential question which arises in these appeals is whether, within the compass of the grant of permission to appeal, these passages in the decisions disclose any material error of law on the part of the Secretary of State's decision maker.

18. During the FtT phase the initial case management directions notified the parties of a forthcoming case management review hearing ("CMR") and included the following:

> *"At least three days before the CMR all parties shall file and serve a skeleton argument addressing the relevance of section 55 of the 2009 Act to each case …"*

This prompted a letter from the Secretary of State's representative stating:

> *"…. The Secretary of State, following submission made by the legal representatives for the above named [the three Appellants concerned], has decided to reconsider the decisions in accordance with the Secretary of State's obligations under section 55 ….*
>
> *Therefore the Secretary of State has decided to withdraw the decisions …."*

It is common case that the withdrawal of the Secretary of State's initial decisions and their substitution by new decisions were precipitated by the grounds of appeal and written representations made on behalf of the three Appellants concerned in response to the FtT's directions. These representations addressed the issue of the impact of the impugned decisions on the welfare of the children concerned.

19. We turn to examine the case made to the FtT on this issue by these three Appellants. In summary:

(a) In the case of the first Appellant, Mr Khan, who was unrepresented, there is no indication that any witness statement or other documentary evidence was presented. The Tribunal's decision records that this Appellant gave evidence and notes the following (referring to one of the members of the panel of three Judges):

> "*Judge Baird asked the Appellant some questions to ascertain the circumstances of him and his family. The Appellant confirmed that he is still on licence, the terms of which prohibit him from going to Rochdale. He lives in Swinton, Manchester. He is working part time in a carpet shop. His wife is still living in Rochdale. He has one son aged 7 who is living with his mother in a council property. He does not see his child. He explained that this was because the social worker will not allow it. He has no telephone contact either. He has cousins, nephews and his wife's family in the UK and he is in contact with them. His wife is a British citizen as is his son …*
>
> *He did see his son when he was in prison. He was asked whether his wife had said how his absence is affecting his son and he responded that the child is very upset and it is affecting his education. His wife lives on state benefits and is struggling financially so their son does not get the things that he needs.*"

(b) The third Appellant, Mr Rauf, who was legally represented, made a relatively detailed witness statement which was submitted to the FtT. The Secretary of State's decision had noted that this Appellant has five British citizen children, aged between 8 and 15 years. In his statement, this Appellant makes a bare, unparticularised reference to "*my wife and children*". The remainder of his statement consists of much advocacy and little concrete evidence. The decision of the FtT contains the following passage:

> "*He told us that he has five children between the ages of 9 and 16. They went to Pakistan to see relations in April 2015. He said that none of them have any medical problems but are upset. When asked how he thought that deprivation of his British citizenship would affect them, he said that it would be a very hard life for them without him. They would be very upset. He said that this was because he looks after them financially and takes them to and from school. His wife cannot drive and she is not educated and there are no other relatives in the UK who can look after the children … he told us that all his children were in education and doing well at school.*"

As appears from the following passage, this Appellant evidently did not proactively alert the FtT to the full picture:

> "*In subsequent re-examination it came out that in fact the Appellant is not living with his wife and children currently. He said it was a condition of his licence that he cannot go to Rochdale which is where they live. He sees them on Saturdays during the day. He confirmed therefore that he is not currently taking or collecting them from school nor is he in employment and providing for them financially … he has not worked since he was released from prison in November 2014. His licence will expire in November 2017 and he is on the Sex Offenders Register for an indefinite period.*"

(c) In the case of the fourth Appellant, Mr Aziz, the Secretary of State's decision noted that he had three British citizen children aged 5, 14 and 17 years. This Appellant was represented before the FtT. The presentation of his case included a written statement. This recounted that prior to his incarceration he was the family's sole bread winner, working as a taxi driver. His children were in full time education. The family was now wholly dependent upon state benefits. His wife and children had visited him during his imprisonment. Following his release from prison in December 2015 any contact with his children had been supervised, involving an appointed Social Services supervisor. His childrens' maternal grandparents lived in the United Kingdom. He had a strong bond with his wife and children. In his evidence to the Tribunal this Appellant elaborated on his written statements and explained that (by reason of the licence conditions) he was living apart from his family, in Manchester. In evidence to the Tribunal, this Appellant's spouse testified that all three children were "*bright in their education*". She described the adverse

impact on the family arising out of her husband's imprisonment and the continuing separation. Similar evidence, both written and oral, was given by the oldest child of the family, a son aged 17. He confirmed the role of his maternal grandparents in their lives.

This Appellant's assertion in examination in chief that he looked after his children financially and accompanied them to and from school, without illumination or elaboration, was plainly misleading.

The FtT's Approach

20. We now turn to consider how the FtT dealt with the best interests of the children issue in its separate decisions. In the case of Mr Khan, the FtT noted the submission on behalf of the Secretary of State relating to section 55 of the 2009 Act and reproduced in full the relevant passage in the Secretary of State's decision: [17] *supra*. The approach espoused by the FtT was that since the removal or deportation of the Appellant was a reasonably foreseeable consequence of depriving him of his British citizenship, Article 8 ECHR must be considered. The word "*deportation*" features repeatedly in the passages which follow. The FtT reasoned:

> "*He is currently not having contact with his child. His wife has looked after the child all the time he has been in prison. She has also been deprived of her husband and his income for that period of time ….*
>
> *There was no evidence of the effect his separation from the child may have had on the child …*
>
> *Given the seriousness of the crimes committed by the Appellant, very considerable weight must be given to the public interest in his removal. The family circumstances of this Appellant, even put at their highest, which would include him being able to resume living with his wife and child, do not render his removal, in all the circumstances, disproportionate.*"

21. In the case of the third Appellant, Mr Rauf, the FtT noted the representative's argument that the Secretary of State had not adequately assessed the best interests of the children. The approach adopted by the Tribunal was essentially the same as in Mr Khan's case, viz to ask whether removal or deportation would be a reasonably foreseeable consequence of depriving this Appellant of his British citizenship, supplying an affirmative answer. The FtT then stated:

> "*The second alleged impropriety is that the Secretary of State did not make adequate or any enquiries as to where the best interests of the children lie and the Appellant is thus unable to answer that. However, the Secretary of State has clearly taken the best interests of the children at their highest and said at paragraph 7 of the Notice that the public interest outweighed the best interests of the children. In other words, even if the best interests of the children required the Appellant to remain a British citizen and thereafter in the UK, those interests are outweighed by the public interest because of the gravity of his offending behaviour ….*

We find that being the case the Secretary of State has adequately dealt with the best interests of the children and fulfilled her obligations under section 55 ….

Conversely, the Appellant has adduced no evidence whatsoever about the children's best interests. We have been provided with no evidence from their GP, school or even their mother that they will suffer by either the Appellant losing his British citizenship or being removed from the UK."

Next the FtT reasoned that to deprive this Appellant of his citizenship would not breach any person's Article 8 rights:

"*It would not prevent the Appellant from being with and caring for his children if permitted to do so. It would be open to him to seek leave to remain in the UK on the basis of his family life. Furthermore, given the grave nature of the offending and the fact that it was an organized crime perpetrated with others over a sustained period, we find the decision to deprive the Appellant of his British citizenship entirely appropriate. The consequences of him no longer being a British citizen on either himself or his family members is not such as to outweigh the public interest in the deprivation.*"

In a later passage, the FtT stated:

"*The Appellant claims that his wife cannot look after the children without him. However, the fact is she has done so for the three years since his arrest and since his release. Again apart from the Appellant's bare assertion, there was not a shred of evidence to support this and most strikingly nothing from his wife …*

The Appellant claims that his children have been badly affected by their separation from the Appellant, again not a shred of evidence to that effect ….

We have been provided with no evidence that the Appellant even has a genuine and subsisting relationship with either his wife or his children."

The FtT's ultimate conclusion was that Article 8 rights did not outweigh the public interest in deportation.

22. In the case of the fourth Appellant, Mr Aziz, the FtT noted the reliance of the Secretary of State's representative on the relevant passage in the substituted decision and reproduced this in its entirety: see [17] *supra*. Having done so, the approach adopted was essentially the same as in the other two cases: see [18] and 19] above. Thus, the Article 8 issues canvassed were viewed from the perspective that the removal or deportation of this Appellant from the United Kingdom was a reasonably foreseeable consequence of depriving him of his British citizenship. As in the other two appeals, the FtT reasoned that the deportation of this Appellant would clearly interfere with family life and continued:

> *"We accept that he has a family life with his wife and children although this is at the moment severely restricted with only supervised contact with his children being allowed ….*
>
> *We take into account that under the terms of his licence, the Appellant cannot go to Rochdale. His wife and children had to live without him when he was in prison though we do accept and take into account that they did have some contact with him by visiting him. We have considered the best interests of his children as we are required to do. Clearly the children have suffered some unpleasantness at the hands of other people due to the crimes committed by their father … Despite that, they do not want their father to have to go to Pakistan. His absence has created financial difficulties for the whole family …*
>
> *We do not accept the evidence of the Appellant's wife about the problems her youngest child had when his father went to prison. He was just a baby and at one year old would be unlikely to be affected as she claims. We would also say that we find it highly unlikely that it is the case that the Appellant's wife is the only person who can look after her parents. She has siblings in the UK and there is in any event no evidence of the level of care required."*

The FtT then expressed the following omnibus conclusion:

> *"Having considered all the evidence in the round, we find that there are no compelling circumstances over and above those described in paragraphs 399 and 399A of the Immigration Rules that would outweigh the public interest in deportation. Indeed, we would go so far as to say that the crime being an organised and sustained series of sexual assaults on children is so serious that the family circumstances of this Appellant come nowhere close to outweighing the public interest in deportation."*
> [Emphasis supplied.]

Adding:

> *"We accept that the best interests of children in general lie in being with both parents but in all the circumstances of this case ….. those interests are outweighed by the public interest and would not render any decision to remove the Appellant disproportionate. We make this finding having considered the family circumstances at their highest, which would include the Appellant being able to resume living with his wife and children. We have no hesitation in finding that the deprivation of citizenship itself does not breach his right to a family and private life as protected by Article 8."*

23. We summarize the rival contentions of the parties' representatives on this issue thus. Mr Jafferji, representing the second to fourth Appellants, submitted that the Secretary of State had committed the "*primary and basic flaw*" in confining her consideration to the immediate consequences of depriving his clients of British citizenship and disregarding the reasonably foreseeable consequences of this measure. His second submission was that the Secretary of State had failed in her duty to make enquiries concerning the children and to obtain relevant information, such as social services

input, relating to, the affected children. In written form, Mr Jafferji formulated this submission thus:

> "*No enquiries were made in these appeals. In light of the publicity, notoriety and nature of the crimes committed by the Appellants, there would plainly have been a grave impact upon the children … despite the obvious need for full and proper information with respect to the impact upon the children, the Respondent did not make any enquiries ….*"

It was argued that the FtT, in failing to identify these legal defects in the Secretary of State's decisions, had erred in law.

24. The main submission of Ms McGahey QC and Mr Mandalia on behalf of the Secretary of State was that having regard to the context, upon which some emphasis was placed, the Secretary of State's duty was limited to considering the extent to which the impugned decisions impacted upon the need to safeguard and promote the welfare of the affected children. Second, the Tribunal was reminded of the terms in which the children's interests were considered in the substituted decisions. Third, we were reminded of the manner in which these issues were explored by the FtT in its successive decisions. Fourth, it was submitted, in terms, that the Appellants' cases under the aegis of this ground of appeal were really advanced in a vacuum: they neither laid before the Secretary of State or the FtT evidence bearing on the childrens' best interests nor made relevant representations. Nor do they point to the existence of any such evidence at this stage

25. We consider that the content of the duty owed by the Secretary of State under section 55(1) of the 2009 Act in the cases of the second to fourth Appellants must be measured by reference to the context. In this respect, the context to which the decisions underlying these conjoined appeals belongs had two basic ingredients, the first factual, and the second legal. The factual dimension of the context is rehearsed above. There follows the legal context.

The Legal Context

26. The first ingredient in the legal context is that each of the Appellants, by virtue of naturalisation, enjoys the status of British citizens. A comprehensive code for the acquisition and loss of British nationality (now British citizenship) has been devised by Parliament since the first statutory intervention of note, namely the British Nationality and Status of Aliens Act 1914, which repealed the Naturalisation Act 1870. Following the Commonwealth Legal Conference held in London in 1947, the British Nationality Act 1948 sought to give effect to the principles of the Canadian Citizenship Act 1946 for general application throughout the Commonwealth. It reflected the principle that people of each of the self-governing countries of the Commonwealth had a particular status as citizens of their own country and a common status as members of the Commonwealth family. A limited power to control the immigration of Commonwealth citizens into the United Kingdom was

introduced via the Commonwealth Immigrants Act 1962. In due course the Immigration Act 1971 and the 1981 Act were introduced.

27. Throughout history, British subjects were free at common law and/or by statute to enter the United Kingdom and reside there. This is the fundamental right conferred by the status of British citizenship. Under the 1981 Act, British citizenship is the only status which confers a legal right to live in the United Kingdom and to come and go at will. The possibility of acquiring this status by naturalisation has long been recognised by statue (see in particular the 1948 Act) and is now governed by section 6 of and Schedule 1 to the British Nationality Act 1981. The effect of modern British nationality laws is that loss of the right of abode in the United Kingdom is the main consequence of depriving a person of British citizenship. The affected subject also suffers the loss of associated and consequential rights, duties and opportunities – in particular voting, standing for election, jury service, military service, eligibility for appointment to the Civil Service and access to state benefits, state financed healthcare and state sponsored education. Fundamentally, the relationship between the individual and the State, which lies at the heart of citizenship and nationality, is extinguished.

28. Interestingly, as a perusal of the 1948 and 1981 statutes indicates, successive Governments have declined to define comprehensively the rights attaching to British citizenship through the vehicle of legislation. The Government perspective on the essential elements of citizenship was expressed in the Green Paper "The Governance of Britain" (CM7170) published in July 2007, which focuses (inter alia) on the concepts of membership of the community, national identity, common British values and the constitution. Another report of note in this context is "The Path to Citizenship: Our Common Bond", which forms part of the background to the 2009 Act.

29. The second main ingredient in the legal context is the decision-making structure devised by the 1981 Act. We have analysed this in [11] – [12] above. In short, decisions of the kind under challenge in these appeals have the status of a notice of intention, under section 40(5) of the 1981 Act, to make a deprivation of citizenship order. If the decision under section 40 (the same structure applies to both section 40(2) and section 40(3)) is not challenged by appeal to the tribunal, the next stage contemplated is a formal order by the Secretary of State. The unexpressed (though perhaps implied) premise is that no deprivation order will be made while an appeal to the tribunal remains undetermined.

30. Loss of British citizenship occurs at the second, rather than the first, of the aforementioned stages. A deprivation of citizenship order – emphatically – does not equate to either removal or deportation of the affected subject from the United Kingdom. Both removal and deportation are governed by other statutory regimes entailing specified procedures, requirements and rights. Removal and deportation decisions may in certain circumstances be challenged by appeal or judicial review proceedings. British citizens are immune from removal and deportation action. Thus they must be deprived of their British citizenship status before either of these courses can be pursued.

31. Accordingly, neither a decision (or notice of intention) to make a deprivation order (these cases) nor a deprivation order itself has the immediate or direct consequence of the affected subject's removal or deportation from the United Kingdom. It is, of course, reasonable to assume that a notice of intention to make a deprivation of citizenship order will normally be given as a prelude to a deprivation order and a later decision to remove or deport the affected person from the United Kingdom. But the initial decision is correctly to be viewed as a first step. Future steps and stages will require the subject to be actively involved and, in particular, will generate the Secretary of State's duty under section 6 of the Human Rights Act 1998 to avoid conduct incompatible with protected Convention rights, will engage the common law principles of a fair decision making process, and will also trigger the constraints imposed by any applicable statutory code (for example the UK Borders Act 2007) and established principles of public law.

31. There is no shortage of judicial learning and guidance relating to section 55 of the 2009 Act, which forms the next component of the legal context. The leading decisions, which emanate from the Supreme Court and the Court of Appeal, were reviewed by this Tribunal in JO and Others (Section 55 Duty) Nigeria [2014] UKUT 00517 (IAC), MK (Section 55 – Tribunal Options) Sierra Leone [2015] UKUT 00223 (IAC) and Kaur (Section 55/Public Interest Interface) [2017] UKUT 14 (IAC). In MK, this Tribunal held that where a breach of section 55(1) is canvassed, the onus rests on the Appellant to establish this on the balance of probabilities and there is no onus on the Secretary of State. This is not contested by these Appellants.

32. In JO Nigeria, this Tribunal, having drawn attention to the twofold duties enshrined in section 55, stated at [13]:

> "*The question of whether the duties imposed by Section 55 have been duly performed in any given case will inevitably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently, as in the present case, be confined to the application or submission made to the Secretary of State and the ultimate letter of decision ….*"

Reflecting this Tribunal's assessment in MK Sierra Leone of where the onus rests, in SS (Nigeria) v SSHD [2013] EWCA Civ 550 Mann J added, at [62]:

> "*In this appeal Counsel for the appellant placed considerable emphasis on the need for the Tribunal to satisfy itself as to the interests of the child in such a way as suggested an inquisitorial procedure. I agree with Laws LJ that the circumstances in which the Tribunal will require further enquiries to be made, or evidence to be obtained, are likely to be extremely rare. In the vast majority of cases, the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision maker by the individual concerned. The decision maker would then make such additional enquiries as might appear to him or her to be appropriate. The scope for the Tribunal to require, much less indulge in, further enquiries of its own seems to me to be extremely limited, almost to the extent that I find it hard to imagine when, or how, it could do so.*"

33. This Tribunal examined this issue in a little detail in JO Nigeria (*supra*), at [10] – [13]. It seems to us that given the particular course and contours of the Secretary of State's decision making processes in these appeals, considered in tandem with the full factual and legal context, the observation of Mann J applies *a fortiori* in the instant context. While the possibility of a duty of proactive enquiry on the part of the Secretary of State in a given context was also canvassed in JO Nigeria, at [14], this Tribunal declined to determine this discrete issue on a hypothetical basis, through recognizing its potential to arise in a specific, concrete fact sensitive context. We shall explain below why we consider that no such duty arose in any of these cases.

34. The context in which the decisions of the Supreme Court and the Court of Appeal noted in Kaur were made, is of some significance. These were all cases involving decisions having final, permanent or long term consequences, by which the individual was compelled to leave the United Kingdom with no further decision to follow. The context enveloping the Secretary of State's decisions underlying these appeals is to be contrasted, as demonstrated above. Furthermore, issues of the kind canvassed under the banner of this ground of appeal are to be evaluated realistically and, where appropriate, robustly, as the following passage in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550 demonstrates, at [58]:

> "*I would not wish for a moment to sideline the importance of s.55 of the 2009 Act or the guidance issued under it … or the statements of high authority to the effect that the child's best interests must be properly gone into. But* ***in the circumstances of this case*** *it is in my judgment wholly unrealistic to suppose that any further evidence, let alone enquiries (whether of the child himself or anyone else) …. might offer the least possibility of establishing a case under Article 8 sufficiently strong to prevail over the extremely pressing public interest in the appellant's deportation.*"
>
> [Our emphasis]

Notably, this was stated in the context of a decision having final character and long term consequences, namely deportation. This passage also reflects this Tribunal's assessment of the interaction between section 55 and Article 8 ECHR in JO (Nigeria), at [7].

35. The question of whether in any given context the Secretary of State's duty under section 55(1) has been discharged will also require consideration of the decision-making process adopted in the individual case. As regards these appeals, this is outlined in [6] and [15] – [16] above. The effect of the decision-making process in the present cases was that the second to fourth Appellants had ample opportunity to make to the Secretary of State such representations and to provide such evidence bearing upon the children's best interests as they wished.

36. We consider that in this decision-making context, the Secretary of State was entitled to expect the second to fourth Appellants and their representatives proactively to

equip her with the representations and information necessary to enable an adequate best interests assessment to be carried out or to suggest other appropriate paths of enquiry. While this analysis will not invariably apply to every context, we consider it applicable in these cases. Secondly, we find no evidential foundation to support the contention that in any of these cases the Secretary of State was under a duty of further proactive enquiry. We accept the submission of Ms McGahey QC that the Appellants' argument to the contrary is made in a vacuum. Thirdly, bearing in mind the features of the context highlighted above, we are satisfied that the substituted decisions contain an adequate best interests assessment. This is our primary conclusion and it is sufficient to defeat the first ground of appeal.

37. While we have found merit in the Respondent's submission that the Appellants did not place any best interests material before the FtT, other than the witness statements provided and the oral evidence elicited in questioning, it is not disputed that the second to fourth Appellants will be at liberty to make such representations and provide such evidence bearing on their children's best interests as they are desirous of providing at the future stages likely to be reached. We consider that this will arise as a matter of right. By virtue of section 55(1), overlaid by the public law principles highlighted in JO Nigeria, the Secretary of State would be under a duty to consider all material of this kind prior to making a removal or deportation decision consequential thereon. The separate duty under section 55(3) would also bite.

38. Thus, insofar as section 55 and Article 8 issues have not arisen forcefully at this stage of the broader landscape, any omission or gap in representations or evidence – for which the Appellants must be held responsible – can be remedied in the future, when further decision making contexts will have two particular features, one legal and the other factual.

39. The legal factor is that any future decision requiring an individual to leave the United Kingdom will have consequences quite different from the (mere) notice of intention decisions currently in existence and the Appellants will have a right to be heard. At that final stage such consequences will raise the spectre of long term or permanent exclusion of the second to fourth Appellants from the day to day lives of their families and prolonged separation. The 'playing field' will be quite different. Furthermore, one would expect further representations and evidence to address the distinction between the impact on the affected children flowing from the harrowing events in their lives during recent years and any predicted further or different impact arising out of the deportation or removal of their respective fathers. This is an issue which the Appellants did not address in their representations to the Secretary of State: this is a paradigm illustration of a context where all the tools and cards are held by the Appellants and their families. There may also, foreseeably, be other evidence – for example from schools, clubs, churches *et alia* – and any expert evidence they may see fit to commission.

40. The stand out factual feature of future decision making processes is that further decisions will have to be based upon such updated representations and information as are assembled and advanced. Drawing attention to the broader canvas in this

way serves to highlight that whilst section 55 and Article 8 issues arise at this stage, in these cases they have done so less forcefully than is likely in the predictable future.

41. Next, the decision of the Upper Tribunal in Deliallisi (British Citizen: Deprivation of Appeal: Scope) [2013] UKUT 00439 (IAC) falls to be considered. Here it was held that in appeals under section 40A of the 1981 Act it is incumbent on the Tribunal to consider the reasonably foreseeable consequences of deprivation of citizenship which may, depending on the facts, include removal from the United Kingdom. The relevant passages are found in [54] – [56]. While the verb "*determine*" features in [2] of the headnote and the relevant cross-heading in the text, we consider that [54] – [56], considered as a whole, reflect the Tribunal's decision that the reasonably foreseeable consequences of a decision under section 40(5) of the 1981 Act are a factor to be considered by the FtT. This clearly embraces section 55 and Article 8 issues.

42. While the analysis and route culminating in the same conclusion which we have charted above may be more elaborate than, and do not mirror precisely, the approach in Deliallisi, we have no reason to doubt the correctness of the decision. To this we add that while the correctness of the Delliallisi decision was challenged in argument before the FtT, based on an earlier decision of the Upper Tribunal in Arusha and Demushi (Deprivation of Citizenship – Delay) [2012 UKUT 80 (IAC), the Secretary of State did not maintain this argument before us: see [52] – [54] of counsel's skeleton argument.

43. We make the following further discrete conclusions. First, there was no error of law on the part of the Secretary of State in this respect. In particular, it was not erroneous in law to focus on the nature of the decisions being made. Second, the Secretary of State plainly did have regard to the possible consequences of those decisions. Third, it cannot sensibly be said that the Secretary of State did not have in contemplation the real possibility that the notice of intention decisions would operate as a first step in a broader process culminating in removal or deportation decisions. Having regard to how the section 40 framework operates to the contrary, realistically, is unarguable.

44. Furthermore there is no demonstrable error of law in the approach of the FtT. As its decisions demonstrate beyond peradventure, it had deportation of the Appellants to the forefront of its mind in considering the various grounds of appeal, as is evidenced by the consideration which it gave to the statutory deportation regime considered in [71 – 76] *infra*.

45. Finally, we would mention section 55(3) of the 2009 Act. As emphasised in JO (Nigeria), this contains a discrete, free standing duty: see [12]. No breach of section 55(3) was canvassed in the Appellants' grounds of appeal, and this issue is not identified in the grant of permission to appeal: on the contrary, the grant of permission is specifically confined to the primary, substantive duty imposed by section 55(1). As a result, the section 55(3) issue did not feature in the skeleton arguments of any of the parties and, at the hearing, arose only in the context of a brief observation on the part of the bench. It is not, therefore, a live issue in these appeals.

46. We nonetheless take the opportunity to observe that the duty imposed by section 55(3) is inextricably linked to that enshrined in section 55(1). The former duty is designed to facilitate and enhance the discharge of the latter. Context, as ever, will be all important. In MK (Sierra Leone), this Tribunal held that it is not necessary for the Secretary of State's decision maker to make specific reference to the statutory guidance: see [19]. This Tribunal has observed more than once that, based on its experience, the discrete statutory duty enshrined in section 55(3) appears to be honoured by the Secretary of State more in the breach than the observance. It is timely to reiterate this message. Our further, and final, observation on section 55(3) is that its impact in notice of intention decisions made under section 40(5) of the 1981 Act will invariably be calibrated according to the individual context and, further, will be assessed in the light of our evaluation of the reach and impact of the section 55(1) duty above. Beyond this we do not venture in the present appeals, as this issue lies outwith the grant of permission to appeal and was not the subject of argument.

47. For the reasons elaborated above, we conclude that the first ground of appeal has no merit.

GROUND 2: THE EU LAW ISSUE

48. This ground is summarised in [15] (ii) above. The starting point is that the impugned decisions of the Secretary of State did not identify, or address, any EU law issue. Mr Jafferji recognised that these appeals have no "cross-border element". He submitted, however, that while the Court of Appeal in G1 v Secretary of State for the Home Department [2012] EWCA Civ 867 considered this an essential factor, the Supreme Court in Pham v Secretary of State for the Home Department [2015] UKSC 19 left the issue undecided and canvassed the possibility of a referral to the CJEU in some appropriate case.

49. Mr Jafferji contended that the specific dimension of EU Law to be considered is the proportionality principle which, in turn, requires consideration of whether the Appellants pose a genuine, present and sufficiently serious threat to an identified public interest; an exclusive focus on the personal conduct of the Appellants; disregard of the issue of general prevention; and consideration of the impact of the Secretary of State's decisions upon the Appellants' rehabilitation prospects. This submission was advanced by reference to Articles 27 and 28 of Directive 2004/38/EC (the "Citizens Directive") and its final element entailed the contention that the Appellants benefit from, as a minimum, the highest tier of protection which the Directive affords, namely imperative grounds of public security.

50. Responding, Ms McGahey QC and Mr Mandalia highlighted the inconclusive nature of the Supreme Court's consideration of this issue in Pham and submitted that this ground of appeal must fail by reason of the decision in G1 to which effect was given recently by this Tribunal in AB (Nigeria v Secretary of State for the Home Department [2016] UKUT 00451 (IAC). The final element of the Respondent's submission was that the "Zambrano" principle is not engaged. It could not be engaged in Mr Ahmed's appeal since there was no child affected by the decision. As

to Messrs Khan, Rauf and Aziz all of the affected children have a British citizen mother upon whom they can rely, and those children are not dependent upon their fathers for the exercise of their rights of residence within the European Union (Zambrano v Office National de L'Emploi [2011] EUECJ C-34/09).

51. The FtT dealt with this discrete issue as follows. In its decision in Mr Rauf's appeal, the Tribunal stated, at [53]:

> "*Depriving the Appellant of his British citizenship will also deprive him of citizenship of the European Union. However the case of Pham relied upon does not find that the Government does not have the power to do this. The UK Government is sovereign in this respect, with the proviso that the decision must accord with the principles of proportionality and must not render a person stateless. As we have found the Appellant will not be stateless and the decision is proportionate. In any event this Appellant has never exercised any rights conferred by his EU citizenship.*"

In Mr Khan's decision there is a similar passage at [27]. In Mr Aziz's decision there is a passage to like effect at [40]. We observe that none of these passages expressly distinguishes between a decision to make a deprivation order and the order itself. All of them are to be considered in conjunction with the FtT's clear awareness of the reasonably foreseeable consequence of future decision making processes relating to deportation or removal of the Appellants from the United Kingdom.

52. In R (G1), which concerned a judicial review challenge to the making of an order to deprive an individual of citizenship, the EU law argument was formulated in very specific terms. The contention advanced was that the Secretary of State had been obliged (and had failed) to observe procedural principles of EU law in making the impugned order: specifically that EU law procedural principles entitled him to attend in person his appeal in the United Kingdom. The critical passages in the leading judgment (of Laws LJ) are in [38] – [39]. The central theme of the decision of the Court of Appeal is that the subject of national citizenship lies exclusively within the competence of individual EU Member States in which EU law has no role to play. We presume to observe that this is well established doctrine. G1 was considered by the Upper Tribunal in AB which, in substance, acknowledged that this general principle may require modification in a deprivation of citizenship case involving a cross-border element: see [85] and [87].

53. Most recently, these issues were considered, but not decided, by the Supreme Court in Pham v Secretary of State for the Home Department [2015] UKSC 19. There the EU law dimension canvassed was the EU principle of proportionality. The appeal against the Secretary of State's "notice of intention" decision had been allowed by SIAC on the ground that the effect of the decision would be to render the appellant stateless. The Court of Appeal reversed this decision and remitted the case to SIAC to determine the other grounds of appeal. The Supreme Court affirmed the decision of the Court of Appeal. Interesting though the judgments of the Supreme Court Justices are, for our purposes the most important consideration is that the decision in G1 was not overruled. Being a decision of the Court of Appeal, it is binding on this

Tribunal by the operation of the doctrine of precedent. This provides a complete answer to this ground of appeal.

54. We add two observations. The first is that, albeit in Article 8(2) proportionality – rather than EU law proportionality – terms, the FtT examined this issue exhaustively and concluded that the impugned decisions of the Secretary of State were a proportionate means of furthering the legitimate aims pursued. Our second observation relates to the context in which proportionality has been raised on behalf of the second to fourth Appellants. We have analysed this at some length above. Based on this analysis, it seems to us that the proportionality challenge to the Secretary of State's decisions savours more of a preliminary skirmish than a major battle having final and decisive consequences. The real battleground for representations, evidence, assessment and determination relating to proportionality, which will include any legal duty of enquiry on the part of the Secretary of State which may arise and will have a clear section 55 dimension, will materialize in the future, in the likely event that the Secretary of State will proceed to make deprivation of citizenship orders and, subsequent thereto, deportation or removal orders.

55. We conclude therefore that this ground of appeal has no merit.

GROUND 3: THE POLICY ISSUE

56. The policy issue which arises in these appeals is a reflection of the lean, economic model for which the legislature opted in devising section 40 of the 1981 Act. A deprivation of citizenship measure is lawful only where the Secretary of State is "… *satisfied that deprivation is conducive to the public good*", per section 40(2). This criterion is not defined. Nor is there any provision in section 40 requiring the Secretary of State to have regard to a series of obligatory considerations.

57. The Secretary of State has chosen to adopt a policy relating to the exercise of the power conferred by section 40(2). The Appellants do not make the case that the Secretary of State failed to take this policy into account. Indeed it is apparent from the text of the impugned decisions that the decision makers were alert to it. Rather, this ground of appeal is to the effect that (a) the policy requires the subjects of this type of decision to have engaged in serious organised crime, and, (b) the Appellants' criminality is not of this character. The Secretary of State, it is argued, erred in law accordingly. The consequential error of law of the FtT was its failure to diagnose the Secretary of State's legal misdirection and, in this context, Mr Jafferji further submitted that there was an insufficiency of material before the FtT.

58. The material point of reference is chapter 55 of the "UK Visas and Immigration Nationality Instructions: Volume 1" which deals with deprivation (section 40) and nullity. This is a publication of the Secretary of State, available in the public domain. It takes the form of policy guidance and instructions directed to case workers. The subject matter of chapter 55 is "Deprivation and Nullity of British Citizenship". This contains, at paragraph 55.4.4, the following statement:

"*'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.*"

This passage first appeared in the version of this publication introduced in 2014.

59. This ground of appeal invokes a further Government publication. This is a Command Paper entitled "Serious and Organized Crime Strategy" (CM8715) published in October 2013. The Foreword to this publication, signed by the Home Secretary, employs the language "*serious and organized crime*". The expressed purpose of the publication is to broadcast to the public a new cross - Government strategy which has been adopted in conjunction with the creation of the National Crime Agency and certain policing reforms. The use of the descriptor "*serious and organized*" is not uniform. In some parts of the Foreword, the adjective employed is "*organized*". The same applies to the "Executive Summary" and other parts of the publication.

60. CM8715 is a relatively bulky and dense publication. It consists of 75 pages. The submissions of Mr Jafferji escorted us to various passages, all of which we have considered. In the course of argument we suggested that its structure is broad and open ended and its language open textured. For the purpose of disposing of this ground of appeal, we propose to make brief references only to the text:

Paragraph 2.5:

"*There is no legal definition of organized crime in England and Wales. For the purposes of this strategy, organized crime is serious crime planned, co - ordinated and conducted by people working together on a continuing basis. Their motivation is often, but not always, financial gain.*"

Paragraph 2.6:

"*Organized crime is characterized by violence or the threat of violence and by the use of bribery and corruption: organized criminals very often depend on the assistance of corrupt, complicit or negligent professionals, notably lawyers, accountants and bankers. Organized crime also uses sophisticated technology to conduct operations, maintain security and evade justice.*"

Paragraph 2.7:

"*We make a distinction between organized crime groups and urban street gangs ….*

The differences are primarily about the level of criminality, organization, planning and control. But there are connections between gangs and organized crime: urban gang members may engage in street drug dealing on behalf of organized criminals and some gangs aspire to and may become organized crime groups in their own right."

Paragraphs 2.20 – 2.21:

"*This section of our strategy provides a short introductory overview of the* ***main*** *organised criminal activities in the UK ….*

Over half of the organized crime groups operating against the UK are involved in drug-related crime; a significant proportion are also involved in violent crime …."

[Our emphasis]

Paragraph 2.43:

"*Child sexual abuse and exploitation remains a largely solitary crime and, where group offending occurs, it shares few of the characteristics traditionally associated with organised crime. The offending is, however, often extremely serious and complex. The majority of child sexual exploitation and abuse offenders are motivated by sexual gratification with a much smaller number motivated by financial or other gain.*"

Finally, Annex B highlights the cross - Government nature of the strategy, listing some 30 public authorities, including the Home Office, with rules and responsibilities for "*tackling serious and organized crime*".

61. Applying an orthodox public law analysis, chapter 55 of the "UK Visas and Immigration Nationality Instructions: Volume 1" was plainly a material consideration to be weighed by the decision maker in all of these cases. As already noted, there is no suggestion that it was not considered in the decision making process. Our evaluation of this dimension of the Appellants' challenge is as follows:

(i) Section 40(2) of the 1981 Act confers on the Secretary of State a discretionary power to deprive a person of British citizenship.

(ii) The statutory pre-condition to the exercise of this power is that the Secretary of State must be "*satisfied*" that "*deprivation is conducive to the public good*". This is a paradigm public law empowering provision. Thus in every case the Secretary of State's decision, *inter alia,* must not lapse into irrationality, must be informed by taking into account all material considerations (which include chapter 55) and must not be contaminated by the intrusion of immaterial considerations. This is not an exhaustive checklist.

(iii) While Chapter 55 purports to supply a definition of "*conducive to the public good*" this cannot have the effect of supplementing the statute. It belongs purely to the realm of a legislation related policy.

(iv) Paragraph 55.4.4 does no more than indicate the kind of cases in which the statutory power might be exercised and it does so without prescription. It does not purport to be exhaustive or comprehensive. This is particularly clear from the words "*unacceptable behaviours*". It is difficult to conceive of a looser, more open – ended linguistic formula. Fundamentally, we consider that paragraph

55.4.4 simply provides case workers with some basic guidance as to how the statutory power might be exercised

(v) The exercise of the statutory power in every case must be harmonious with the statutory language, accord with the underlying legislative intention and further the policy and objects of the statute, duly infused with the avoidance of fetter of discretion in accordance with the hallowed British Oxygen principle (British Oxygen v Board of Trade [1971] AC 610).

62. The main evidence considered by both the Secretary of State and the FtT relating to the nature and gravity of the Appellants' offending was the transcript of the sentencing hearing. Part of this is digested in the Secretary of State's decisions, while other parts are summarized or reproduced in the decisions of the FtT. Giving effect to the analysis in the foregoing paragraph, we consider that it was rationally open to the decision maker to conclude that the Appellants' offending was embraced by the inexhaustive, elastic terms of paragraph 55.4.4 under the rubric of "unacceptable behaviours".

63. We give separate consideration to CM8715. The first question in our view is whether this publication had the status of an obligatory material consideration. Chapter 55 of the "UK Visas and Immigration Nationality Instructions: Volume 1" makes no reference to it. This is unsurprising, given that chapter 55 pre-dates CM8715. Thus there is no express nexus between the two policies. The only link is constituted by the phrase "*serious organized crime*". For present purposes, we are prepared to assume, without deciding, that the two policies are sufficiently inter-related to fall to be considered together.

64. Mr Jafferji, very sensibly, did not seek to argue that the criminal behaviour of any of the Appellants was not serious. His contention, rather, was that it was not of the character to attract the appellation of serious organized crime. In exchanges with the bench, Mr Jafferji was disposed to accept that criminality of this kind could in principle amount to serious organized crime. He further agreed that the question of what constitutes serious organized crime involves a wide margin of appreciation on the part of the decision maker. Finally, he did not demur from our proposition that CM8715 is framed in terms which are not precise, exhaustive or comprehensive.

65. Our analysis of chapter 55 above applies also to CM8715. In addition, we consider it instructive to reflect on the legal character and effect of the latter kind of publication. CM8715 is, in our judgment, a classic illustration of a non-prescriptive, open-ended and inexhaustive Government policy publication. It contains no bright line or hard edged rules or definitions. Indeed, by its terms it is at pains to avoid these. Furthermore, it does not purport to be comprehensive. Its elasticity is one of its dominant attributes. In short, it is a classic policy

66. Furthermore, CM8715 is a paradigm illustration of a policy which falls to be viewed through the analysis of Lord Clyde in R (Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295, at [143]:

> *"The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable.* ***What is crucial is that the policy must not fetter the exercise of the discretion.*** *The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to applicants and decision-makers."*
>
> [Emphasis added]

We would add that it is long established that this type of publication is not to be construed by adopting the approach applicable to a statute, deed or contract. See, for example R v Secretary of State for the Home Department, ex parte Ozminnos [1994] Imm AR 287 at 292. The construction of every document is, of course, a question of law and, therefore, ultimately a matter for the court: In Re McFarland [2004] UKHL 17 at [24].

67. The heavy emphasis on policies which this ground of appeal involves raises the risk of distracting from the ultimate question. That question, giving precedence to the primary legislation, is whether the Secretary of State's conclusion that to deprive the Appellants of their British citizenship status is conducive to the public good was one that was reasonably open to her. This is not a question of fact. Rather, as the word "*satisfied*" indicates, it is a matter of evaluative judgment on the part of the Secretary of State. Furthermore, neither of the policies can have the effect of diluting, restricting or modifying the statutory language. The criterion of "*conducive to the public good*" constitutes the ultimate touchstone. There is no challenge based on the disregard of material facts or factors or the intrusion of something alien. Nor is there any irrationality challenge – and any such challenge would in our judgment be doomed to fail in any event. Viewed through this prism, and taking all of the foregoing into account, we consider that the Secretary of State's decisions withstand this ground of challenge.

68. We further consider that the Secretary of State's evaluative assessment that the Appellants' offending fell within the embrace of this policy is uncontaminated by any error of law. Accordingly, neither the Secretary of State's decision nor the decisions of the FtT can be impugned on this ground.

GROUND 4: THE ARTICLE 8 ECHR ISSUE.

69. All representatives were in agreement with our analysis that this ground is inextricably immersed within the first ground, as [14] – [44] above demonstrate. Accordingly, in common with the first ground, this ground too must fail.

GROUND 5: THE PART 5A NIAA 2002 ISSUE

70. Part 5A of the Nationality, Immigration and Asylum Act (the "2002 Act"), which has been in force since 28 July 2014, is introduced by section 117A (1) in these terms:

> "*This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts -*
>
> *(a) breaches a person's right to respect for private and family life under Article 8, and*
>
> *(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.*"

The Secretary of State's decisions were not made "*under the Immigration Acts*", as these enactments do not include the 1981 Act: see the definition of "*the Immigration Acts*" in section 61 of the UK Borders Act 2007. Historically, statutes dealing with British nationality have never been embraced by the recurring statutory phrase "*the Immigration Acts*". As a result Part 5A was inapplicable. This is common case.

71. The question for this Tribunal is whether the consideration which the FtT gave to Part 5A gave rise to any material error of law in its decisions. This ground of appeal is formulated in the skeleton argument on behalf of the Appellants thus:

> "*This error is not immaterial. It shows that the FtT's approach to the appeals was confused. This confusion led it into error in assessing whether the deprivation decisions were inconsistent with Article 8 rights; and in exercising discretion generally as to whether the deprivation decisions should have been made.*"

The riposte on behalf of the Secretary of State is the following:

> "*… The FtT made clear that it was considering the hypothetical situation in which there was an appeal against a decision to deport. The FtT may well have found such a hypothetical consideration a useful check on its decision under Article 8 about the decision to deprive of citizenship ….*
>
> *The Respondent accepts that the provisions did not apply to the decision to deprive of citizenship. The FtT did not suggest that they did. The Respondent did not apply them when making her decisions. The Respondent submits that hypothetical consideration of the deportation issue by the FtT has no effect on its properly reached conclusions in respect of the deprivation of citizenship.*"

As these passages make clear, the final ground of appeal did not generate elaborate argument on behalf of the Appellants and this was reflected at the hearing, by which stage this ground had receded to a point where it was quite subsidiary to the three principal grounds addressed above.

72. As already acknowledged, it was not necessary for the FtT to review the legality of the Secretary of State's decisions by reference to the regime constituted by Part 5A of

the 2002 Act, as it was of no application. The FtT, however, did so by reference to the probability of deportation. We are unable to detect any resulting material error of law in any event. Our first conclusion on this ground of appeal is that the decisions of the FtT are not vitiated by reason of conducting this exercise. While the FtT was in error to do so, we consider that such error was immaterial.

73. It may further be said that the FtT's excursus into Part 5A, if anything, benefited the Appellants, since its effect was to subject the legality of the Secretary of State's decisions to a series of checks, standards and requirements which did not have to be considered. Furthermore, the FtT, in consequence, conducted a considerably more elaborate proportionality balancing exercise than the circumstances required. The Part 5A exercise which it carried out conferred no discernible advantage on the Secretary of State and none was identified in argument.

74. The discrete argument, set forth above, that the FtT's Part 5A exercise "*… led it into error in assessing whether the deprivation decisions were inconsistent with Article 8 rights*" was advanced faintly and without elaboration. No specific, concrete material "*error*" was particularised in argument and we can identify none. Furthermore, the Article 8 issues were inextricably bound up in the section 55 ground of appeal which we have considered *in extenso* and rejected in [14] – [46] above. We further find merit in Ms McGahey's submission that the exercise conducted by the FtT was in substance a hypothetical one, in which we discern traces of an abundance of caution.

75. For these reasons we reject this final ground of appeal.

A Footnote

76. At the eleventh hour, the first of the four Appellants, Mr Ahmed, was left unrepresented. The Tribunal during the morning of the hearing received a belated letter from his instructed solicitors asserting that Mr Ahmed had "*withdrawn his instructions*", in circumstances where (it was said) the solicitors had been providing their services on a pro-bono basis and this Appellant had been "*paying for Counsel's fees on a private basis*" but had no further resources to do so. There was no application to adjourn the hearing. As appears from the formal sections at the beginning of this judgment, we had the benefit of a skeleton argument from counsel previously instructed on behalf of this Appellant. This contained the following statements:

> "*Having had sight of the skeleton argument prepared for the other Appellants, the first Appellant wishes to adopt that skeleton without repetition herein …*
>
> *Any submissions made in this skeleton are in addition to the points therein.*"

What followed did not differ in substance from the more extensive skeleton argument provided by counsel representing the other three Appellants. Insofar as there were any different emphases or nuances, these were duly taken into account by our careful reading of this written submission. We concluded that fairness did not require the adjournment of Mr Ahmed's appeal of our own motion.

77. On a separate issue, we would recommend that the Secretary of State give careful consideration to the viability and desirability of making section 40 and deportation decisions jointly. If this is feasible, it will have the supreme merits of combined appeals to the tribunal (FtT) and a single hearing addressing all issues, together with reduced cost and delay.

OMNIBUS CONCLUSION

78. None of the Appellants' grounds of appeal having been made out, we dismiss all appeals and affirm the decisions of the FtT.

Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY, PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER **Dated: 31 January 2017**