Neutral Citation Number: [2025] EWCA Civ 10

Case No: CA-2024-000094

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER
DOVE J, PRESIDENT, AND MR CMG OCKELTON, VICE-PRESIDENT
UI-2022-004762

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2025

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE DINGEMANS
and
LORD JUSTICE EDIS

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
GJELOSH KOLICAJ	**Respondent**

- -
- -

Cathryn McGahey KC (instructed by **the Treasury Solicitor**) for the **Home Secretary**
David Chirico KC and Glen Hodgetts (instructed by **OTB Legal**) for **Mr. Kolicaj**

Hearing dates : 11 December 2024

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 2:15pm on 17 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Edis:

1. This is an appeal by the Secretary of State for the Home Department, who was the Right Honourable Priti Patel MP at the material time, against a decision of the Upper Tribunal Immigration and Asylum Chamber (the UT). By that decision, the UT (Dove J and Mr. CMG Ockelton, President and Vice-President respectively of the UT) allowed an appeal by the Respondent (Mr. Kolicaj) in a reasoned decision published on 13 November 2023.

2. Mr. Kolicaj was deprived of his UK citizenship by an order ("the Deprivation Order") made by the Secretary of State on 22 January 2021 under section 40(2) of the British Nationality Act 1981. The Deprivation Order said:-

> "It is hereby ordered in pursuance of the notice issued by the Secretary of State for Home Affairs on 22 January 2021 that:
>
> Gjelosh Kolicaj, born in Puke, Albania on 24 April 1981
>
> Be deprived of his British citizenship on the grounds of conduciveness to the public good.
>
> The Secretary of State is satisfied that Gjelosh Kolicaj will not be rendered stateless by such action."

3. The notice ("the Notice") referred to in the order was served on Mr. Kolicaj in prison on 22 January 2021 about half an hour before the Deprivation Order was served on him. He had been given no prior notice of the intention of the Secretary of State to make a deprivation order and he was not allowed any opportunity to make representations to the Secretary of State before she made her decision. The Notice is required by section 40(5) of the British Nationality Act 1981 before an order can be made. It is sometimes referred to as "the decision letter" because it is the only document which was served on Mr. Kolicaj prior to the making of the Deprivation Order and it is the document in

which the Secretary of State sought to comply with her statutory duty to give reasons for making the Deprivation Order.

4. Mr. Kolicaj appealed against the Deprivation Order to the First Tier Tribunal (Immigration and Asylum Chamber) (FTT) which dismissed his appeal by a reasoned decision promulgated on 5 May 2022. The FTT comprised Resident Judge Holmes and FTT Judge Hughes. The UT allowed Mr. Kolicaj's appeal against that order and it is that decision which is now the subject of this appeal.

The issues on appeal

5. Although more issues were raised before the FTT and the UT, this appeal concerns three points:-

   i) The Secretary of State has permission, granted by Falk LJ, to advance one ground of appeal in these terms:-

   > "The UT erred in law in finding that the Secretary of State, when making her decision to deprive Mr. Kolicaj of his British citizenship, was unaware that she had a discretion to exercise, and accordingly that she failed to take into account any of the matters relevant to the exercise of her discretion."

   ii) In a Respondent's Notice Mr. Kolicaj seeks to uphold the decision of the UT on two grounds which, he says, were wrongly rejected by both the FTT and the UT on appeal. These are:-

      a) The Deprivation Order was made following a process which was procedurally unfair because Mr. Kolicaj was not allowed any opportunity to make representations to the Secretary of State before she made her decision.

b) The Deprivation Order was unlawful because it was made by the application of a policy which was not published and not made available to Mr. Kolicaj until 23 March 2022. The suggested policy document is a submission by Ms. Fiona Johnstone dated 13 May 2020, more fully described below. That was disclosed shortly before the hearing in the FTT and this disclosure was the result of a request for disclosure on his behalf. The request was made because earlier disclosure, on 18 February 2022, had been given of the official advice which had been placed before the Secretary of State when she decided to make the Deprivation Order. That advice was contained in a submission by Mr. Steve Parsons with annexes which is dated 17 December 2020 and which referred to Ms. Johnstone's earlier document.

The background facts

6. Given the nature of the issues we have to deal with, the facts of the case can be quite briefly summarised.

7. Mr. Kolicaj is, or was, a dual Albanian/UK national. He came to the UK in 2005 and was naturalised as a British citizen on 5 February 2009. He married an Albanian national in 2013 and they live in the United Kingdom with their four British children. At the date of the Deprivation Order she had applied for further leave to remain on the basis of her marriage to a British citizen, but that had not been determined. Mr Kolicaj was her sponsor and if the Deprivation Order was sustained her application on that basis would fall away. At the time of the Deprivation Order they had two children, born in 2013 and 2015.

8. On 27 February 2018 Mr. Kolicaj pleaded guilty in the Crown Court at Kingston to conspiracy to remove the proceeds of criminal conduct from England and Wales contrary to section 1(1) of the Criminal Law Act 1977. The substantive offence was contrary to section 327(1)(e) of the Proceeds of Crime Act 2002. The case arose from an investigation by the National Crime Agency into an organised crime group which was involved in high value money laundering. Large quantities of cash were transported in suitcases on flights from the UK to various European countries for ultimate delivery into Albania. Mr. Kolicaj was an organiser of these transports and directed and controlled the couriers who took the suitcases. The judge in the Crown Court imposed a sentence of 6 years' imprisonment having determined that the proper sentence, before a 25% discount for the guilty plea, was 8 years. She found that Mr. Kolicaj was a leading figure in this money laundering exercise which had involved multiple journeys by couriers, in the course of which it was estimated that £8m or thereabouts was removed from England and Wales and transported onwards to Albania. Mr. Kolicaj himself had made journeys to Albania immediately after some cash seizures by law enforcement authorities, and this was said to show his managerial role in the operation. He had used his UK passport in this operation. One of these trips took place after he himself had been arrested in the UK and released. This level of determination to continue offending was later relied upon by the National Crime Agency as indicating that it was likely that he would continue to pose a risk following completion of his sentence. That assessment was one of the Annexes to Mr. Parsons' December 2020 submission to the Secretary of State about Mr. Kolicaj's case.

The Secretary of State's decision

9. The events which culminated in the Deprivation Order occurred while Mr. Kolicaj was in prison, approaching the point at which he would be released under licence after serving half his sentence.

i) On 13 May 2020 Fiona Johnstone, a Home Office official, wrote the ministerial submission to the Secretary of State entitled "Deprivation of British Citizenship" which recommended that the Home Office should "use the deprivation power [arising under section 40(2) of the 1981 Act] against people guilty of serious organised crime, but limit its use to the most serious and high profile cases." Until this point, although Chapter 5 of the published Home Office Nationality Instructions issued by the Secretary of State as a guide to decision makers had defined "conduciveness to the public good" as "depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours", we understand that this power had not in practice been regularly used in cases of serious organised crime. The facts in *Aziz v. Secretary of State for the Home Department* [2018] EWCA Civ 1854; [2019] 1 WLR 266 (*Aziz*) show that the Secretary of State in 2015 gave a notice relying on "serious and/or organised crime", see [9] per Sales LJ. No doubt Ms. Johnstone's advice was designed to extend the use of the published policy to more cases of serious organised crime. The Secretary of State accepted the advice given, which meant that thereafter the previously published policy would be applied in such cases, although only to the most serious and high-profile cases.

ii) On 19 October 2020 the National Crime Agency wrote to the Secretary of State inviting her to use her powers under section 40(2) of the British Nationality Act 1981 to deprive Mr. Kolicaj of his British citizenship and to consider subsequently deporting him to Albania. It set out the facts of his offending and some information about his family circumstances. The letter was written before the decision of the Supreme Court in *R (Begum) v. SIAC* [2021] UKSC 7; [2021] AC 765 which was handed down on 26 February 2021, by which time the Secretary of State had made the decision to issue the Deprivation Order, which had been served on Mr. Kolicaj. The NCA letter contained the assessment of risk referred to at [8] above, reviewed Mr. Kolicaj's private life and concluded:-

> "Consideration has been given to the private life that Gjelosh KOLICAJ has established in the UK since 2005 and the family life with his wife and two children. However, given the seriousness of his criminal conduct, only the most exceptional human rights considerations could outweigh it, which he will have ample opportunity to raise given that both decisions attract a statutory right of appeal. In addition, as his wife also originates from Albania and their children are still relatively young, it would be viable for them to maintain their family life back in their home country.
>
> Given Gjelosh KOLICAJ's established leading role in supporting the operations of Albanian OCGs in the UK, the exceptional action of deprivation/deportation would be proportionate. His continuing presence in the UK is clearly not conducive to the public good."

iii) On 17 December 2020 Mr. Parsons' submission was .placed before the Secretary of State. This recommended that Mr. Kolicaj should be the subject of a deprivation order under section 40(2) of the 1981 Act and that:-

> "[the Secretary of State should] sign the notice at Annex E, authorising deprivation of KOLICAJ G on the grounds of his engagement in serious and organised criminality …Once notice is served an official can sign the deprivation order…"

iv) This ministerial submission attached 5 Annexes. Annex A was the NCA letter referred to above. Annexe E was the draft notice which the Secretary of State later signed and which is the Notice which I shall set out in full below. Annex B was an assessment that deprivation would not render Mr. Kolicaj stateless. Annex C was an assessment for the purposes of the European Convention on Human Rights of the impact of both deprivation and deportation on Mr. Kolicaj's rights. Articles 2 and 3 were said to be engaged by deportation and Article 8 was considered both in respect of deprivation and deportation. The Article 8 assessment said that his "full circumstances are not known at this time so only a preliminary assessment can be made. He will have the opportunity to make representations against each decision" [i.e. both in relation to the proposed deprivation order and the proposed subsequent deportation order]. The document further notes that Mr. Kolicaj's circumstances in full "will only be known once he makes representations against both the decision to deprive his citizenship and the decision to deport him" and said that any representations "will be given careful consideration". Annex D contained an assessment regarding the welfare of the children for the purposes of the Secretary of State's statutory duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of the children. This was described in the document as an "initial assessment" which would be kept under review and "any representations will be fully considered".

Annex E was the draft which became the Notice. At some point the Secretary of State personally signed the Notice, without affording Mr. Kolicaj any opportunity to make representations either before or after she did that.

v) On 22 January 2021 the Notice was served on Mr. Kolicaj in prison under the cover of a letter which said "Please find attached a letter informing you that your status as a British citizen is under review". This was infelicitously phrased. The "letter" was in fact the Notice and Mr. Kolicaj's British citizenship was not "under review" but was about to be brought to an end, subject to his right of appeal. The ministerial submission and annexes were not served on Mr. Kolicaj at this point. They were disclosed in 2022 in stages prior to the hearing in the FTT in a way which may not be wholly attractive but which is not now important.

vi) About half an hour after the Notice and its covering letter was given to Mr. Kolicaj he was served with the Deprivation Order.

10. The Notice is central to the Secretary of State's Ground of Appeal. It is headed "Notice of Intention to make a deprivation order". It is necessary to set it out in full:-

> Deprivation of citizenship
>
> As the Secretary of State, I hereby give notice in accordance with section 40(5) of the British Nationality Act 1981 that I have decided to make an order to deprive you, Gjelosh KOLICAJ of your British citizenship under section 40(2) of the Act. This is because I am satisfied that it is conducive to the public good to do so.

The reason for my decision is that on 27 February 2018 you were convicted of conspiracy to remove criminal property from England and Wales. In sentencing you the Judge agreed a reduction of your tariff of 25% to reflect your guilty plea and sentenced you to 6 years. In sentencing you along with your brother Jak, the Judge remarked : "I am satisfied that Jak and Gjelosh Kolicaj were organisers, with a leading role in this group criminal activity conducted over the timescale of the indictment, one which persisted even after individuals were arrested and cash was seized" ... "I am satisfied that the Kolicajs had a leading role, because they were not supervised when they travelled and Gjelosh Kolicaj had the keys to the suitcase containing the large amount of cash that he had checked in, and that the evidence is that, on two occasions after cash was seized by authorities, Gjelosh Kolicaj went directly to Albania. The inference is that he was liaising to those who were the intended recipients of the money in Albania".

The offences you have been convicted of are of a very serious nature and contained an element of organisation, involving collusion with others. I am satisfied your offending is rightly justified as participation in serious organised crime within the meaning of the reference to serious organised crime in paragraph 55.4.4 of the Nationality Instructions.

It is assessed that you are an Albanian / British dual national who has been convicted of conspiracy to remove criminal property from England and Wales.

These are serious and organised offences, involving collusion with others. In light of this conviction, I am satisfied that deprivation of your citizenship is conducive to the public good.

In accordance with section 40(4) of the British Nationality Act 1981, I am satisfied that such an order will not make you stateless.

I have also taken account of my responsibilities under Section 55 of the Border, Citizenship and Immigration Act 2009. It is acknowledged you have British citizen children. Deprivation of your citizenship (as distinct from deportation) is unlikely, in itself, to have a significant effect on the best interests of any children you have. It will not impact on their status in the United Kingdom, nor is there any evidence that it will impact on their education, housing, financial support or contact with you. It is acknowledged 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 my Section 55 duty, I consider that the public interest in depriving you of

> citizenship clearly outweighs any interest which they might have in your remaining a British citizen.
>
> I am also giving you notice of your right of appeal against the decision to make a deprivation order, under section 40A(1) of the British Nationality Act 1981 .
>
> You may appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against the decision to deprive you of your citizenship, under section 40A(1) of the British Nationality Act 1981 . You have 14 calendar days from the date this decision was sent to appeal. Information on how to appeal, the appeal process and the fees payable (if applicable) are all available online at: https://www.gov.uk/immigrationasylum- tribunal/overview.
>
> The order under section 40(2) of the British Nationality Act 1981 depriving you of your British citizenship will be made after you have been served with this notice under the rules set out in regulation 10 of the British Nationality (General) Regulations 2003.

11. The Notice was in the form of the Annex E draft. It said nothing about any opportunity Mr. Kolicaj may have to make representations about any aspect of its contents, and he had none. The references to representations contained in Annexes C and D are misleading. The process as implemented in his case did not involve the Secretary of State having any material supplied by or on behalf of Mr. Kolicaj. A decision adverse to his interests was made without him being given any opportunity to make representations to the Secretary of State at any stage.

The procedure adopted for section 40(2) deprivation orders in 2020/21

12. It is necessary now to say something about the procedure which was operated by the Secretary of State and how it developed. This explanation begins with sections 40 and 40A of the 1981 Act. I shall set these out in part:-

> **40 Deprivation of citizenship.**

(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.

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

(a) fraud,

(b) false representation, or

(c) concealment of a material fact.

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

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

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

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

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

> (5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—
>
> > (a) that the Secretary of State has decided to make an order,
> >
> > (b) the reasons for the order, and
> >
> > (c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68).
>
> (6) …….
>
> **40A Deprivation of citizenship: appeal**
>
> (1) A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against the decision to the First-tier Tribunal.
>
> ……

13. Two significant events have occurred since the provisions set out above came to be enacted in this form. First, the Secretary of State has changed her practice in relation to giving of notices of decision as required by section 40(5). Initially, as recorded by this court in *Laci v. Secretary of State for the Home Department* [2021] EWCA Civ 769; [2021] 4 WLR 379 at [14] the practice was that the Notice required by section 40(5) of the 1981 Act would be served containing the decision to deprive. The person on whom it was served could then appeal to the FTT and the deprivation order would be made within four weeks of the appeal rights being exhausted or of receipt of confirmation that there would be no appeal. *Laci* was a section 40(3) case to which section 40(4) does not apply, but our understanding is that originally the same practice applied in section 40(2) cases. As a result of developments in cases arising from grooming of minors for sexual services in Rochdale, it was discovered that a naturalised British citizen may be able to frustrate deprivation and deportation on the

"conducive to the public good" ground by renouncing their original nationality. That would mean that deprivation would render that person stateless and it would thus be barred by section 40(4). Accordingly, the Secretary of State began to operate a new practice, as applied in this case, where the decision notice would be served just minutes before the Order, thus denying the person affected any chance to renounce their original citizenship. The order did not make them stateless and could lawfully be made. It was confirmed to us on behalf of the Secretary of State that this new practice is limited to section 40(2) cases and the original approach continues to apply in section 40(3) cases where statelessness is not a bar to deprivation.

14. Surprisingly, this new practice does not appear to have been written down anywhere. We were told by Ms. McGahey KC, for the Secretary of State, that it is applied to all cases of section 40(2) "public good" deprivations without regard to whether it is actually possible for the person affected to renounce their original citizenship under the law of that country. In contrast to the present case, in *Laci* the person affected had been invited to make representations on whether a deprivation order should be made on 17 February 2009, 28 February 2018 and again on 9 April 2018. The decision was made on 22 June 2018. Mr. Laci therefore had three opportunities to make representations before the decision and the opportunity to appeal to the FTT against it before the deprivation order was made. Mr. Kolicaj had no opportunity to make any representations before the decision was made and the Notice and Deprivation Order served.

15. The second significant event which has occurred is the decision of the Supreme Court in *Begum* which restricts the scope of an appeal to the FTT against a

deprivation decision under section 40(2) to a review of the decision on public law grounds. This does not allow new material to be placed before the FTT and involves no right to make representations to the FTT of the kind which might affect the merits of the decision. There is a right to make such representations and provide evidence as to the merits in relation to a human rights appeal relying on Article 8, but deprivation of citizenship (as contrasted with deportation, see *Aziz* at [26] per Sales LJ and *Laci* at [25] per Underhill LJ) has only a limited impact on the rights protected by Article 8. This right does not therefore fill the gap left by the new procedure adopted in section 40(2) cases explained above. An example of a submission which Mr. Kolicaj might have made which would not be relevant to an Article 8 appeal is that his offending was not of the most serious or high profile kind and therefore he did not fall within the published policy as refined by the acceptance by the Secretary of State of Ms. Johnstone's ministerial submission in May 2020, see [9(i)] above. He could not make this submission because:-

i) He was given no opportunity to make any submissions to the Secretary of State before the Notice was served, followed by service of the Deportation Order;

ii) It would inevitably involve him setting out a factual case as to the extent of his criminality, and the FTT would not permit him to do this; and, in any event,

iii) He knew nothing about the ministerial submission until it was disclosed to his lawyers shortly before the FTT hearing.

16. I wish to make clear that I am not suggesting that this submission would necessarily have merit. The offending involved laundering £8m in cash over a prolonged period, and Mr. Kolicaj's role was a leading one. If made, however, the decision maker would have to consider it and make a decision about it.

17. A second example of a submission Mr. Kolicaj may have wished to make was that whatever may have happened in the past, he now represented a very low risk of re-offending because he simply wanted to live with his family in the United Kingdom and start a business. It is clear that it is not necessary for a risk of harm to be established as a condition precedent of the exercise of the section 40(2) power, see *Pham v. Secretary of State for the Home Department* [2018] EWCA Civ 2064; [2019] 1 WLR 2070 at [52] per Arden LJ. However, it is also clear that the presence or absence of such a risk may be a relevant consideration in deciding whether to exercise that power when exercising the discretion which is the second stage of the decision making process once "conduciveness" has been found, see *Begum* at [70B] per Lord Reed PSC. In this respect Mr. Kolicaj wishes to rely on an Initial Assessment by the Probation Service following his release from prison which assessed him as representing a low risk of re-offending. He could not have relied on that before the Secretary of State because it was not written until 26 March 2021, but he would no doubt have submitted that the Secretary of State ought to make a necessary enquiry by commissioning such a report before making a deprivation decision.

18. Again, I would not wish to be understood as expressing a view that this submission would be likely to succeed. Post-release risk assessments like that of 26 March 2021 are sometimes based, as this one was, on what the person

being assessed says. On the evidence before the Court, it would be open to a rational decision maker to decide that Mr. Kolicaj has shown himself to be very dishonest and avaricious, and to prefer the National Crime Agency assessment. But again, if made, it would have to be considered and a decision made.

19. The result of this analysis is that Mr. Kolicaj has been deprived of his British citizenship without at any stage being able to advance reasons why that should not happen. It is in this context that he seeks to support the decision of the UT by resisting the Secretary of State's appeal, and by advancing the two points in his Respondent's Notice. It is agreed that if he succeeds on the appeal or his first ground in the Respondent's Notice, which relates to his inability to make representations, then his second ground in that Notice does not arise. This is because the Secretary of State would then be required to make a new decision and would do so applying a new policy which has been published since the events with which we are concerned. I will not deal further with that second ground for reasons which will become apparent.

20. It seems to me that the two points which are live at this stage of the analysis are related. It will be noted that the terms of the Notice, which were the basis of the decision of the UT, do not deal with Annex C at all. This is the Annex which considers Article 8 in its application to both deprivation and deportation and says that Mr. Kolicaj will be able to make representations about both these decisions and that these will be carefully considered. It offers a preliminary view that they will fail which, presumably, the Secretary of State must have accepted although the Notice is entirely silent on this Annex. Annexes A, B and D are all reflected in the Notice and this is odd. Nowhere in it does the

Secretary of State justify or explain why she had decided to adopt a procedure which denies Mr. Kolicaj any chance to make representations. That is also passed over in silence.

The decision of the UT

21. The critical parts of the decision of the UT are those which deal with the fact that Mr. Kolicaj was denied an opportunity to make representations and the disposition section which quashed the Secretary of State's decision because she had failed to deal properly with the discretionary stage of her decision-making.

22. The absence of any opportunity to make representations or supply evidence to the Secretary of State (Respondent's Notice first ground) is dealt with by the UT at paragraphs 57 and 58:-

> 57. The merits in relation to the appellant's submissions in respect of procedural fairness are, in our view, more finely balanced. It appears that it is necessary for the respondent to establish that there was a clear justification for the departure from the normally applicable principles set out in *Balajigari* which occurred in the making of this decision without the opportunity for the appellant to make any representations about whether or not he should be deprived of his citizenship. In examining this question it cannot go unremarked that it appears from the documentation that was before the respondent, such as for instance the analysis of the ECHR issues, that the author anticipated that it would be an appropriate part of the decision-making process that the appellant would be given the opportunity to provide further information on these matters. It also has to be noted that there is nothing in the decision itself, or the briefing which led to it, which suggests that it would be necessary to proceed to the decision without giving the appellant any chance to comment before it was made. Furthermore, the appellant is entitled to draw attention to the case of *Hassan*, in which the failure to afford an opportunity comment on the proposed decision was held by the Upper Tribunal to be an error of law.
>
> 58. Notwithstanding these points we agree with the FTT Panel that in the circumstances of this case the risk of the entire

> decision-making process being frustrated by the appellant renouncing his Albanian citizenship so as to disqualify him from a decision to deprive him of his citizenship on the basis that to do so would render him stateless justified the respondent proceeding without affording the appellant an opportunity to make representations. The clear and obvious risk was that notification of the respondent's intended decision would tip off the appellant, and provide him with a clear and obvious opportunity to derail the entire process irrespective of the merits of the potential decision. It does not appear that this was a concern which featured, for whatever reason, in the decision of the Upper Tribunal in *Hassan*. Although, as set out above, the concerns in relation to the problems of tipping the appellant off through the provision of a "minded to" letter were not rehearsed in the decision itself or the documentation supporting it we are satisfied that the concerns in this respect were sufficiently serious and obvious as to justify the approach to decision making which the respondent adopted. In the circumstances of this case providing the opportunity to the appellant to renounce his Albanian citizenship and remove the possibility of the respondent depriving him of his citizenship were sufficient to justify not adopting a procedure which gave the appellant the chance to comment on the respondent's concerns.

23. The passage which is the subject of the appeal is at paragraphs 62-65:-

> 62. Having scrutinised the decision which the respondent arrived at we are concerned that there does not appear to be anything within it to give us or any reader confidence that the respondent was aware of her discretion or that she exercised it in the appellant's case. She was presented with a range of material in the briefing documentation which she was given, in relation to the appellant's risk of future offending, the question of the potential impact of the decision on the appellant's human rights and the potential impact of the decision on his family and in particular his children. Each of these matters was potentially relevant to the exercise of the respondent's overall discretion in relation to whether or not to exercise her power under section 40(2), but they have not apparently played any part in the respondent's decision-making process. Rather, the respondent has progressed directly from her assessment of the seriousness of the offending to a conclusion that the appellant should be deprived or his citizenship without appreciating that she had a discretion to exercise based on all the circumstances of the case. As set out above, the respondent was not required to investigate the risk of future offending as a pre-condition of deciding to deprive the appellant of his citizenship, but it was a matter which was capable of being taken into account in the exercise of the respondent's discretion. By failing to engage in exercising the

discretion conferred by the power the respondent fell into legal error, with the consequence that none of the matters potentially relevant to the exercise of her discretion were considered at all.

63. We are unable to accept the submission made on behalf of the respondent that when the decision records that "in the light of this conviction, I am satisfied that deprivation of your citizenship is conducive to the public good", and she is making the order "because I am satisfied that it is conducive to the public good to do so", this was reasoning explaining a conclusion both in relation to the condition precedent and also the exercise of discretion. To accept this would involve reading into the decision conclusions both of substance and also respecting what material was and was not taken into account which are simply not present. Our decision is based on the clear failure of the respondent to exercise her discretion in this case. However, even if we were prepared to accept that she did exercise it, which we do not, the respondent's submissions expose the inadequacy of the reasons contained in the decision when exercising her discretion having concluded that the condition precedent has been satisfied. Similar considerations apply to the suggestion made on behalf of the respondent to the effect that she should be read as having afforded little weight to all of the other factors which were drawn to her attention as part of her briefing for the decision.

64. In the course of her submissions in response to the question posed on the 12th October 2023 the respondent draws attention to the fact that the point taken in the present case about the exercise of the respondent's discretion under section 40(2) of the 1980 Act was not taken in the case of *D5, D6 and D7*, notwithstanding that the decisions which were taken in respect of deprivation were in similar form to that taken in the present case. We are of the view that this is not a point which assists the respondent in the present case. We are unable to comment upon why this point was not taken in *D5, D6 and D7*, but the fact remains that the point has been taken in the present case and we are required to determine it. Our reasons for concluding in the manner which we have are set out above.

65. The reasons provided by the respondent did address the interests of the appellant's children, but it appears that this part of the decision was essentially focussed upon the consideration by the respondent of her duty under section 55 of the Border, Citizenship and Immigration Act 2009 rather than the discretion under section 40(2) of the 1981 Act. In any event, we are not satisfied that this passage in the reasoning of the decision, focussed on the specific section 55 issue, overcomes the concerns which we have in relation to the respondent's decision-making in this case.

24. The UT referred to three decisions in these passages, *R (Balajigari) v Secretary of State* [2019] EWCA Civ 673; [2019] 1 WLR 4647 (*Balajigari*), *Hassan v Secretary of State for the Home Department* DC/00023/2021; UI-2022-00779 *D5, D6 and D7 v Secretary of State for the Home Department* SC/176-178/2020. It is unnecessary to deal with the two UT decisions.

Procedural fairness; Respondent's Notice Ground 1: discussion

25. In *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, Lord Neuberger of Abbotsbury PSC (following *R v Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, 560) said, at para 179:

> "In my view, the rule is that, before a statutory power is exercised, any person who foreseeably would be significantly detrimentally affected by the exercise should be given the opportunity to make representations in advance, unless (i) the statutory provisions concerned expressly or impliedly provide otherwise or (ii) the circumstances in which the power is to be exercised would render it impossible, impractical or pointless to afford such an opportunity. I would add that any argument advanced in support of impossibility, impracticality or pointlessness should be very closely examined, as a court will be slow to hold that there is no obligation to give the opportunity, when such an obligation is not dispensed with in the relevant statute."

26. Building on that passage, the court in *Balajigari* extracted this further observation:-

> "60. This leads to the proposition that, unless the circumstances of a particular case make this impracticable, the ability to make representations only after a decision has been taken will usually be insufficient to satisfy the demands of common law procedural fairness. The rationale for this proposition lies in the underlying reasons for having procedural fairness in the first place. It is conducive to better decision-making because it ensures that the decision-maker is fully informed at a point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected, who will know that they have had the opportunity to influence a decision before it is made.

> Another rationale is no doubt that, if a decision has already been made, human nature being what it is, the decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come. In the related context of the right to be consulted, in *Sinfield v London Transport Executive* [1970] Ch 550, 558, Sachs LJ made reference to the need to avoid the decision-maker's mind becoming "unduly fixed" before representations are made. He said:
>
> > 'any right to be consulted is something that is indeed valuable and should be implemented by giving those who have the right an opportunity to be heard at the formative stage of proposals 'before the mind of the executive becomes unduly fixed.'"

27. In the present case, the statute does not expressly provide that there should be no right to make representations. In my judgment it does not do so by implication either. The purpose of section 40(5) is to enable a person who is the subject of a decision to make a deprivation order to bring an effective appeal before the order is made. That provision has been applied differently in section 40(2) cases, as I have explained, since events in Rochdale, but the statutory purpose is clear. At the time of the enactment of the 1981 Act that was understood to be an appeal on the merits. The Act does not mandate a procedure for making the original decision, but the provisions of section 40(5) clearly indicate a Parliamentary intention to place a high value on procedural fairness.

28. The Secretary of State's case is that it would be impossible, impractical or pointless to afford an opportunity to make representations at any stage because notice might cause the recipient to renounce their other nationality. This would mean that they could not be deprived of their British citizenship because that would render them stateless and engage section 40(4). This argument must be "closely examined", and, in my judgment, rejected.

29. I accept that in the circumstances which arise in section 40(2) cases it is legitimate to operate a system in which the Secretary of State informs the person affected of the decision only after it is made because of the risk of renunciation of the other nationality. However, in the absence of a full appeal on the merits to the FTT, she should also say at that time that she is willing to review her decision by conducting a merits based evaluation in the light any representations or evidence which that person supplies. This runs no risk of tipping the person off, and that advantage is enough to displace the usual rule in *Balajigari* at [60], quoted above. It is not enough to say that the appeal rights conferred by section 40A remedy the lack of a chance to make representations because of the inability to challenge the decision to find that deprivation would be conducive to the public good or the exercise of discretion to deprive, save on public law grounds and on the basis of the material before the Secretary of State.

30. Therefore, the Notice and the Deprivation Order was issued and maintained in a way which was procedurally unfair and must be quashed.

31. It is not for the court to devise a procedure which would satisfy procedural fairness. As far as the documents which we have seen reveal, the Secretary of State has never given any thought to how the new way of dealing with section 40(2) decisions might be fairly operated, simply overriding the obligations of fairness in the interest of expediency. That is a surprising state of affairs which should receive immediate attention.

The discretion decision; the Appeal

Submissions

32. Ms. McGahey KC submitted that the UT applied far too strict a test to the decision letter. The s.40(5)(b) duty has been complied with, because Mr. Kolicaj knows why the decision was made. She says that there is no requirement for a detailed step by step account of the thought process. The briefing materials in the Annexes deal with issues beyond the finding that deprivation was conducive to public good, and the Secretary of State knew that this was because she had a discretion to exercise. She suggests that the letter should be read as a whole and in the context of all the information available to the Secretary of State.

33. Mr. Chirico KC identifies two reasons for the decision of the UT on this issue: a failure to exercise the discretion and a failure to give adequate reasons. He submits that the distinction between the condition precedent and the exercise of discretion is not quite as clear cut as is the case in a section 40(3) case. In that situation there is a clear factual condition precedent (fraud) which must be found as a matter of fact before the Secretary of State moves to the exercise of her discretion. In section 40(2) the condition precedent is a decision that deprivation would be "conducive to the public good", which Mr. Chirico submits is more than a simple question of past fact. The Nationality Instructions appear to treat it as such, requiring "involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours", see [9(i)] above. He says that the more narrowly the phrase "conducive to the public good" is defined, the more broad the range of factors taken into account only at the discretion stage will be. However, he says, there is an overlap between the two stages in section 40(2) cases.

34. Mr. Chirico accepts that the consideration in the Notice of the duty in section 55 of the Borders, Citizenship and Immigration Act 2009 in relation to the children in the Notice means that the Secretary of State was taking account of a factor which was relevant to the exercise of her discretion.

Discussion

35. The issue on which the UT decided the appeal is not one of the 13 grounds of appeal settled by Mr. Hodgetts when seeking leave to appeal to the UT. Ms McGahey and Mr Chirico agree that it arose for the first time during discussions between Mr Chirico and the bench during the appeal hearing before the UT.

36. Since, in my view, the Deprivation Order falls to be quashed for procedural unfairness, the issue on the appeal is of lesser significance. To some extent there is no hard line between the procedural unfairness ground and the ground of appeal, because the principal failure to give reasons related to matters which concerned Mr. Kolicaj himself. The Secretary of State had been advised that she would, at some unspecified stage, receive representations from him and that they would receive consideration then, in some unspecified way. She failed to ensure that this happened which meant both that her decision was procedurally unfair and that her reasons were inadequate. She could not give reasons for rejecting submissions she had not received.

37. I do not think that the UT was right to say that there is no evidence that the Secretary of State knew that she had a discretion, or that she ever exercised it. I do not find paragraph 65 of the UT decision compelling. The duty in section 55 of the 2009 Act governed the functions identified in section 55(2)(a) of the 2009 Act which clearly included the making of decisions under section 40(2) of

the 1981 Act. This would operate on the exercise of discretion and on the assessment of Article 8. As I have said above, Article 8 operates in a limited way in relation to deprivation decisions, and the main relevance of the section 55 duty here is to the exercise of discretion. In reality, in a case such as the present, the interests of the British citizen children are likely to be the most important consideration aside from the offending of Mr. Kolicaj in the exercise of discretion, and the fact that they were considered is evidence of the exercise of discretion.

38. It is clear from the briefing documents that all concerned in advising the Secretary of State knew that there was a discretion to be exercised, and they sought to assist her in that regard. The NCA letter addresses discretionary matters, as does the Annex which addresses compatibility with Convention Rights (Annex C). Annex D deals with the children and this is fully reflected in the Notice.

39. I consider that the Notice is not well-drafted and agree that it would have been preferable if the exercise of discretion had been fully spelt out with reasons given for the decision to deprive which addressed it as a separate matter. However, I do not think it is possible to say that the Secretary of State was unaware she was exercising a discretion in making her decision.

40. I would, therefore, have allowed the appeal against the quashing of the Deprivation Order on the ground that the Secretary of State did not exercise her discretion. This does not assist the Secretary of State in the result because I would uphold the quashing on the first ground in the Respondent's Notice (procedural unfairness) for the reasons I have given.

Conclusion

41. I would have allowed this appeal on the ground set out in the Notice of Appeal but this is of no effect, since I would uphold the quashing of the Deprivation Order on the first ground in the Respondent's Notice. The result of this is that the appeal fails.

Lord Justice Dingemans

42. I agree with both judgments.

Lord Justice Underhill

43. I agree that this appeal should be allowed, and the Deprivation Order quashed, for the reasons given by Edis LJ. Like him, I would not want to be thought to be expressing any view about the merits of the arguments open to Mr Kolicaj to resist the making of such an Order in his case, but the point is one of principle. It is a matter of basic fairness that a person whom the Secretary of State proposes to deprive of British citizenship should have the opportunity to put forward reasons in opposition, and all the more so where the scope of any appeal is as limited as the Supreme Court has now held it to be. It is a matter of real concern that the officials advising the Home Secretary in the present case asserted in materials put before her that Mr Kolicaj would have such a right, when it should have been obvious that the effect of the new "post-Rochdale" procedure described at paras. 13-14 above was to deprive him of it. This may be the result of the fact that, as Edis LJ notes, the new practice does not appear to have been reduced to writing: indeed it was only from Ms McGahey's answers to questions from the Court that we obtained a clear understanding of its origins and how it

was being applied. I note what Edis LJ says at para. 29 about the possibility of operating a procedure under which a Deprivation Order is made but coupled with a simultaneous notification of a right of review. Certainly, a procedure of that kind may in some circumstances be enough to satisfy the requirements of fairness, as discussed in the passage which he cites from the judgment of the Court in *Balajigari*; but I myself express no view about whether that would have been so in the present case. I agree with what Edis LJ says at para. 31: it is surprising that no thought appears to have been given to the fairness of the procedure now being followed, and that needs to be remedied forthwith.