UT Neutral citation number: [2023] UKUT 00294 (IAC)

Kolicaj (Deprivation: procedure and discretion)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 19th July 2023
Promulgated on 13 November 2023

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT

Between

GJELOSH KOLICAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr David Chirico, instructed by OTB Legal
For the Respondent: Ms Cathryn McGahey KC, instructed by the Government Legal Department

1. *The requirements of procedural fairness are highly fact-sensitive but will normally require that the Secretary of State notifies an individual that she is minded to deprive them of their citizenship, so as to afford them an opportunity to make representations. The Secretary of State might lawfully dispense with that step, however, where there is proper reason to believe that the individual would attempt to frustrate the process upon receipt of such notification.*

2. *Where the Secretary of State seeks to deprive a person of British citizenship under s40(2) of the British Nationality Act 1981, she may lawfully dispense with the 'minded-to' step where*

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there is a clear and obvious risk of the individual renouncing any other citizenship so as to render themselves stateless and engage the statelessness proviso in s40(4).

3. *The power to deprive a person of their citizenship under section 40 of the 1981 Act and the jurisdiction on appeal under section 40A were explained in Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00235 and Chimi (deprivation appeals; scope and evidence) Cameroon [2023] UKUT 00115 (IAC). Where the Secretary of State determines that the condition precedent for exercising that power is made out, she must then exercise her discretion as to whether to deprive that person of their British citizenship in the light of all the circumstances of the case. It follows that even if the decision of the Secretary of State in relation to the condition precedent is free of public law error, the decision might nevertheless be unlawful where she fails to exercise her discretion, or where the exercise of that discretion is itself tainted by public law error.*

INTRODUCTION

1. The appellant was born on the 24th April 1981 in Albania. He came to the UK in 2005, and on the 6th September 2007 he was granted indefinite leave to remain on the basis of his marriage to a British citizen. On the 5th February 2009 the appellant was naturalised as a British citizen and as a result he became a dual national holding both Albanian and British citizenship.

2. Following the hearing, and in the course of the panel deliberating in relation to the merits of the appeal, it became clear to us that there was question in relation to a possible outcome of those deliberations which the parties should be given the opportunity to comment upon and which the panel would benefit from receiving further submissions about. A further hearing was convened on 12th October 2023, at which the parties were invited to make submissions on the following proposition:

   > "If (on the one hand) the Tribunal accepted that there were good reasons for the Secretary of State to take the deprivation decision without warning but (on the other hand) thought that the appeal should be allowed, how would the Secretary of State envisage that the Tribunal (a) phrase and (b) communicate its decision?"

3. The parties decided that they would prefer to have some time to take instructions and provide an exchange of written submissions to address this question. The parties submissions in relation to this issue, which were provided by the respondent on the 19th October, and by the appellant on 26th October 2023, are set out below. We are extremely grateful to both counsel in the case, and those who supported them, for the high quality of the submissions which we received both orally and in writing.

THE FACTS

4. On 27th February 2018 in the Crown Court at Kingston upon Thames the appellant was convicted on his own guilty plea of an offence of conspiracy to remove the proceeds of criminal conduct from England and Wales contrary to section 327 of the Proceeds of Crime Act 2002. The case arose from an investigation by the National Crime Agency into an organised crime group who were involved in high value money laundering, where cash

from undetermined criminal conduct was removed from the UK using flights to European countries. The appellant was part of a conspiracy who engaged in this activity. The appellant's role was to orchestrate the movement of large quantities of cash in suitcases on flights, including the direction and control of couriers who undertook this activity on behalf of the conspiracy. The details of the movements of cash and the involvement of the appellant are set out in a sentencing note prepared for the purposes of the Crown Court sentencing hearing by the prosecution. In total, in accordance with the estimate provided by the investigators, a little short of £8 million was moved out of the UK as a result of the activities of the conspiracy.

5. When sentencing the appellant the Crown Court judge made clear that she was satisfied that the conspiracy was well planned and sophisticated, and that the appellant had taken a leading role in its activities. Having applied the relevant provisions of the sentencing guidelines for the offence concerned, the judge concluded that the appropriate sentence for the appellant, giving a reduction for his guilty plea, was one of imprisonment for six years.

6. On the 22nd January 2021 the respondent decided to deprive the appellant of his British citizenship. The respondent served on the appellant a letter informing him that his status as a British citizen was under review. Also on the 22nd January 2021 the respondent served notice that the appellant had been deprived of his British citizenship on the grounds of "conduciveness to the public good". He appealed this decision to the First-tier Tribunal Immigration and Asylum Chamber ("FtT") and his appeal was dismissed by a panel of FtT judges in a determination dated the 26th April 2022, further details of which are set out below.

7. The substance of the respondent's decision, as set out in the letter accompanying the notice, provided as follows:

> "The reason for my decision is that on the 27th 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 six 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 the 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 that 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 Borders, 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."

8. It appears that consideration of the deprivation of the appellant's British citizenship had been brought to the attention of the respondent by the National Crime Agency in a letter to her dated the 19th October 2020. That letter set out the circumstances of the appellant's offending and his involvement over a protracted period with organised crime, and the conveying of criminal profits in the form of cash to Albania. The circumstances of the offence and the evidence surrounding it led the representative of the National Crime Agency to the view that the level of determination of the appellant and his brother to persist in unlawful activities rendered it "likely that they will continue to pose a risk following completion of their sentences."

9. This communication formed part of the documentation in the package of material presented to the respondent in the form of a minute to support the decision that the appellant should be deprived of his British citizenship. The package of information was supported by advice to the respondent in relation to the exercise of her power to deprive the appellant of his citizenship. Within that minute the background of the appellant's conviction and the circumstances giving rise to it were set out. The sentencing remarks of the judge were quoted. Reference was also made to a submission by Fiona Johnston dated the 13th May 2020 which is set out below, and it was noted that the respondent had agreed to use the deprivation power in cases involving serious criminal convictions, focusing on the highest harm offences. The author of the minute assessed that the appellant met this criterion.

10. The minute went on to assess that there was sufficient information to conclude that the appellant was a dual Albanian-British national and that a decision to deprive him of his citizenship would not render him stateless. The case for deprivation was made within the minute in the following terms:

> "We recommend depriving KOLICAJ G of his British citizenship due to his leading role in serious organised crime. His criminality fits squarely within the parameters for use of the conducive deprivation power set out in Fiona Johnston's submission of the 13th May

> and summarised in paragraph 4. Additionally, the NCA have assessed that the deprivation of KOLICAJ G would negate the risk he poses to the UK based on his role in serious organised criminality. KOLICAJ G's criminal enterprise was facilitated by the ease of travel he enjoyed as a British citizen, using his British passport to transport money out of the UK in order to launder it. It is considered that depriving KOLICAJ G of his British citizenship would be conducive to the public good because it would contribute to preventing and deterring further criminality, in particular from the organised crime group of which he held a senior and controlling role.
>
> Deprivation of citizenship is not sought solely to sanction the criminality in this case but also as a tool to protect the public. KOLICAJ G has been in the UK legally since August 2005. His parents are still living in Albania and he has maintained contact, which is evidenced by the multiple applications he has made to sponsor his parents to visit the UK. He divorced his British citizen wife and remarried in January 2013. The decision to deprive KOLICAJ G of British citizenship will not affect the status of his two children, who were born in the UK in 2013 and 2015 and will remain British citizens, but it will affect the status of his wife, the mother of the children, who lives with them in the UK. She is an Albanian citizen and has applied for leave to remain as his partner, but in order to sponsor under the family rules a sponsor must be British or hold settled status. Further information has been requested and her application will be considered once she replies. If KOLICAJ G is deprived of citizenship before her application is decided, he cannot be her sponsor and she will not be able to obtain LTR as his partner. However, the decision maker would then consider exceptional circumstances and take into account matters such as the children under Gen 3.2 of the Rules. It is therefore highly likely she will be granted 30 months leave outside the rules as a parent of British children. She would be on the 10 year route to settlement (outside the rules) and would have to apply for further leave every 30 months, with leave automatically granted on account of her relationship with her British children. We assess that it is proportionate to deprive KOLICAJ G of his British citizenship to achieve the legitimate aim of preventing serious organised crime. Do you agree?"

11. The minute then proceeded to consider the question of whether or not the appellant should be made the subject of a deportation order, and also the procedure in relation to his deportation. The minute concluded by addressing financial and other legal implications which are of little relevance to the issues in this appeal. It was against the background of this minute that the respondent reached her decision to deprive the appellant of his British citizenship and to make the order that he should be deprived of it for the reasons explained in the letter set out in detail above.

12. The minute was accompanied by a number of annexes addressing matters in greater detail and supporting the observations made within the advice to the respondent. The first annex was the recommendation of the NCA which has been set out above. The second annex addresses the question of statelessness and provided the reasons and evidence for the conclusion that the appellant was a dual Albanian-British citizen. The third annexe addressed the question of the issues arising under the ECHR. It excluded the possibility of the deprivation of the appellant's citizenship giving rise to breaches of articles 2 and 3 of the ECHR. In respect of Article 8 the consideration was as follows:

> "KOLICAJ G's 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. KOLICAJ G has been in the UK legally since August 2005. He has been a British citizen since the 5th February 2009. The full nature of his circumstances will only be known once he makes his representations against both the decision to deprive his citizenship and the decision to deport him to Albania.
>
> KOLICAJ G remarried in 2013 and his wife, an Albanian citizen, has applied for further leave to remain with KOLICAJ G her sponsor. They have two British citizen children, born in 2013 and 2015. If he is deprived of his British citizenship, he may seek to argue that the decision disproportionately interferes with his right to a private and family life and any representations will be given careful consideration.
>
> It is acknowledged that KOLICAJ G has lived in the UK since August 2005. Based on what is currently known about KOLICAJ G any interference with his right to respect for private and family life is justified under Article 8 (2). Such interference would be in accordance with the law and is necessary in the public interest for the prevention of crime based on the nature of the activity attributed to him and as proportionate interference based on the risk he poses to the UK."

13. The fourth annex accompanying the minute addressed the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the welfare of children in making decisions of this kind. It noted that the duty was engaged in the decision which was before the respondent on the basis that the appellant had two children who were both British citizens. The assessment was set out in the following terms:

> "A preliminary assessment has been carried out in regard to the impact of the decision to deport KOLICAJ G to Albania. His daughter is aged 7 and his son is aged 5 and both have already spent time without their father in their life on a daily basis due to the time he has spent in prison. It will be open to them to visit their father in Albania where they have grandparents and extended family. His wife holds a valid Albanian passport and will be able to join KOLICAJ G in Albania, so this is not an insurmountable hurdle. The public interest in deporting KOLICAJ G carries significant weight given the level of his involvement in serious organised criminality.
>
> An initial assessment has been made on the information known and this duty will be kept under review. KOLICAJ G will have the opportunity to make representations against both the decision to deprive him of his British citizenship and the decision to deport him to Albania and any representations will be fully considered. The public interest in deporting KOLICAJ G carries significant weight given the level of his involvement in serious organised criminality. If he makes representations which include the fact that he has children, the best interests of the children will be considered."

14. Subsequent to the decision to deprive the appellant of his British citizenship the respondent wrote to the appellant in relation to the prospect of him being deported. There was no response to that letter on the basis that the appellant's representatives considered that since an appeal had been lodged against the decision to deprive him of his British citizenship this affected the respondent's ability to deport him. That was in error, and on the 8th July 2021 the appellant was served with a deportation order and accompanying correspondence.

THE DECISION UNDER APPEAL

15. The appeal before the FtT panel was advanced on a wide range of points which were characterised in paragraph 19 of the determination as follows: disregarding material considerations which should have been taken into account; procedural impropriety as a result of failing to give the appellant an opportunity to address the risk of reoffending in his case prior to making the decision; irrationality; failing to have regard to the respondent's own policy; and failure to have regard to the principle of proportionality in accordance with EU case law on the question of deprivation of citizenship.

16. Whilst a witness statement had been served on the part of the appellant, at the hearing the appellant chose not to give any evidence. The matter therefore proceeded on the basis of submissions only. The FtT panel set out the legal framework which is rehearsed further below, comprising essentially the provisions of sections 40(2) and 40A, and the explanation of these provisions set out in the recent decisions of the Supreme Court in *Begum v Secretary of State for the Home Department* [2021] UKSC 7 and the Upper Tribunal in *Ciceri* (Deprivation of citizenship appeals: principles) [2021] UKUT 00235. At paragraph 35 of the determination the FtT panel noted that whilst counsel originally instructed in the appeal had identified nine separate issues to be addressed, at the hearing the appellant's representative accepted that to a large extent the first seven of those issues overlapped and were public law arguments relating to the respondent's approach to her decision-making process. The eighth issue was that related to the principle of proportionality under EU law. The ninth issue related to the impact of the decision upon the appellant's article 8 rights. In connection with the article 8 issues it was noted that the appellant had been given permission to work in the UK and was currently employed; his wife has permission to claim benefits and was continuing to do so. The issues that arose in relation to article 8 were therefore confined to his liability to deportation along with the inability to hold a UK bank account or a UK driving licence (it being accepted that the appellant could have a driving licence and bank account which were Albanian).

17. The first issue which the FtT panel considered was whether or not the decision that the condition precedent contained within section 40(2) of the 1981 Act was satisfied in the appellant's case was one which was properly open to the respondent. In respect of that issue the FtT panel concluded at paragraph 38 of their determination as follows:

> "38. In our judgement there is no scope for dispute concerning the nature of the appellant's criminal conduct. That was established by the conviction that followed the appellant's guilty plea, and the basis upon which he agreed he should be sentenced. We are satisfied that it was the conviction, and the summary of his criminal conduct that was the basis upon which he was sentenced, that formed the factual basis for the respondent's conclusion that he was a participant in "serious organised crime" within the meaning of that term as used in chapter 55. 4. 4 of the Nationality Instructions. We are satisfied that it was the conclusion that he had colluded with others to commit the serious crime of removing criminal property from England and Wales which formed the basis of the respondent's consideration of whether or not to exercise her discretion."

18. The FtT panel then turned to consider the arguments raised in relation to Article 8. They undertook a careful examination of all of the relevant factors associated with the appellant's private and family life, focusing in particular on those which might be affected

by the decision to deprive him of his British citizenship. In relation to the effect of the decision making the appellant liable to deportation the FtT panel concluded that the impact of this point was in reality circular, as it involved the argument that because the appellant was now liable to deportation it was disproportionate to make a decision to deprive him of his citizenship. The appropriate forum for the consideration of such arguments would be in the context of any decision to deport him. Thus, the FtT panel were unimpressed by this argument. The appellant's second point that there may be a significant period prior to determining whether he will be removed from the UK or granted leave to remain was simply a "limbo" argument which carried little weight. Finally, the argument in relation to the appellant's inability to hold a UK bank account or driving licence did not have a material impact on the core aspects of the appellant's right to a private life, in particular on the basis that he was entitled to have an Albanian bank account and driving licence. The FtT panel therefore dismissed the appellant's article 8 arguments.

19. The FtT panel then turned to the public law arguments, the first of which being that the respondent failed to take account of the appellant's propensity to commit further offences and his risk of reoffending, and thus the risk of serious harm. The FtT panel rejected this argument on the basis that the respondent had before her the assessment made by the NCA and a summary of it. That assessment was reasonable and there was no duty on the respondent to undertake any further inquiries. The FtT panel placed reliance upon the case of *Pham* [2018] EWCA Civ 2064, in which the Court of Appeal held that there was no need for the respondent to have before her a current assessment of the risk of harm or re-offending in order to make her decision. The FtT panel went further and concluded that even if there had been no consideration of the risk posed by the appellant that would not have been fatal to the respondent's decision on the basis that the condition precedent under section 40(2) of the 1981 Act does not include any particular level of future risk of any particular type of reoffending.

20. The second issue raised by the appellant was that the respondent's decision was procedurally flawed because she failed to notify the appellant that she was considering exercising her power to deprive the appellant of his citizenship and provide him with an opportunity to offer evidence in response to this potential decision. The appellant would have provided evidence to establish a lack of any propensity to reoffend. The FtT panel rejected this argument on the basis that it was not necessary for the respondent to make any inquiry into the issue of propensity to reoffend. Furthermore, section 40(5) of the 1981 Act did not incorporate any requirement for giving notice of a potential decision within the statutory framework. In the present case the FtT panel considered that there were sound practical reasons for not notifying the appellant, namely that in the circumstances of an individual with dual nationality it would afford them the opportunity to renounce their other citizenship and thereby frustrate the opportunity to deprive them of their British citizenship since to do so after they had renounced their other citizenship would render them stateless. The requirements of fairness did not therefore require the appellant to be given an opportunity to respond to the fact that the respondent was minded to make a deprivation order in his case.

21. The appellant's issues three to seven were apparently characterised at the hearing as submissions based upon the suggested failure of the respondent to apply her own policy to the appellant's case. The relevant extracts of the policy are set out below, but it suffices at this stage to note that the FtT panel were wholly unpersuaded that the appellant's offending could not properly be characterised as falling within the relevant terms of the policy published by the respondent in respect of deprivation of citizenship, and as further explained in the document from Fiona Johnston dated the 12th May 2020 (which the FtT panel concluded was not a new or separate policy, but simply an exposition of the policy as publicly set out). It was the FtT panel's judgment that the intention of the policy was to focus upon those involved in serious organised crime and the highest harm offences with particular focus on violence, sexual, and other high harm offences such as organised drug trafficking. The FtT panel was satisfied that the appellant's offending fell four-square within that policy.

22. Finally, the FtT panel rejected the arguments based upon proportionality as derived from EU law. They were unconvinced that it added anything to the arguments which they had already considered, and moreover there was no evidence of any cross-border element to the appeal. Furthermore, the decision under appeal had been made after the completion of the UK's withdrawal from the EU and the appellant was unable to identify anything that he had lost in terms of rights as an EU citizen as a consequence of the decision under appeal.

RELEVANT POLICY

23. The respondent publishes policy in relation to the use of the powers contained in section 40 of the 1981 Act. Having set out the essence of the powers the policy addresses the application of section 40(2) by setting out a definition of conduciveness to the public good in the following terms:

> "**"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."

24. On 13th May 2020 Ms Fiona Johnston, an official in the respondent's Migrant Criminality Policy unit, sent to the respondent amongst others a submission relating to the use of the power to deprive a person of their British citizenship. The recommendation to the respondent, which it appears was accepted, was that she should "use the deprivation power against people guilty of organised crime, but limit its use to the most serious and high-profile cases". The respondent should also agree that the deprivation power should be used even in cases where deportation cannot be pursued because of the "nature of the crime and the public interest in taking action".

25. In the section of the submission described as "Discussion" the following explanation of the recommendation is provided.

> "In 2015 the power was tested on some members of the Rochdale child sexual exploitation gang…. Following successful court judgments in these cases the previous Home Secretary agreed to formalise use of the "conducive" deprivation power for cases

> involving serious organised crime (SOC) and made a commitment to party conference that serious criminals would be stripped of their citizenship.
> …
> Our aim in serious organised crime (SOC) cases is to deprive individuals of British citizenship and deport them from the UK. However, deportation may not always be possible: the authorities of their other country of nationality may not accept the person is one of their nationals, we may be reliant on co-operation from foreign governments to obtain a travel document or the person may have a strong human rights claim to remain in the UK. Nevertheless, even if deportation is unlikely, deprivation means that an individual loses the benefits of British citizenship such as passport facilities and access to some benefits and services.
> …
> We consider there is a good case to pursue deprivation in SOC cases as part of a wider government approach to tackling serious and organised crime; but only in the most serious and high-profile cases. A key objective of the government's serious organised crime strategy, published in November 2018, is "relentless disruption and targeted action against the highest harm serious and organised criminals and networks". It sets out the intention to maximise the use of immigration and nationality powers against individuals involved in serious organised crime, including, where appropriate, depriving individuals of British citizenship.
> To mitigate the risks of expanding the use of deprivation to SOC cases we expect the number of serious criminality cases meeting the threshold for deprivation to be very low. Focus will be given to organised crime, particularly that involving violent, sexual and other high harm offences such as trafficking, organised drug importation and child sexual exploitation. We will make clear that decisions must be reasonable and proportionate, balancing the impact deprivation will have on the individual with the prevailing public interest in denying them the privilege of holding British citizenship. Other considerations will include the organised nature of the crime and the individual's role, the sentence handed down (including any sentence in remarks from the court), the individual strength of ties to the UK and whether deprivation would make them stateless. When necessary, expert opinion will be sought to establish whether the person holds another nationality."

THE LAW

26. The power used by the respondent to deprive the appellant of his British citizenship in this case is provided by section 40(2) of the 1981 Act. This provides as follows:

> "40(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."

This power is subject to the proviso under section 40(4) of the 1981 Act that an order may not be made using this power if the respondent is satisfied that it would make a person stateless, unless section 40(4A) applies.

27. In addition to the type of case contemplated by section 40(2) of the 1981 Act, and for the sake of completeness, by virtue of section 40(3) of the 1981 Act the respondent is given the power to deprive a person of citizenship which has resulted from registration or naturalisation which was obtained by means of fraud, false representation or concealment of a material fact. The present case was not, as appears from the facts set out above, concerned with either the power under section 40(3) or the proviso under section 40(4).

28. Section 40(5) of the 1981 Act contains a procedural requirement which is specified as follows:

> "40(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 persons right of appeal under section 40A(1)…"

29. The right of appeal provided by section 40A of the 1981 act is set out as follows:

> "40A(1) A person-
> (a) who is given notice under section 40(5) of a decision to make an order in respect of the person under section 40, or
> (b) in respect of whom an order under section 40 is made without the person having been given notice under section 40(5) of the decision to make the order,
> may appeal against the decision to the First-tier Tribunal."

30. The correct approach to the question of the scope of an appeal in relation to a decision made pursuant to the power granted by section 40(2) was the subject of consideration by the Supreme Court in the case of *Begum,* in particular from paragraphs 63 to 71 in the judgment of Lord Reed (with whom the other members of the court agreed). It is unnecessary to set out those paragraphs in detail since they are fully cited in subsequent decisions to which we are about to refer. In particular the approach specified in *Begum* for appeals of this kind was considered by the Upper Tribunal in the case of *Ciceri*. It is, of course, important to emphasise that the case of *Begum* is of the highest authority in relation to not merely the power under section 40(2), but also the scope of the appeal jurisdiction which is being exercised on an appeal under section 40A of the 1981 Act. Subsequent to *Ciceri*, the Upper Tribunal returned to the question of the appropriate approach to the scope of an appeal of this kind in the case of *Chimi (deprivation appeals; scope and evidence) Cameroon* [2023] UKUT 00115 (IAC) in which the approach of the Upper Tribunal in *Ciceri* to the scope of the appeal jurisdiction in respect of cases engaging the power to deprive a person of their British citizenship was endorsed. The headnote to the decision in *Chimi* sets out a staged approach to the consideration of the merits of an appeal of this kind, and specifies the correct analysis to be undertaken, in the following terms:

> "*(1) a tribunal determining an appeal against a decision taken by the respondent under section 40(2) of the British nationality act 1981 should consider the following questions:*
> *(a) did the Secretary of State materially err in law when she decided that the condition precedent in section 40(2) or 40(3) of the British nationality act 1981 was satisfied? If so, the appeal falls to be allowed. If not,*
> *(b) did the Secretary of State materially err in law when she decided to exercise her discretion to deprive the appellant of British citizenship? If so, the appeal falls to be allowed. If not,*
> *(c) weighing the lawfully determined deprivation decision against the reasonably foreseeable consequences for the appellant, is the decision unlawful under section six*

> *of the Human Rights Act 1998? If so, the appeal falls to be allowed on human rights grounds. If not, the appeal falls to be dismissed.*
>
> *(2) In considering questions (1)(a) and (b), the tribunal must only consider evidence which was before the secretary of state or which is otherwise relevant to establishing a pleaded error of law in the decision on the challenge. Insofar as Berdica [2022] UKUT 276 (IAC) suggests otherwise, it should not be followed.*
>
> *(3) In considering question (c), the tribunal may consider evidence which was not before the secretary of state but, in doing so, it may not revisit the conclusions it reached in respect of questions 1(a) and (b)."*

31. This structured approach to scrutiny of the Secretary of State's decision in a deprivation case of this sort is to be applied in the context of the present appeal. It is explained in greater detail so far as the respondent's discretion is concerned in paragraphs 57 to 60 of the decision in *Chimi.*

32. A part of the case advanced by the appellant related to the consideration of future risk as part and parcel of the assessment as to whether or not the respondent was entitled to conclude that it was conducive to the public good for the appellant to be deprived of his citizenship. The case of *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064; [2019] Imm AR 296 considers the question of whether or not it was necessary for the respondent to be satisfied that there was a current risk of harm posed by a person who was being considered for deprivation of citizenship in order for the power under section 40 to be exercised. The conclusion as to the correct interpretation of section 40 on this point was set out in the judgement of Arden LJ (with whom the rest of the court agreed) in the following terms:

> "52. The question whether the risk of current harm is always required is first and foremost a question of the interpretation of section 40. The material words are that "the Secretary of State is satisfied that deprivation is conducive to the public good". In my judgment, it is plain that what must be current is the Secretary of State's opinion as to what is conducive to the public good. In my judgment, this requirement could be satisfied in many ways, including the conclusion that the Crown should not have to provide protection to a person who has in the past so fundamentally repudiated the obligations which he owes as a citizen. The precise grounds are a matter for the Secretary of State. There is nothing to make it a precondition that there should be a risk of current harm."

33. This approach to the consideration by the respondent of whether it will be conducive to the public good to deprive a person of their British citizenship and whether the discretion should be exercised so as to do so affords a broad canvas for the consideration of these issues. As the analysis in *Chimi* makes clear, there are two stages to the exercise of that discretion, firstly the question of whether the condition precedent has been established and, secondly, the question of whether if the condition precedent is made out whether in all the circumstances of the case the respondent's discretion should be exercised so as to deprive the person in question of their citizenship.

34. An aspect of the appellant's case depends upon submissions that the process adopted by the respondent in this case breached the requirements of procedural fairness. The principles in relation to this have their root in the decision of the House of Lords in the case of *R v Secretary of State ex p Doody* [1994] 1 AC 531, 560, in particular in the

opinion of Lord Mustill. These principles, and the way in which they have been understood in subsequent authorities, were applied in an immigration context in the case of *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673; [2019] Imm AR 1152. This case concerned a number of appellants who had been granted leave to enter and remain in the United Kingdom as Tier 1 (General) migrants, a status which entitled them to apply for indefinite leave to remain after five years on the basis of demonstrating a given level of earnings in the previous year. It was the policy of the respondent to refuse such applications where, as a result of deliberate dishonesty, there was a significant discrepancy between the earnings claimed in the application and the earnings declared in the applicant's tax return. The Court of Appeal held that where the respondent was minded to refuse an application on the basis of the applicant's dishonesty, founded upon the discrepancy between the earnings declared in the application and those declared in a tax return, procedural fairness required that the respondent indicate clearly to the applicant that the respondent suspected that the applicant had been dishonest and to provide the applicant with an opportunity to respond to the respondent's suspicions. Procedural fairness also required that the respondent take account of this response before arriving at a final decision in the case, and in particular prior to drawing the conclusion that the applicant had been dishonest (see paragraphs 55 and 56).

35. In *Balajigari* it was submitted by the respondent that there was no need for this "minded to" procedure on the basis that there was an opportunity for the decision to be reconsidered by a process of administrative review. The court rejected this argument, and observed:

> "59. In the first place, although sometimes the duty to act fairly may not require a fair process to be followed before a decision is reached (as was made clear by Lord Mustill in the passage in *R v Secretary of State for the home department ex p Doody* [1994] 1 AC 531 which we have quoted earlier… fairness will usually require that to be done where that is feasible for practical and other reasons. In *Bank Mellat v HM Treasury (No2)* [2014] AC 700, Lord Neuburger of Abbotsbury PSC (after having cited at paragraph 178 the above passage from *ex p Doody*) said at paragraph 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 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, in practicality 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."
>
> 60. This leads to the proposition that, unless the circumstances of a particular case make this impractical, 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."

36. The appellant relies upon these authorities to support the submission that it was procedurally unfair for the respondent to reach a decision in his case without affording the opportunity for him to respond to the concerns raised in his case prior to the final decision being made.

37. The appellant also relies upon the principles derived from the well-known speech of Lord Diplock in the case of *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065 and submits that in this case the respondent failed to take the steps reasonably required of her to acquire the relevant and necessary information to make the decision in this case. These principles are helpfully summarised in the decision of the Divisional Court in *R (on the application of Plantagenet Alliance Limited) v Secretary of State for Justice and others* [2014] EWHC 1662 (QB); [2015] 3 All ER 261 at paragraphs 99 and 100 in the following terms:

> "99. A public body has a duty to carry out sufficient inquiry prior to making its decision. This is sometimes known as the "Tameside" duty since the principle derives from Lord Diplock's speech in *Secretary of State for Education and Science the Tameside MBC* [1977] AC 1014 where he said "the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"
> 100. The following principles can be gleaned from the authorities:
> (1) the obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
> (2) subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (*R(Khatun) v Newham LBC* [2005] QB 37 at paragraph 35 per Laws LJ)
> (3) the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neil LJ in *R (Bayani) v Kensington and Chelsea Royal BC* (1990) 22 HLR 406).
> (4) the court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schieman J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301, cited with approval by Laws LJ in *R(Khatun) v Newham LBC* supra at paragraph 35).
> (5) the principle that the decision- maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in *R (London Borough of Southwark) v Secretary of State for Education*).
> (6) the wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (*R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G)."

38. Finally in connection with the legal principles relating to the issues arising in the appeal, the appellant relies upon the case of *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245. The decision of the Supreme Court is said to be relevant to the internal departmental submission which we have set out at paragraphs 24-25 above, since it was relied upon by the respondent but was not in the public domain.

SUBMISSIONS AND CONCLUSIONS

39. Whilst in the form in which permission was granted the appellant's case was advanced on no less than 14 grounds, many of which were overlapping and duplicitous, Mr Chirico on behalf of the appellant corralled the appellant's case into three themes covering the submissions contained in the grounds, supported by a very useful synopsis of what he submitted were the relevant legal principles. This led to an inevitable recasting of the arguments which were presented to the FtT panel, albeit covering in substance many of the points which were addressed by the FtT in their determination. The three themes of the appellant's case as advanced at the hearing before us were, firstly, procedural fairness; secondly, material considerations; and, thirdly, the *Tameside* duty.

40. At the outset of his submissions Mr Chirico emphasised, in a way which perhaps was not before the FtT, the structure of the decision being taken by the respondent as explained in the case of *Chimi*. The provisions of section 40(2) of the 1981 Act require the respondent to assess first whether the condition precedent (namely that it is conducive to the public good for the person to be deprived of their citizenship) has been established in the circumstances of the case which she is considering and then, if it has, to consider whether in the light of all that she knows about the case she should exercise her discretion to deprive the person in question of their citizenship. The decision, and in particular the exercise of discretion if the condition precedent is made out, will involve the evaluation of a wide variety of considerations.

41. In respect of the decision which the respondent made, the appellant draws attention to a number of features upon which reliance is placed. Firstly, it is submitted that it does not appear from the terms of the respondent's decision that the respondent in fact ever addressed the exercise of her discretion to deprive the appellant of his citizenship having been satisfied that the condition precedent was met. The decision does not contain any separate identification of the need for the respondent to exercise a discretion in order to lawfully use her power, and what the respondent made of the broad range of considerations about the particular circumstances of the appellant and his family beyond the assessment of conduciveness which were contained in the documentation she was provided with. In short, the decision-making process appears to stop once it has been determined by the respondent that it is conducive to the public good to deprive the appellant of his citizenship and does not engage in the broader exercise of discretion required by section 40(2).

42. In respect of procedural fairness the appellant submits that it was unfair for the respondent to proceed to make the decision to deprive the appellant of his citizenship without affording him the opportunity to make representations in relation to that decision. The

appellant had material which he would have wished to put before the respondent in relation in particular to his risk of reoffending. There was a risk assessment undertaken by the Probation Service on 26th March 2021, in which overall it was assessed that the appellant presented a low risk of reoffending. This was an assessment which was not before the respondent (the only assessment being that of the NCA based solely on the circumstances of the appellant's offending) and which was relevant to both the question of conduciveness and also the overall exercise of the respondent's discretion. Furthermore, in this context, it was unfair of the respondent to rely upon the NCA assessment of risk without permitting the appellant an opportunity to comment upon it.

43. In connection with the appellant's submissions relating to procedural fairness, the appellant draws attention to the several places in the documentation before the respondent where there is reference to further information which would be provided to the respondent following the receipt of further submissions from the appellant. For instance, in the annexe related to the assessment of the impact of the decision upon the appellant's rights under the ECHR, the author of the annexe specifically references that the respondent will have a fuller understanding of the merits of any claim by the appellant in respect of his article 8 rights after the receipt of further evidence from him in response to the potential decision to deprive him of his citizenship. It appears therefore that the respondent's officials acknowledged the need for the appellant to be given a chance to respond to the respondent's concerns before a decision was made.

44. In support of these contentions the appellant draws attention to the recent decision of the Upper Tribunal in *Hassan v Secretary of State for the Home Department* DC/00023/2021; UI-2022-00779 in which the Upper Tribunal allowed an appeal in relation to a decision of the respondent to deprive an appellant of his citizenship on similar grounds to those in this case, on the basis that the respondent had failed to provide the appellant with an opportunity to make representations before doing so.

45. The appellant's points in relation to the assessment of future risk, including the existence of the favourable Probation Report, bleed into the submissions made about the failure to take account of material considerations and also the failure to undertake further necessary enquiries in accordance with the *Tameside* duty. The appellant further submits that the Fiona Johnston statement which was used in order to make the decision in the present case was in effect a secret policy, which was not in the public domain until it was disclosed in this case, and therefore the reliance placed upon it by the respondent was unlawful. Furthermore, and in any event, in respect of the respondent's policy there was no explanation provided as to why it was considered that the crimes which the appellant had committed were properly to be characterised as being the most serious and high profile so as to qualify under the policy for deprivation of citizenship.

46. Turning to article 8, the appellant submits that in all the circumstances the arbitrariness of the respondent's decision and the lack of proper procedural safeguards also amounted to a breach of article 8, and the appeal should be allowed on that basis.

47. In response to these submissions the respondent addressed, firstly, the question of procedural fairness. On behalf of the respondent it was submitted that it was not unfair to

proceed with a decision in the relation to the appellant when the effect of permitting the appellant to make representations would have been to frustrate the opportunity for the respondent to deprive the appellant of his citizenship before a decision could be reached. It was submitted that it was obvious to the respondent that if the appellant had been put on notice of the respondent's potential decision he would have immediately renounced his Albanian citizenship thus rendering any decision to deprive him unlawful as it would have caused him to be stateless. This feature of the decision in the present case justified the respondent's failure to invite the appellant to make representations prior to depriving him of his citizenship.

48. In relation to the question of reasons, it was submitted on behalf of the respondent that the reasons in relation to the decision were adequate and it was not necessary for the respondent to give reasons for her reasons. It was clear that from the documentation that the basis of the respondent's decision was the seriousness of the offending in which the appellant had been engaged. In response to the appellant's contention that there was no sign in the decision that the respondent had exercised her discretion or provided reasons in that connection, it was submitted that when the respondent stated that it was conducive to the public good to deprive the appellant of his citizenship that was reasoning both in respect of the condition precedent and also in respect of the exercise of discretion. It was submitted that it could be deduced from this that the respondent had attached little or no weight to any of the other factors that had been drawn to her attention in the documentation before her and the seriousness of the offending was regarded by her as the overriding consideration in the case.

49. So far as the Fiona Johnston minute was concerned the respondent submitted that this was not a freestanding policy as suggested by the appellant, but was rather the thinking of one of the respondent's officials in relation to the approach to the application of the policy, and in particular what might amount to a high profile offence. The policy of the respondent was unchanged and was properly reflected in the respondent's published material set out above. In so far as the application of that policy is concerned the nature of the offences committed by the appellant were perfectly properly characterised as serious and high harm offences.

50. In respect of the points raised by the appellant relating to material considerations, and in particular the risk of future re-offending, in reliance upon the decision of the Court of Appeal in *Pham* it was submitted that the was no requirement to take the risk of future offending into account. It was contended that in fact the respondent did not take the NCA risk assessment into account in making her decision, or that it was given little or no weight in the decision. Prior offending was contended to have been the sole basis for the making of the decision in the present case.

51. In respect of the submissions made by the appellant about the application of article 8, the respondent submitted that there was no breach of the procedural requirements of article 8 in the decision that the respondent reached. In any event, the present proceedings addressed any concerns in respect of the procedural aspects of article 8, and in relation to its substantive requirements the FtT panel had been correct in their assessment that there was no substantive breach of the appellant's article 8 rights.

52. Our conclusions in relation to these submissions commence with an analysis based upon the framework provided by, firstly, *Ciceri* and, subsequently, *Chimi* based in their turn upon the analysis given by Lord Reed in *Begum* which is, as we have noted above, of the highest authority. We start, therefore, with the question of whether or not the respondent erred in law in reaching her conclusion that it was conducive to the public good for the appellant to be deprived of his British citizenship. A number of issues are raised by the appellant in connection with that issue and our views are as follows.

53. Firstly, we are entirely satisfied that the minute from 13 May 2020 from Fiona Johnston was not a secret or alternative policy in relation to decisions of this kind. The paper which she provided was simply a discussion or explanation of the substance of the current policy, which was the policy which the respondent applied in reaching her decision. It follows that there is no substance in the appellant's case that the decision in relation to him was as the result of the application of some "bottom drawer" or unpublished policy and unlawful as a consequence.

54. The question which then arises is whether there is any force in the appellant's contention that the policy was not properly applicable to his case and that, as a consequence, the decision to apply that policy to his case and deprive him of his British citizenship was unlawful. We are unable to accept this argument. As is clear from the material which has been set out above, and which was before us, the appellant was convicted of a particularly serious piece of offending and received as a consequence a significant sentence of imprisonment. The seriousness of the offence can be gauged in a number of ways. Firstly, the offence involved the movement of a very significant amount of money on a repeated basis over a distinct period of time. Secondly, as the respondent observed, it involved the direction of others and collusion with them in the movement of the money. These features betray the fact that the appellant was involved in the activities of a serious organised crime group at the time. It follows that in our view the opinion of the respondent that the appellant's offending engaged participation in serious organised crime as understood by paragraph 55.4.4 of the Nationality Instructions was unimpeachable.

55. Turning to the question of material considerations, and in particular the assessment of the future risk to the public from further offending by the appellant, in our view care needs to be taken. It appears from the decision, and this is the submission of the respondent, that the decision was taken without any reference to future risk at all, including that provided and before her in the material from the NCA. The submission made by the appellant is, therefore, that the respondent was obliged to take account of the question of the risk of future offending in making her assessment of whether the condition precedent was satisfied. Allied to this is the submission that it was unreasonable of the respondent to proceed to determine the appellant's case without making further enquiries in relation to the risk of him reoffending, which would inevitably have brought the recent Probation Service report into account with its conclusion that the appellant presented a low risk.

56. We accept the respondent's submission that she was not obliged or required to have regard to current harm as a pre-condition to her conclusion on the condition precedent that it was conducive to the public good for the appellant to be deprived of his British

citizenship. This follows directly from paragraphs 52 and 53 of the judgment of Arden LJ in *Pham*. As Arden LJ points out, whether the risk of current harm is always required to be taken into account in the assessment is primarily a question of statutory construction, and there is nothing to make that consideration a pre-condition of finding that it is conducive to the public good for deprivation to occur. Arden LJ also makes clear that the requirement that it be conducive to the public good for a person to be deprived of their citizenship could be satisfied in many ways. It follows that whilst the respondent is not required to take account of future risk of harm in the context of deciding whether the condition precedent is satisfied, it is a factor which it is open to her to take account of, and it is not difficult to imagine cases where this would be the case. Furthermore, it may well be a factor at the stage subsequent to the satisfaction of the condition precedent at which the respondent considers whether she should exercise her discretion in all the circumstances of the case to deprive the person of their British citizenship. What follows is that the respondent's conclusion that the condition precedent in the present case was made out without the need to have any regard to the current risk of harm presented by the appellant was not unlawful. It was open to the respondent to take that risk into account, but her leaving it out of account altogether was not an error of law.

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.

59. In the course of the respondent's submissions following the hearing on the 12th October 2023 reference has been made to the recent decision on the 13th October 2023 of SIAC in the case of *D5, D6 and D7 v Secretary of State for the Home Department* SC/176-178/2020, in which at paragraphs 88 to 94 it was concluded that in the particular circumstances of that case the respondent had acted lawfully in depriving those appellants of their citizenship or excluding them from the UK without affording them the opportunity to make representations about those decisions. Beyond noting that there may be some possible parallels between that case and the present appeal we do not consider that this case is of any particular significance to our decision. In the light of the authorities which have been set out above it is axiomatic that the requirements of fairness will be shaped by a close examination of the facts of the individual case which is under consideration. There are significant differences between the facts of this case and that of *D5, D6 and D7,* and thus whilst the decision of SIAC in that case is illustrative of the application of the principles it is of no greater moment in the determination of the requirements of fairness in the present case. Our reasons for concluding that the requirements of fairness did not extend to providing the appellant with an earlier opportunity to make representations prior to the decision are those which have been set out above.

60. It was further observed in the respondent's submissions in relation to the question posed on the 12th October 2023 that the value of making a decision without notice to the recipient exists only at the beginning of the decision making process. The respondent contends that once individuals are on notice of a deprivation decision and have instigated an appeal they are likely to become aware of options to frustrate the decision, such as renunciation, and that if they are minded to take such an option they will almost inevitably do so well before a decision is due at the second stage appeal before the Upper Tribunal. Thus it appears that the point taken by the respondent in support of her argument that fairness did not require her to provide the appellant with the opportunity to make submissions prior to a decision (on the basis that this would tip off the appellant and trigger actions to frustrate this decision) do not apply to these proceedings, but are solely relevant to the making of the initial decision.

61. It follows from the conclusions which we have reached above that we are satisfied that there was no public law error of the kind contended for by the appellant affecting the decision of the respondent that the condition precedent had been satisfied. The next stage of the analysis required by *Ciceri* and *Chimi* is to address the question of whether there was any error of law in the decision of the respondent, having concluded that the condition precedent was satisfied, to exercise her discretion to conclude that in all the circumstances of the case it was appropriate to make the decision to deprive the appellant of his citizenship. This question arises from the way in which section 40(2) of the 1981 Act is framed: having concluded that the condition precedent is satisfied the section then

provides that the respondent “may” deprive the appellant of British citizenship. Establishment of the condition precedent does not automatically require that deprivation should be ordered. There may be a wide range of matters encompassed in the circumstances of the case which could bear on this exercise of discretion and which the respondent may take into account in reaching her decision.

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 exercise the discretion conferred by statute, 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 Borders, 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.

66. It follows that for the reasons which we have given we have reached the conclusion that there is an error of law in the decision which the respondent made in this case. The question then arises as to whether or not this error had a material impact on the decision which the respondent reached. In the absence of the respondent undertaking the exercise of her discretion we are not prepared to guess what conclusion the respondent might reach were she to exercise her discretion. In these circumstances it follows that the decision of the First-tier Tribunal must be set aside and the appeal allowed.

Notice of decision

The appeal pursuant to section 40A(1) is allowed.

Signed Ian Dove Date 11th November 2023

The Hon. Mr Justice Dove
President of the Upper Tribunal
Immigration and Asylum Chamber