



**Seminar organized by the Supreme
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***“Public order, national security and the rights
of the third-country nationals in immigration
and citizenship cases”***

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Answers to questionnaire: United Kingdom



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**Public order, national security and the rights of third-country nationals in immigration
and citizenship cases**

United Kingdom

IMMIGRATION

Legislative framework and substantive issues

Control of entry or stay (non-deportation)

The rules governing control of entry and stay are largely contained in the Immigration Rules (the “Rules”). These are detailed statements by a minister of the Crown as to how the Crown proposes to exercise its executive power to control immigration.¹ The Immigration Act 1971 (the “1971 Act”)² contains provision about what the Rules must contain and how parliamentary approval of the Rules should be obtained. However, the 1971 Act does not authorise the making or changing of the Rules. They are therefore not delegated legislation; however they have acquired a status of “quasi-law”.³

Criminal Convictions

- The Rules bar those with convictions from gaining entry or settlement in the UK for indefinite or definite time periods.
- Mandatory exclusion:

Length of sentence	Time bar to entry into the UK (para 320(2))	Time bar for qualification for indefinite leave to remain (para 322(1C))
4 years or more	Indefinite	Indefinite
12 months to 4 years	10 years	15 years
Less than 12 months`	5 years	7 years
Non-custodial sentence within 24 months prior to date the		24 months

¹ *Odela v SSHD* [2009] UKHL 25, at [6].

² <http://www.legislation.gov.uk/ukpga/1971/77>

³ *SSHD v Pankina* [2010] EWCA Civ 719.

application is decided		
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- Convictions that would otherwise become ‘spent’ by virtue of the Rehabilitation of Offenders Act, do not do so for the purposes of any immigration decisions to grant or refuse persons leave to enter or remain in UK or to remove or deport persons from the UK or in respect of nationality decisions.⁴
- Paras 320(18A) and (18B) (entry) and 322(5A) (leave to remain) provide for discretionary exclusion on the basis of conviction for or admission of an offence within the last 12 months which is recorded on the criminal record albeit with a non-custodial or out of court disposal. It is relevant to the exercise of the discretion whether the person is a persistent offender who shows a particular disregard for the law or the offending has caused serious harm.

Exclusion for the public good

- Refusal of leave to enter or entry clearance or cancellation of leave to enter or remain on arrival is mandatory where the Secretary of State for the Home Department (“SSHD”) has personally directed that that person’s exclusion from the UK is conducive to the public good (paras 320(6) and 321A(4)).
- Even where there is no such direction, leave should normally be refused (320(19)) or is to be cancelled (para 321A(5)) where the immigration officer deems the exclusion from the UK to be conducive to the public good for example, in light of the person’s character, conduct or associations.
- Refusal on “conductive to the public good” grounds may therefore result from a prior ban imposed by the SSHD or an on-the-spot decision by an immigration officer. Examples of prior bans include on Ku Klux Klan imperial wizard Bill Wilkinson and US Nation of Islam leader Louis Farrakhan.⁵
- In August 2005, the Home Office published an indicative list of “unacceptable behaviours” which would trigger consideration of exclusion.⁶ The list was re-published in 2015, in an answer to a PQ:

⁴ UK Borders Act 2007, s.56A.

⁵ Upheld by the Court of Appeal in *R (on the application of Farrakhan) v SSHD* [2002] EWCA Civ 606.

⁶ Home Office, press release, 124/2005 ‘Tackling Terrorism-Behaviours unacceptable in the UK’, 25 August 2005 (available from Statewatch website <http://www.statewatch.org/news/2005/aug/07uk-terr-behaviour.htm>)

The list of unacceptable behaviours is indicative rather than exhaustive. It covers any non-UK national whether in the UK or abroad who uses any means or medium including:

- writing, producing, publishing or distributing material;
- public speaking including preaching
- running a website; or
- using a position of responsibility such as teacher, community or youth leader

To express views which:

- foment, justify or glorify terrorist violence in furtherance of particular beliefs;
- seek to provoke others to terrorist acts;
- foment other serious criminal activity or seek to provoke others to serious criminal acts or;
- foster hatred which might lead to inter-community violence in the UK.⁷

- A 2009 Home Office press release gave some details about the number of people excluded from the UK between August 2005 and March 2009 under the policy:

In the period from August 2005 to 31 March 2009, a total of 101 individuals have been excluded from the UK for having engaged in unacceptable behaviour. Of these 101 individuals, a total of 22 were excluded by the Home Secretary in the period from 28 October 2008 to 31 March 2009.

This figure comprises 72 individuals excluded for fomenting, justifying or glorifying terrorist violence in furtherance of particular beliefs; two individuals excluded for seeking to provoke others to terrorist acts; 18 individuals excluded for fomenting other serious criminal activity or seeking to provoke others to serious criminal acts; and nine individuals excluded for fostering hatred which might lead to inter-community violence in the UK.

The individuals concerned include animal rights extremists, right to life extremists, homophobic extremists, far-right extremists, as well as advocates of hatred and violence in support of their religious beliefs.

- On-the-spot refusals are used where someone is given leave to enter by the immigration officer and passes through to Customs where drugs are discovered.⁸ The Modernised Guidance suggests other reasons for a refusal on conducive grounds would include extreme views which might lead to civil unrest or offences by others, evidence of involvement in war crimes or crimes against humanity, a threat to national security or a concern that admitting

⁷ Written Question HL4168, answered on 22 January 2015, available at <http://www.parliament.uk/written-questions-answers-statements/written-question/lords/2015-01-14/HL4168>

⁸ As in *Villone v SSHD* [1979-80] Imm AR 23.

the person could unfavourable affect foreign policy.⁹

- Home Office policy guidance to staff handling visa applications gives an indication of the type of behaviour which might warrant refusal under paragraph 320(19):

“Low-level criminal activity. Association with known criminals. Involvement with gangs. Pending prosecutions. Extradition requests. public order risks. Prescribed organisations. Unacceptable behaviours. Subject to a travel ban. War crimes. Article 1F of the refugee convention. Deliberate debiting. Proceeds of crime and finances of questionable origins. Corruption. Relations between the UK and elsewhere. Assisting in the invasion of the immigration control. Hiring illegal workers. Engaging in deceitful or dishonest dealings with Her Majesty’s Government”¹⁰

- In determining whether a person should be refused admission on public good grounds the discretion is wide but the reasons must not be trivial or light.¹¹ However, this has not prevented refusals for possession of trivial amounts of cannabis.¹² Drug smuggling cases the offender or suspect is unlikely to obtain admission. Past dishonest deception is also covered by the power to deem deportation conducive to the public good.¹³ Refusal of entry on conducive good grounds based on serious deception, past or present is unlikely to be struck down as unreasonable on a judicial review challenge.¹⁴
- Leave to enter was refused on public good grounds to a man who was attempting to come to the UK for a marriage, who’s bride-to-be was only 14.5.¹⁵ This situation is now covered by para 277 of the Rules which provides that entry clearance, leave to enter, leave to remain or variation for leave as a spouse of civil partner will not be granted if the applicant or sponsor is under 18 on the date of arrival in the UK or leave to remain/ variation of leave would be granted. The public good rule has also been invoked to exclude a man who obtained his prior residence status by a sham marriage.¹⁶
- Refusal of variation or further leave, or curtailment of existing leave, may occur if it is deemed undesirable to permit the applicant to remain in the UK in light of his/her character,

⁹Modernised Guidance: General Grounds for Refusal: Considering entry clearance, Section 2, Version 28.0, published 10 April 2017 p.62

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607623/GGFR-Section-2-v28.pdf

¹⁰ Home Office, Entry Clearance Guidance, RFL09, 14 November 2013

<https://www.gov.uk/government/publications/when-can-i-refuse-on-character-conduct-or-associations-rfl09-paragraph-32019/when-can-i-refuse-on-character-conduct-or-associations>

¹¹ *Scheele v immigration Officer, Harwich* [1976] Imm AR 1.

¹² *Villone v SSHD*

¹³ *R v Immigration Appeal Tribunal ex parte Patel* [1988] AC 910.

¹⁴ *R v SSHD ex p Kwapong* [1993] Imm AR 569.

¹⁵ *R v Immigration Appeal Tribunal ex pa Ajab Singh* [1978] Imm AR 59

¹⁶ *Osama v Immigration Officer, London (Gatwick) Airport* [1978] Imm AR 8.

conduct or associations (para 322(5)). A person does not need to have been convicted of a criminal offence for this provision to apply. This may include cases where a migrant has entered, attempted to enter or facilitated a sham marriage to evade immigration control.¹⁷

Deportation

- Those subject to a current deportation are barred indefinitely from getting leave to enter (para 320(2)(a)) and leave to remain or an application to extend their stay must be refused (para 322(IB)). See further below in respect of deportation orders.

International Obligations

- Section 8B of the Immigration Act 1971 provides for mandatory refusal or cancellation of leave to enter of ‘excluded persons’, defined as persons named or described by UN Resolution of EU Council instrument. The Immigration Act 2016 (in force from 12 July 2016) removed the need to update secondary legislation in order to implement an international travel ban, in order that the bans can take immediate effect.

Deportation

Deportation is the process whereby a non-British citizen can be compulsorily removed from the UK and prevented from returning unless the deportation order is revoked. A deportation order operates to cancel leave to remain.¹⁸ A person who is not a British citizen and not exempt is liable to deportation from the UK in the following circumstances under the Immigration Act 1971:

- the SoS deems his or her deportation to be conducive to the public good;¹⁹
- another member of the family to which he or she belongs is to be deported;²⁰
- a court recommends deportation in the case of a person over the age of 17 after conviction of an offence punishable by imprisonment;²¹

¹⁷ Modernised Guidance: General Grounds for Refusal: Considering leave to remain, Section 4, Version 28.0, published 10 April 2017 p.34,

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607627/GGFR-Section-4-v28.pdf

¹⁸ Immigration Act 1971, s.5(1) and (2).

¹⁹ Immigration Act 1971, s.3(5)(a), as amended by the Immigration and Asylum Act 1999, Sch 14 para 44(2).

²⁰ Immigration Act 1971, s.3(5)(b), as amended.

²¹ Immigration Act 1971, s.3(6).

and, under the UK Borders Act 2007 (“UKBA 2007”) following a conviction of a criminal offence attracting at least one single sentence of imprisonment of 12 months or more.²²

Deportation may be deemed conducive to the public good as being in the interests of national security or the relations between the UK and another country, or for other reasons of a political nature. In *Rehman*²³ the House of Lords held that ‘national security’, ‘international relations’ and ‘other political reasons’ may overlap and gave an extremely broad meaning to national security. Rejecting the approach of the SIAC, which had held that endangering national security required engagement in, promotion or encouragement of violent activity targeted at the UK, its system of government or its people, their Lordships held that the promotion of terrorism against any state is capable of being a threat to the UK's national security, since increasingly the security of one country is dependent upon the security of others, so that any activity likely to create a risk of adverse repercussions, including conduct which could have an adverse effect on the UK's relationship with a friendly state, could threaten the UK's national security. Thus planning and organisation in the UK of terrorist acts abroad could found deportation, although the Secretary of State would have to show that there was a real possibility of adverse repercussions in terrorist cases. The House also endorsed the Court of Appeal's distinction between proof and evaluation; the Secretary of State's reasons are not counts on an indictment, and the task is evaluative and predictive, using a global approach to assess whether the subject is a danger to national security. Nevertheless, the assertions on which the Secretary of State bases her evaluation of danger must be reliable, and suspicious circumstances do not necessarily make for a reasonable suspicion so as to justify deportation.

Public good ground for deportation may also include assisting the proliferation of another country's nuclear capability contrary to international treaty.²⁴ #

It has been held that a sham marriage qualifies because it undermines a fundamental institution of society.²⁵ This ground, although still available, is unlikely to be used again, since obtaining

²² UK Borders Act 2007, s.32.

²³ *SSHD v Rehman* [2001] UKHL 47.

²⁴ *R v SSHD ex p Saleem* 23 July 1997 unreported.

²⁵ *R v Immigration Appeal Tribunal ex p Cheema* [1982] Imm AR 124.

leave by deception is now a ground for administrative removal, without an in country appeal, under section 10 of the Immigration and Asylum Act 1999.

Criminal associations which have not led to a conviction might be a further basis, and evidence of spent convictions and of a charge that had been withdrawn from a jury have been held to be admissible but not as a basis without more for justifying deportation.²⁶ Further, whilst the Secretary of State may rely on inferences drawn from such past conduct and events,²⁷ there will likely be difficulty in proving the acts complained of. The standard is the civil burden of proof, but flexibly applied, so that the graver the allegation the more certain the proof required.²⁸ The commission of offences abroad might be a ground for a public good deportation,²⁹ so long as it is not disguised extradition³⁰ and does not breach the person's human rights.

Where the Home Office has been misled into granting an indefinite leave to remain, it can base a decision to deport under section 3(5)(a) of the Immigration Act 1971 on that ground.³¹ This may involve false allegations as to marital status, or as to the continued existence of cohabitation at a time when the parties are living separately, or a fabricated claim to refugee status. Fraud must be 'clear and manifest' to justify deportation of someone granted indefinite leave to remain as a refugee.³² In *Patel*³³ Lord Bridge reconsidered and withdrew his dictum in *Khawaja* that the power could not be used to deport someone who told lies on entry if his or her conduct thereafter was perfectly satisfactory, and lies on entry may form the basis of a later deportation on conducive grounds,³⁴ although administrative removal as an illegal entrant is easier.³⁵

Automatic deportation

Automatic deportation provisions contained in ss.32-38 of the UKBA 2007 apply to "foreign criminals", defined as an individual who is not a British citizen, is convicted in the UK of an

²⁶ *R (on the application of V) v Asylum and Immigration Tribunal* [2009] EWHC 1902.

²⁷ *Martinez-Tobon v Immigration Appeal Tribunal* [1988] Imm AR 319 CA

²⁸ *Khawaja v SSHD* [1984] AC 74.

²⁹ *El-Awan* (12807) (14 December 1995, unreported).

³⁰ *Caddoux Re* [2004] EWHC 642.

³¹ *Re Owusu-Sekyere* [1987] Imm AR 425, CA

³² *R (on the application of Sarribal) v SSHD* [2002] EWHC 1542.

³³ *R v Immigration Appeal Tribunal ex p Patel* [1988] AC 910

³⁴ *R v SSHD ex p Chaumon* [1999] INLR 479

³⁵ Immigration Act 1971, Sch 2 Para 9.

offence and who is either (1) sentenced to a period of imprisonment of at least 12 months; or (2) is sentenced to a period of imprisonment following conviction for serious criminal offences as specified by order of the SoS under s.72(4)(a) of the NIAA 2002.³⁶ The deportation of foreign criminals is deemed conducive to the public good for the purposes of s.3(5)(a) of the Immigration Act 1971, by s.32(4) UKBA 2007 and the SoS must make a deportation order in respect of a foreign criminal unless one of the exceptions in s.33 applies.³⁷ The exceptions include:

- where removal of the foreign criminal would breach the foreign criminal's rights under the European Convention on Human Rights (the "ECHR" or the "Convention"), or under the Refugee Convention;³⁸
- where removal of the foreign criminal would breach their rights under EU treaties;³⁹ or
- where the SoS thinks that deportation would contravene the UK's obligations under the Council of Europe's Convention on Action against Trafficking in Human Beings.⁴⁰

The exceptions remove the requirement to make a deportation order they do not prevent the making of one. Moreover, if the ECHR / Refugee Convention exception applies deportation must still be treated as conducive to the public good.⁴¹

Where the automatic deportation does not apply because one of the exceptions operates but the SoS wishes to proceed with deportation under s.3(5)(a) of the Immigration Act 1971, the immigration judge must attach weight to the SoS's view of the public good and public interest.⁴²

In most contested cases of automatic deportation, the most common defence is Article 8 ECHR. The Immigration Act 2014 inserted a new Part 5A (s.117A-117D) into the NIAA 2002. Section 117C sets out the considerations applicable to the 'public interest question' in cases involving foreign criminals who are seeking to resist deportation on Article 8 grounds, it states that:

- Deportation of foreign criminals is in the public interest.⁴³

³⁶ UKBA 2007, s.32(1)-(3).

³⁷ UKBA 2007, s.32(5).

³⁸ UKBA 2007, s.33(2).

³⁹ UKBA 2007, s.33(4).

⁴⁰ UKBA 2007, s.33(6A).

⁴¹ UKBA 2007, s.33(7).

⁴² *BK (Deportation – s.33 'exception' UKBA 2007- public interest) Ghana* [2010] UKUT 328 (IAC).

⁴³ NIAA 2002, s.117C(1).

- The more serious the offence committed, the greater the public interest in deportation.⁴⁴
- The public interest requires deportation of foreign criminals sentenced to less than four years unless Exception 1 or Exception 2 applies.⁴⁵
- Exception 1 applies where the foreign criminal has been lawfully resident in the United Kingdom for most of C's life, is socially and culturally integrated in the United Kingdom and there would be very significant obstacles to his/her integration into the country to which it is proposed that they will be deported.⁴⁶
- Exception 2 applies where the foreign criminal has a genuine and subsisting relationship with a qualifying partner (a British citizen who is ordinarily resident in the UK without being subject under the immigration laws to any restriction on the period for which he/she may remain),⁴⁷ or a genuine and subsisting parental relationship with a qualifying child (a person under the age of 18 who is a British citizen or has lived in the UK for a continuous period of seven years),⁴⁸ and the effect of his/her deportation on the partner or child would be unduly harsh.⁴⁹
- In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.⁵⁰
- The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.⁵¹

At the same time as those provisions entered into force the Immigration Rules were amended and also came into effect on 28 July 2014. Paras 398 to 399B were amended so as to harmonise with Part 5A of the 2002 Act.

⁴⁴ NIAA 2002, s.117C(2).

⁴⁵ NIAA 2002, s.117C(3).

⁴⁶ NIAA 2002, s.117C(4).

⁴⁷ NIAA 2002, s.117D(1) and Immigration Act 1971, s.33(2A).

⁴⁸ NIAA 2002, s.117D(1).

⁴⁹ NIAA 2002, s.117C(5).

⁵⁰ NIAA 2002, s.117C(6).

⁵¹ NIAA 2002, s.117C(7).

Prior to the introduction of Part 5A of the NIAA 2002 by the Immigration Act 2014 and the 2014 Immigration Rules, similar provisions were contained in the previous version of the Immigration Rules, the 2012 Rules. 2.2 Paragraphs 398, 399 and 399A of Part 13 the Immigration Rules in force between 9 July 2012 and 27 July 2014 gave guidance on how Article 8 claims of foreign criminals resisting deportation should be assessed. Para 398 stated that offenders sentenced to between one and four years will not be deported if they come within one of the two ‘safety nets’ set out in paras 399 and 399A. To do so the foreign criminal must have:

- a subsisting parental relationship with a British child or partner (para 399); or
- lived in the UK for a certain number of years and have no cultural ties to the country they would be returned to (para 399A).

In addition, para 398 stated that if the safety nets do not apply, then a foreign criminal can only escape deportation on Article 8 grounds in “exceptional circumstances”.

The recent Supreme Court decision in *Hesham Ali v SSHD*⁵² considered the relationship between the Immigration Rules and ECHR, art 8. In particular, whether the 2012 Immigration Rules in relation to art 8 and deportation which sought themselves to strike the balance were compatible with article 8 ECHR. The Court held that the Immigration Rules were a relevant and important consideration which the Upper Tribunal ought to have taken into account when assessing the proportionality of the interference with the appellant’s article 8 rights. The European Court of Human Rights has provided guidance to the factors which should be taken into account in the balancing exercise (for example in *Boultif v Switzerland* (2001) 33 EHRR 50, *Maslov v Austria* [2009] INLR 47, *Jeunesse v Netherlands* (2014) 60 EHRR 17). These factors involve wide-ranging consideration of the appellant’s circumstances including the nature of his private and family life in the UK, his links to the destination country, and the likelihood of him re-offending. The weight to be attached to each factor in the balancing exercise falls within the margin of appreciation of the national authorities. The Rules set out the Secretary of State’s assessment of the weight generally to be afforded to some of these factors. In particular, the Rules prescribe a presumption that the deportation of foreign criminals is in the public interest, except where specified factors are present which the Rules accept outweigh that interest. Outside of those specified factors (for example in every case where a custodial sentence of 4 years or more has

⁵² [2016] UKSC 60.

been imposed, as here), the Rules state that exceptional circumstances – that is, compelling reasons – are required to outweigh the public interest in deportation. The Rules are not law, but do have a statutory basis and require the approval of Parliament. It is within the margin of appreciation to adopt rules reflecting the assessment of the general public interest made by the Secretary of State and endorsed by Parliament. As an appellate body, the Upper Tribunal’s decision making process is not governed by the Rules, but should nevertheless involve their consideration. The Upper Tribunal must make its own assessment of the proportionality of deportation, on the basis of its own consideration of the factors relevant to the particular case, and application of the relevant law. But in doing so, it must not disregard the decision under appeal. Where the Secretary of State has adopted a policy in relation to the assessment of proportionality, set out in the Rules and endorsed by Parliament, the Upper Tribunal should give considerable weight to that policy. Public concern (as reflected in the Rules endorsed by Parliament) can assist a court’s objective analysis of where the public interest lies.

Children

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires that immigration decisions are made having regard to the need to safeguard and promote the welfare of children who are in the UK.

In *ZH (Tanzania) v Secretary of State for the Home Department*⁵³ the Supreme Court had to consider the weight to be given to the best interests of children who are affected by the decision to remove or deport one or both of their parents and the circumstances in which it is permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave. In giving effect to a child’s best interests, the Supreme Court held that attention must be given to the child’s British citizenship. The child’s best interests will normally include “the advantages of growing up and being educated in their own country, their own culture and their own language”. Although the Supreme Court was not dealing with the case of a non-British citizen, it should be noted that these advantages may also apply to a non-British citizen child if, for example, he or she has lived all or most of his or her

⁵³ [2011] UKSC 4.

life in the UK and is not familiar with the country of his or her, or his or her parent's, origin. The best interests of any child must be considered first. This does not mean that, in any particular case, the child's best interests cannot be outweighed by other matters, such as the interests of immigration control. This does not mean that, in a case such as that of ZH, a parent's immigration history or the precariousness of the parent's immigration status at the time family life was created (e.g. the birth of the children) will be irrelevant. However, decision-makers must be careful to avoid treating children as responsible for their parent's actions. Finally, the Supreme Court emphasised the importance of ensuring that children are given proper opportunity to have their views heard in matters affecting them – including actions by the UK Border Agency and in appeal proceedings.

Judicial framework

Administrative review

Administrative review is available in respect of in-country decisions to refuse certain types of leave to remain, refusals of certain applications for entry-clearance and decision to cancel leave to enter or leave to remain on the basis that there had been a change in circumstance in the applicant's case since leave was granted, or leave had been obtained as a result of false information.⁵⁴ Administrative review involves a Home Office caseworker or Immigration officer reviewing an eligible decision taken by one of his or her colleagues to see whether it is wrong because of a case working error. The Rules exclusively list 'case working errors' which include where the original decision maker otherwise applied the Immigration Rules incorrectly; or where the original decision maker failed to apply the Secretary of State's relevant published policy and guidance in relation to the application.⁵⁵

Rights of appeal

A right of appeal was previously triggered by a relevant immigration decision being made, such as a refusal of entry clearance, refusal to vary leave to remain which resulted in no leave to remain and a decision to remove an applicant from the UK. Previously grounds of appeal included the ground that a decision was not in accordance with the law, that discretion ought to

⁵⁴ Immigration Rules, Appendix AR.

⁵⁵ Appendix AR.

have been exercised differently and that a decision breached a person's rights under the Refugee Convention and/or the Human Rights Act 1998. However, section 15 of the Immigration Act 2014 ("IA 2014") amended section 82 (rights of appeal) and section 84 (grounds of appeal) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002").⁵⁶ Rather than focusing on the decision made, the amendments to s.82 introduced by the IA 2014, now focus on the type of claim made. Under the new s.82, a right of appeal occurs only where:(i) A Protection Claim is refused; (ii) A Human Rights Claim is refused; or (iii) Protection status is revoked. A Protection Claim is one in which a person claims that their removal from the UK would breach the Refugee Convention or their right to humanitarian protection, so essentially a claim for asylum or humanitarian protection. A Human Rights Claim is a claim that a decision would be unlawful under the Human Rights Act 1998, for example because it would breach a person's right to a private and family life in the UK under Article 8 of the European Convention on Human Rights.

The right of appeal to under s.82 of NIAA is excluded where decisions raise political or national security issues. See "Special Immigration Appeals Commission" section below.

Out-of-country appeals

The Immigration Act 2014 introduced s.94B into NIAA 2002, allowing the SSHD to certify certain human rights claims made by foreign nationals who had served a criminal sentence and faced deportation. It applies to all human rights claims except those involving asylum or Articles 2 or 3 of the European Convention on Human Rights (protecting the right to life and prohibiting torture and ill-treatment). Certifying the claim in this way has the effect of requiring the appellant to bring any appeal against a refusal from outside the UK. The SSHD may only certify a claim under this provision if bringing an appeal from outside the UK would not breach the individual's rights under the European Convention on Human Rights, for example if it causes them serious and irreversible harm. From 1 December 2016, the Immigration Act 2016 extended this provision to all individuals who are appealing against a decision in respect of a human rights claim, not just those who face deportation after serving a criminal sentence. As with the previous provision the SSHD will only be able to certify claims if bringing the appeal from outside the UK

⁵⁶ <http://www.legislation.gov.uk/ukpga/2002/41/contents> and <http://www.legislation.gov.uk/ukpga/2014/22/contents/enacted>

would not breach the appellant's rights under the European Convention on Human Rights. Such a breach might include a real risk of serious irreversible harm but this is not the only type of breach that must be considered.⁵⁷ Neither the Immigration Act 2014, nor the Immigration Act 2016 has amended s.78 of the NIAA 2002, which provides that individuals may not be removed pending an appeal. Therefore, whilst a person whose claim has been certified after commencing an appeal may not continue the appeal whilst still in the UK, he or she may not be removed either.

Under other provisions, human rights claim (or asylum claim) may be certified as 'clearly unfounded' and this also has the effect of requiring the applicant to bring any appeal from outside the UK. A claim may be certified as 'clearly unfounded' if the applicant is from a list of designated countries where the Home Office does not consider that there is a serious risk of persecution or human rights breaches for people generally or for certain classes of people in that country (these are currently all EU countries). The Home Office may also certify a claim as clearly unfounded if it considers there is no reason to believe that the applicant's rights will be breached if returned to the relevant country. The Home Office needs to show that any appeal that would be brought would be 'bound to fail' which is a high threshold. This is important because in cases where it is argued that an individual is at risk in the country of return it is unlikely that the ability to bring an appeal from that country will be a meaningful safeguard. An asylum or human rights claim may also be certified if the same issues were raised or could have been raised at an earlier stage in the determination process.

Tribunals and courts responsible for immigration cases

The right of appeal lies to the First-tier Tribunal (Immigration and Asylum Chamber) (the "FT"). This and the second tier tribunal, the Upper Tribunal ("UT"), were created by the Tribunals, Court and Enforcement Act 2007.⁵⁸ From 20 October 2014, the FT has been governed by its own bespoke rules: the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber)

⁵⁷ The previous version of s.94B introduced by the Immigration Act 2014 has been the subject of a challenge in the Supreme Court *R (on the application of Kiarie) v Secretary of State for the Home Department* UKSC 2016/0009.

⁵⁸ <http://www.legislation.gov.uk/ukpga/2007/15/contents>

Rules 2014.⁵⁹ The FT will decide any matter raised as a ground of appeal i.e. whether or not removal or revocation of protections status will breach the UK's protection or ECHR obligations. Under the Immigration Act 2014 it is no longer able to allow or dismiss an appeal or decide that discretion of the decision maker should have been exercised differently.⁶⁰ Nor is it able, as it used to be, to make directions that the immigration decision maker will have to comply with.⁶¹ However, if the tribunal determines that removal would breach the UK's protection or human rights obligations, the SSHD would be obliged to act in accordance with its decisions as the decision of the tribunal is binding on the parties, including the SSHD.⁶² There is therefore little scope for the tribunal to act as the primary decision maker, because the appeal is confined to consideration of the decision on a claim by reference only to the criteria that the decision maker will (or should) have applied. It will only by if the SSHD permits the tribunal to consider a 'new matter' that the tribunal will be a primary decision maker.

There is a right of appeal from the FT to the UT with permission of the FT or UT on a point of law.⁶³ If the UT finds an error on a point of law it may set aside the decision of the FT and either remit the case to the FT or remake the decision itself.⁶⁴ There is a further right of appeal from the UT to the Court of Appeal with the permission of the UT or the Court of Appeal.⁶⁵ Such permission may be granted only if the UT or the Court considers that the appeal would raise some important point of principle or practice or there is some other compelling reason for the appeal to be heard.⁶⁶ The Court of Appeal has similar powers to the UT where it finds there has been an error on a point of law i.e. either remit the case to the UT or the FT or re-make the decision itself.⁶⁷ However, it will only remake the decision itself where there are clear findings of fact by the tribunal that are undisputed and as a matter of law admit of only one answer to the appeal.⁶⁸ There is a final right of appeal from the Court of Appeal to Supreme Court with the

⁵⁹ SI 2014/2604

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/367129/immigration-asylum-chamber-tribunal-procedure-rules.pdf

⁶⁰ IA 2014, Sch 9, para 36, deleting sub-ss(3)-(6) of NIAA 2002, s.86

⁶¹ IA 2014, Sch 9 para 37, repealing NIAA 2002, s.87,

⁶² *TB (Jamaica) v SSHD* [2008] EWCA Civ 977.

⁶³ Tribunals, Courts and Enforcement Act 2007, s.11(1)-(4)

⁶⁴ Tribunals, Courts and Enforcement Act 2007, s.12(2)(b)

⁶⁵ Tribunals, Courts and Enforcement Act 2007, s.13

⁶⁶ Tribunals, Courts and Enforcement Act 2007, s.13(6)

⁶⁷ Tribunals, Courts and Enforcement Act 2007, s.14(2)

⁶⁸ *KR (Nepal) v SSHD* [2012] EWCA Civ 1619.

permission of the Court of Appeal or the Supreme Court if it raises an arguable point of law of general public importance.⁶⁹

The UT also exercises a judicial review jurisdiction. A claim for judicial review is a claim to review the lawfulness of an enactment or a decision, action or failure to act in relation to the exercise of a public function. Most immigration decisions are potentially subject to judicial review, whether those of an entry clearance officer, an immigration officer, the Secretary of State or a criminal court dealing with immigration offences. If a statutory right of appeal exists then it must be used. Judicial review cannot be used instead because the right of appeal can only be exercised out-of-country.⁷⁰ The UT is now the primary forum for judicial reviews of decision made under the Immigration Acts or otherwise relating to leave to enter or remain in the UK outside the Rules. However, certain types of judicial reviews are brought in the Administrative Court (a branch of the High Court) including: challenges to validity of primary or subordinate legislation or of Immigration Rules; a challenge to a decision as to citizenship; a challenge to the decision of the Upper Tribunal; a challenge to a decision of the SIAC; and an application for a declaration of incomparability under s.4 of the HRA.

Special Immigration Appeals Commission (“SIAC”)

SIAC was created by the Special Immigration Appeals Commission Act 1997 (SIACA 1997)⁷¹ and established on 3 August 1998.

By virtue of s.97 NIAA 2002, appeals under s.82 NIAA 2002 may not be brought against the following decisions:

- A personal decision of the SSHD taken wholly or partly on the ground that the person’s removal or exclusion from the UK is in the interests of national security or in the interests of the relationship between the UK and another country.⁷²
- A decision taken in accordance with a personal direction from the SSHD, identifying the person to whom the decision relates and which is given wholly or partly on national security

⁶⁹ Supreme Court Practice Direction 3.3.3

⁷⁰ *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738.

⁷¹ <http://www.legislation.gov.uk/ukpga/1997/68>

⁷² NIAA 2002, s.97(1)(a), (2) and (4).

or diplomatic grounds.⁷³

- A decision taken wholly or partly in reliance on information which the SSHD personally certifies should not be made public for national security, diplomatic or other public interest reasons.⁷⁴

Where an individual would have had a right of appeal under s.82 but for certification by the SSHD under s.97, then they may appeal to the SIAC.⁷⁵ The SIAC's jurisdiction on appeal is the same as that of the FT.⁷⁶

Section 79 NIAA 2002, which prevents the making of a deportation order while an appeal that may be brought or continued from within the UK against the decision to make the order could be brought or is pending is disapplied where the SoS certifies that the decision to make the deportation order was taken on the grounds his removal is in the interests of national security.⁷⁷

A person may not bring an appeal to the SIAC against the decision to make a deportation order from within the UK unless they have made a human rights claim whilst in the UK, unless the SoS has certified that removal pending appeal would not be unlawful under s.6 of the Human Rights Act, in particular on the grounds that the person would not face a real risk of serious irreversible harm if removed to the country or territory to which the person is proposed to be removed or that the whole or part of any human rights claim made by the person is clearly unfounded.⁷⁸

Section 15 of the Justice and Security Act 2013 introduced new provisions in the SIACA 1997 which provide a new jurisdiction for SIAC to review and set aside:

- A direction by the SSHD about the exclusion from the UK of a non-EEA national made wholly or partly on the ground that the exclusion is conducive to the public good which does not attract a right of appeal and which has been certified by the SoS as having been made wholly or partly in reliance on information which, in the opinion of the SoS should not be made public in the interests of national security, in the interests of the relationship between

⁷³ NIAA 2002, s.97(1)(b), (2) and (4).

⁷⁴ NIAA 2002, s.97(3) and (4).

⁷⁵ SIACA 1997, s.2(1).

⁷⁶ SIACA 1997, s.2(2).

⁷⁷ NIAA 2002, s.97A(1), (1A), (2).

⁷⁸ NIAA 2002, s.97A(2B) and (2C).

the UK and another country or otherwise in the public interest.

- A decision or refuse to issue a certificate of naturalisation as a British citizen under s.6 of the BNA 1981 or to refuse to register as a British citizen under s.41A BNA 1981, which is similarly certified by the SoS.⁷⁹

In determining whether the decision should be set aside, the SIAC must apply the principle which apply judicial review proceedings.⁸⁰

The Commission will adopt the following approach to satisfy itself that the material available to it enables it properly to determined proceedings:

- the factual basis for the judgment must be scrutinised “anxiously” by the Commission;
- it is a review, not an appeal on the facts. If the facts or factual inferences reached by the SoS were reasonable, there should be no interference on that ground, even if the Commission would reach a different conclusion;
- if the factual findings are reasonable, the Commission will then review the judgments made by the SoS on that factual picture and interfere if the SoS’s decision has been unreasonable. There is no place for particular deference to SoS beyond normal public law principles which support a degree of deference to the decision of the SoS e.g. because she has democratic responsibility and answers to Parliament, is entitled to formulate and implement policy and has the benefit of expert advice;
- if the decision engages Convention rights the Commission will consider whether an otherwise reasonable decision represents a disproportionate interference with the relevant Convention right;
- it will not be sufficient for the Commission and Special Advocates to be shown only a summary prepared by the Home Office;
- neither domestic law nor Strasbourg authority requires a minimum level of onward disclosure to the Appellant, where the case does not involve personal liberty.⁸¹

⁷⁹ SIACA 1997, 2C and 2D.

⁸⁰ SIACA 1997, 2C(3) and 2D(3).

⁸¹ *AHK and others v SSHD*, Preliminary Issue Judgment, 18 July 2014, Appeal Nos: SN/2/2014, SN/3/2014, SN/4/2014 and SN/5/2014

The Lord Chancellor (Secretary of State for Justice) appoints members of the SIAC.⁸² It is constituted by three members, one of whom holds or has held high judicial office, one who is or has been a judge of the FT or UT and the third who needs no particular qualification by statute.⁸³ During the passage of the Bill it was indicated that the third member would have some experience of national security matters and will be familiar with the evidence that is likely to be presented to the Commission.⁸⁴ The Lord Chancellor is empowered to make rules for the regulation of the exercise of appeal rights and for prescribing the practice and procedure to be followed.⁸⁵ Practice and procedure is governed by the Special Immigration Appeals Commission (Procedure) Rules 2003, which applies to both appeals and applications for review.⁸⁶ The procedure rules contain a general duty on the Commission not to disclose information contrary to the interests of national, the international relations of the UK, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.⁸⁷ Subject to this duty, the Commission must satisfy itself that the material available to it enables it properly to determine proceedings.⁸⁸

In light of the general duty, the SIAC operates largely under what is known as a “closed material procedure”. This a procedure whereby the government is permitted to comply with its disclosure obligations and rely on evidence without disclosing such materials to the other appellant or his or her legal representative. Once the SoS is served with a notice of appeal or an application under the SIACA 1997, unless it intends to concede the appeal or not object to the disclosure of any material on which the decision is based, the Attorney-General (England and Wales), Lord Advocate (Scotland) or Attorney-General for Northern Ireland (Northern Ireland), as appropriate will appoint a special advocate. This is a security-vetted lawyer who represents the appellant’s interests on the appeal but is not instructed by or responsible to the appellant.⁸⁹ The special advocate is entitled to see the ‘closed material’ made available to SIAC, make private

⁸² SAICA 1997, Sch 1, para 1

⁸³ SAICA 1997, Sch 2 para 5(a) and (b)

⁸⁴ 301 HC Official Report (6th series) col 1033, 26 November 1997.

⁸⁵ SIACA 1997, s.5

⁸⁶ SI 2003/1034 (the “2003 Rules”)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421503/Consolidated_text_of_SIAC_Rules_2003.pdf

⁸⁷ 2003 Rules, r 4(1)

⁸⁸ 2003 Rules, r 4(3)

⁸⁹ SIACA 1997, s.6(1) and (4).

submissions and discuss with the Home Office's legal team items in the closed material which should be disclosed, to argue the issue of disclosure before SIAC where not agreement on disclosure has been reached, to make any other submissions at any hearing from which appellants and their representatives are excluded, to adduce evidence, cross-examine and make written submissions.⁹⁰ The special advocate may communicate with the appellant or his/her representatives at any time before the SoS serves 'closed material'.⁹¹ After this, such communication is prohibited unless the Commission otherwise directs.⁹² The appellant can communicate with the special advocate after this time in writing only through a legal representative and the special advocate may not reply (without direction from the Commission), apart from sending a written acknowledgment.⁹³

The SoS must file with the Commission and serve on the special advocate the closed material and a statement of reasons for objecting to its disclosure.⁹⁴ The SoS must also serve, if and to the extent it is possible to do so without disclosing information contrary to the public interest, a statement of the closed material in a form which can be served on the defendant.⁹⁵ In practice the SoS almost always takes the position that this cannot be done. Once closed material has been filed with the special advocate and the Commission, the Commission will give a direction as to what the SoS may redact.⁹⁶ If the SoS objects to the disclosure of any material to the appellant or objects to the special advocate's request for post 'closed material' communication with the appellant, the Commission must fix a hearing for the SoS and the special advocate to make oral representation, known as a 'rule 38' hearing, which the appellant and his representatives cannot attend.⁹⁷ The Commission must uphold the SoS's objection where it considers that the disclosure of the material would be contrary to the public interest.⁹⁸ If the objection is upheld the Commission must consider whether to direct the SoS to serve a summary of the closed material on the appellant.⁹⁹

⁹⁰ 2003 Rules, r 35.

⁹¹ 2003 Rules, r 36(1).

⁹² 2003 Rules, r 36(2).

⁹³ 2003 Rules, r 36(4) and (5).

⁹⁴ 2003 Rules, r 37(3)(a) and (b).

⁹⁵ 2003 Rules, r 37(3)(c).

⁹⁶ 2003 Rules, r 37(4A)(b).

⁹⁷ 2003 Rules, r 38.

⁹⁸ 2003 Rules, r 38(5).

⁹⁹ 2003 Rules, r 38(9)(a).

The Commission must record its decision and the reasons for it.¹⁰⁰ The determination must contain reasons to the extent that is possible to do so without disclosing information contrary to the public interest.¹⁰¹ Where the determination does not include full reasons for the decision the Commission must serve a separate determination, including those full reasons, on the Secretary of State and the special advocate.¹⁰² The special advocate may apply to the Commission to amend both determinations on the ground that the separate determination contains material the disclosure of which would not be contrary to the public interest.¹⁰³

Any party to an appeal before the SIAC may bring a further appeal to the appropriate appeal court (Court of Appeal (England and Wales), Court of Session (Scotland) or Court of Appeal in Northern Ireland (Northern Ireland)) on any question of law material to the final determination of an appeal.¹⁰⁴ Such an appeal can only be brought with the leave of the Commission or the appeal court.¹⁰⁵ The Court of Appeal's role on appeals is a secondary reviewing function limited to traditional questions of law.¹⁰⁶

Complaints regarding the fairness of the SAIC procedures to appellants have been roundly rejected by the Commission itself, the Court of Appeal and the House of Lords.¹⁰⁷ Article 6 of the ECHR has been held not to apply to proceedings before the commission on the basis that deportation proceedings and decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations.¹⁰⁸ The Court of Appeal in *W (Algeria) v SSHD* recognised that the proceedings in SIAC may breach the equivalent fundamental right at common law to a fair hearing, however this was mandated by Parliament through s.5 of the 1997 Act and procedural rule 4.¹⁰⁹

¹⁰⁰ 2003 Rules, r 47(2).

¹⁰¹ 2003 Rules, r 47(3).

¹⁰² 2003 Rules, r 47(4).

¹⁰³ 2003 Rules, r 47(5).

¹⁰⁴ SIACA 1997, s.7(1).

¹⁰⁵ SIACA 1997, s.7(2).

¹⁰⁶ SIACA 1997, s.7(1).

¹⁰⁷ *RB (Algeria) v SSHD; Othman (Jordan) v SSHD* [2009] UKHL 10.

¹⁰⁸ *Maaouia v France* (2000) 33 EHRR 1037, para 40 and *RB (Algeria) v SSHD; Othman (Jordan) v SSHD* [2009] UKHL 10.

¹⁰⁹ [2010] EWCA Civ 898.

A large number of cases before the SIAC are national security deportation cases. The SoS decides to deport the appellant on the grounds that deportation is deemed to be conducive to the public good under s.3(5) of the Immigration Act 1971 then certifies that the decision was taken in the interests of national security under s.97 NIAA 2002. Such appeals generally fall into two halves, first, the 'national security case', and second, issues relating to safety on return. In *Rehman*¹¹⁰ the House of Lords held that the Commission had taken too narrow a view of what could constitute a threat to national security. A global approach had to be taken to the question of what the interests of national security were, that the action did not have to be either directly or immediately against the UK, that action against a foreign state may be capable of indirectly affecting the security of the UK, and that there would be significant deference given to the Secretary of State's view on this. Their Lordships further held that the concept of a 'standard of proof' was not particularly helpful in the national security deportation context. Where the focus of the enquiry was the assessment of future risk, proof of past facts to the civil standard was not necessary to reach the conclusion that a person poses a danger to national security, and that the question was to be answered by a cumulative evaluation of all the evidence in relation to the actual and potential activities and connections of the person concerned and the importance of the security interest at stake. However, SIAC has held that where specific acts which have already occurred are relied upon, they should be proved to the civil standard of proof.¹¹¹ Few appellants have succeeded in the national security case.¹¹² If the national security case is made out appellants will often seek to rely on a risk of ill-treatment contrary to Article 3 ECHR in their home country if deported. The SoS will often seek assurances in the form of Memoranda of Understanding from governments of the receiving state that they will respect the human rights of deportees. The approach taken by SIAC to the issue of assurances is that whilst assurance from countries which have a track record of endemic torture should be treated with scepticism, the question of whether assurances could be relied upon was a matter of fact for determination by SIAC.¹¹³

¹¹⁰ *SSHD v Rehman (Shafiq Ur)* [2001] UKHL 47

¹¹¹ *ZZ v SHHD* (SC/63/2007) 30 July 2008, *EV v SSHD* (SC/67/2008), 7 April 2009 and *OL v SSHD* (SC/312005), 22 March 2010.

¹¹² *Moloud Siahli v SSHD* (SC/38/2007), 14 May 2007. *T v SSHD* (SC/31/2005), 22 March 2010.

¹¹³ *RB (Algeria) v SSHD; Othman (Jordan) v SHHD* [2009] UKHL 10

CITIZENSHIP

Legislative framework and substantive issues

Naturalisation

Acquisition of citizenship by naturalisation is governed by s.6 and Schedule 1 of the British Nationality Act 1981 (“BNA 1981”).

Good character

All applicants must show *inter alia* that they are of good character. There is no definition of good character in the BNA 1981. In *Fayed (No 2)*¹¹⁴ Nourse LJ described the requirements for good character as a concept that cannot be defined as a single standard to which all rational beings would subscribe. It is no part of the function of the courts, to discourage ministers of the Crown from adopting a high standard in matters which have been assigned to their judgment by Parliament, provided only that it is one which can reasonably be adopted in the circumstances.

The UK Visas and Immigration Authority issue guidance for making nationality decisions. In *SK (Sri Lanka)* the Court of Appeal said that "...it is unnecessary to give the Nationality Instructions anything other than their plain and ordinary meaning. Since this suffices for the purposes of the Secretary of State in this appeal, we did not hear argument as to whether they are to be interpreted objectively, or whether, as the Secretary of State contends, she is entitled to place her own interpretation on them, subject to the requirement of rationality. My strong provisional view ... is that the Secretary of State is not free to decide what they mean."¹¹⁵ As regards to the good character requirement the Nationality Instructions (“NI”) state that the decision maker will not normally consider applicants to be of good character if there was information to suggest that they did not respect and were not prepared to abide by the law (ie were, or were suspected of being, involved in crime), they have been involved in or associated with war crimes, crimes against humanity or genocide, terrorism or other actions that are considered not to be conducive to the public good, their financial affairs were not in order (eg failure to pay taxes for which they were liable), their activities were notorious and cast serious doubt on their standing in the local

¹¹⁴ *R v SSHD ex pa Al-Fayed* [2001] Imm AR 134.

¹¹⁵ *SSHD v SK (Sri Lanka)* [2012] EWCA Civ 16 at [35].

community, they had practised deceit, they have assisted in the evasion of immigration control; or they have previously been deprived of citizenship.¹¹⁶

Crimes against humanity and war crimes

Refusals of naturalisation on national security grounds, refusals because of involvement in war crimes and crimes against humanity have been very much on the increase. In *AHK v Secretary of State for the Home Department; AM v Secretary of State for the Home Department; AS v Secretary of State for the Home Department*¹¹⁷ Ouseley J indicated that there were over 40 cases currently before the Administrative Court, where naturalisation had been refused and the Secretary of State was unwilling to give reasons for the refusal as doing so would be harmful to national security.

*SK (Sri Lanka)*¹¹⁸ deals with war crimes and the distinction between obtaining asylum and obtaining naturalisation in case where the applicant for naturalisation has been involved in organisations which have been responsible for war crimes or crimes against humanity. SK was a former 'more than ordinary' member of the LTTE in Sri Lanka. He had twice been involved in battles in the aftermath of which the LTTE murdered prisoners of war. It is not in doubt that the murder of prisoners of war is a war crime. The Court of Appeal held that the Secretary of State was entitled to conclude that SK, if not involved in war crimes, in the sense of personally carrying out such murders, was associated with such crimes. In naturalisation applications applicants should be refused if their activities cast 'serious doubts' on their good character. Serious doubts will be cast if applicants have been involved in or associated with war crimes, crimes against humanity or genocide or have supported the commission of war crimes, crimes against humanity or genocide or have supported groups whose main purpose or mode of operation consisted of the committing of these crimes even if that support did not make any direct contribution to the groups' war crimes or crimes against humanity and genocide. The NI

¹¹⁶ Nationality Instructions, Chapter 18, Annex D: the Good Character requirement
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406368/Chapter_18_Annex_D_v02.pdf

¹¹⁷ *AHK v Secretary of State for the Home Department; AM v Secretary of State for the Home Department; AS v Secretary of State for the Home Department* [2013] EWHC 1426, [2013] All ER (D) 128 (Jun).

¹¹⁸ *Secretary of State for Home Department v SK (Sri Lanka)* [2012] EWCA Civ 16.

Guidance applicable in this case provided that in certain cases membership of a particular group may be sufficient to determine that an applicant has been supportive of, and in some cases complicit in, war crimes or crimes against humanity committed by that group. In such cases consideration will be given to the length of membership and the degree to which the group employed war crimes or crimes against humanity to achieve its ends.

Because SK had been granted asylum, it was argued that not granting him citizenship was an abuse of process. In rejecting this argument Burnton LJ said that naturalisation and asylum are different things, involving the conferment of different rights and the imposition of different obligations on the applicant, and different rights and obligations on the part of the host state or country of proposed nationality. The grant of asylum, he said, does not involve any obligation to grant naturalisation. "In relation to naturalisation...the test is whether the Secretary of State is satisfied that the applicant is of good character. It is for the applicant to so satisfy the Secretary of State. Furthermore, while the Secretary of State must exercise her powers reasonably, essentially the test for disqualification from citizenship is subjective. If the Secretary of State is not satisfied that an applicant is of good character, and has good reason not to be satisfied, she is bound to refuse naturalisation. For these reasons too a decision in one context is not binding in the other."¹¹⁹

Fraud in earlier immigration applications may of itself be a reason for refusing a later application for naturalisation. In *Kurmekaj*¹²⁰ it was held that the Secretary of State had been entitled to refuse an application for naturalisation on the basis of good character where the applicant's earlier immigration applications, which had led to him being able to make the naturalisation application, had been based on fraud. The judge rejected the argument that the deception of an applicant was not relevant in the context of good character for an application for naturalisation where the applicant had been deceitful when claiming asylum, but was later granted indefinite leave to remain under a family concession and not on the basis of his refugee status. The court applied *SK (Sri Lanka)*. There was no good reason why the earlier deception, although it had no bearing on the later grant of indefinite leave to remain, should not be taken into consideration for

¹¹⁹ At [30].

¹²⁰ *R (on the application of Kurmekaj) v Secretary of State for the Home Department* [2014] EWHC 1701 (Admin).

the purposes of good character. a decision-maker was not confined to considering fraud only within the immigration and naturalisation process and to no other dealings with the state.

Iranian conscripts have had considerable difficulty in overcoming the stigma of the crimes against humanity carried out during their military service, even although they have come to the UK, obtained asylum and have lived blameless lives during many years since fleeing from the heartless grip on their lives in their own country. In *Amirifard*,¹²¹ a national of Iran, having been conscripted into military service, was sent to work as a guard in Shiraz prison. Due to his duties there he developed a depressive illness as a result of witnessing torture and executions in the prison. After a year, he could not bear it any longer, and went absent without leave. He was caught and given military detention for one month, and ordered to undertake an additional four months of conscription. He was then transferred to Lajavardi prison in Shiraz where he witnessed prison guards torturing prisoners, he was guarding a section of the prison which contained mainly university students detained without trial. They started a riot and he refused an order to shoot at them. He was threatened by the prison chief, and hit on the head and chest with a rifle. He was seriously injured and lost consciousness. He was then detained in a prison cell for 24 days, and subjected to torture. Fearing that he was going to be killed, he managed to escape from the car when he was being taken to court. He eventually made his way to the UK, where he was granted asylum. However, when he applied for naturalisation he was turned down on the basis that he was not of good character. His application for judicial review failed. The court held that when all the evidence was taken into account, in particular the active part which he played, over a period of years, in guarding prisoners subjected to crimes against humanity, the Defendant concluded that the Claimant had not sufficiently disassociated himself from the regime. This was not an irrational conclusion. Nor was the Defendant's decision irrational in light of the fact that the Claimant had demonstrated his good conduct whilst in the UK for some eleven years. It is unlikely that the Defendant overlooked this factor. However, it was unlikely to have been sufficient to overcome the Defendant's doubts about his character as a result of his activities in Iran.¹²²

¹²¹ *R (on the application of Amirifard) v Secretary of State for the Home Department* [2013] EWHC 279 (Admin).

¹²² [57-58].

In *R (on the application of DA (Iran)) v Secretary of State for the Home Department* the Court of Appeal approved the Secretary of State's distinction between disassociation from crimes against humanity, committed during conscripted army service in Iran, and fleeing the country for reasons of self-preservation. The Court of Appeal held that the Secretary of State had been justified in refusing naturalisation to an Iranian national on the ground that his association with crimes against humanity during his compulsory military service in Iran 15 years previously meant that he was not of sufficiently good character. A finding that his escape from the regime had been an act of self-preservation rather than one of disassociation was not, on the evidence, irrational.¹²³

Criminality and good character

Where an application features a conviction and was been made on or before 12 December 2012, caseworkers must have regard to the provisions of the Rehabilitation of Offenders Act 1974. Under the Rehabilitation of Offenders Act 1974, a conviction becomes 'spent' after a specified rehabilitation period, which will vary depending on the sentence imposed. The advice to caseworkers is that spent convictions should not be taken into account in assessing the character requirement.

From the 1 October 2012, certain immigration and nationality decisions became exempt from section 4 of the Rehabilitation of Offenders Act 1974. In England and Wales the concept of a conviction becoming 'spent' no longer applies when making an assessment of good character. Therefore, when dealing with nationality applications made on or after 13 December 2012, the Guidance advises caseworkers that they should refuse an individual who has a conviction within the relevant sentence based threshold as detailed in the table set out in the Guidance:¹²⁴

Sentence	Impact
4 years or more imprisonment.	Application will normally be refused, regardless of when the conviction occurred.
Between 12 months and 4 Years' imprisonment	Application will normally be refused unless 15 years have passed since the end of the sentence.
Up to 12 months' imprisonment.	Applications will normally be refused unless 10 years have passed since the end of the sentence.

¹²³ [2014] EWCA Civ 654 at [19-20].

¹²⁴ NI ch 18, Annex D, s 2.1

A non-custodial sentence or other out of court disposal that is recorded on a person's criminal record	Applications will normally be refused if the conviction occurred in the last 3 years.
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A fine will be considered a 'non-custodial offence' as will other out of court disposals that are recorded on a person's criminal record. Even where a person does not have a fine within the last three years, the decision maker may still conclude that a person is not of good character – and therefore refuse an application – if they have received multiple disposals of this kind that show a pattern of offending.¹²⁵

Fixed Penalty Notices, Penalty Charge Notices and Penalty Notices for Disorder are imposed by the Police or other authorised enforcement officers for traffic rule violations, environmental and civil violations. It is a way of the criminal justice system disposing of fairly minor offences without the need for a person to attend court. Receiving one does not form part of a person's criminal record as there is no admission of guilt. The decision maker will not consider these unless the person has:

- failed to pay and there were criminal proceedings as a result; or
- received numerous fixed penalty notices which would suggest a pattern of behaviour that calls into question their character.

Where a fixed penalty notice or fiscal fine has been referred to a court due to non- payment or the notice has been unsuccessfully challenged by the person in court, the decision maker will consider this as a conviction and assessed in line with the new sentence imposed.¹²⁶

A caution (simple or conditional), warning or reprimand are all examples of an 'out of court disposal' that are recorded on a person's criminal record. Even where a person does not have a caution, warning or reprimand within the last three years, the decision maker may still refuse an application if the person has received multiple disposals of this kind that show a pattern of offending.¹²⁷

¹²⁵ NI ch 18, Annex D, s 3.1.

¹²⁶ NI ch 18, Annex D, s 3.2.

¹²⁷ NI ch 18, Annex D, s 3.3.

Where a Community Sentence is imposed the offence is to be treated as a 'non-custodial offence' and is recorded on a person's criminal record. Even where a person does not have a community sentence within the last three years, the decision maker may still conclude that a person is not of good character – and therefore refuse an application – if they have received multiple disposals of this kind that show a pattern of offending.¹²⁸

Registration

In certain circumstances individuals who do not automatically qualify for citizenship are entitled to register as a British Citizen. Most applicants for British nationality by registration are required, by virtue of s.41A of the BNA 1981, to satisfy the SoS that they are “of good character” before nationality may be granted. Exceptions will continue to be made where the applicant has an entitlement to registration deriving from the 1961 UN Convention on the Reduction of Statelessness or is entitled to registration under s.4B of the BNA 1981 which gives registration entitlements to certain British Overseas Citizens, British subjects, British nationals overseas without other citizenship, or is aged below 10 on the date of the application.¹²⁹

Deprivation of citizenship

A British citizen may be deprived of citizenship under the BNA 1981, as amended by the NIAA 2002 as from 1 April 2003, the Immigration Nationality and Asylum Act 2006 as from 16 June 2006, and the Immigration Act 2014 as from 28 July 2014 are as follows:

- The Secretary of State is satisfied that doing so is 'conducive to the public good' (section 40(2)) and the person would not be left stateless as a result (section 40(4)).¹³⁰
- Where the Secretary of State is satisfied-regardless of whether or not it will render them stateless – that naturalised citizens have conducted themselves in a manner seriously prejudicial to the vital interests of the UK and she has reasonable grounds to believe that the person is able, under the law of a country or territory outside the UK, to become a national of such a country or territory.¹³¹
- Where the Secretary of State is satisfied that registration or naturalisation has been obtained

¹²⁸ NI ch 18, Annex D, s 3.4.

¹²⁹ BNA 1981, s.41A(5).

¹³⁰ BNA 1981, s 40(2) and (6).

¹³¹ BNA 1981, s 40(4A), inserted by the Immigration Act 2014, s 66.

by fraud, false representation or concealment of material facts.¹³²

Chapter 55 of the Nationality Instructions deal with deprivation and nullity of British citizenship.¹³³

Conducive to the public good

“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.¹³⁴

The Courts take a *de jure* view of statelessness rather than a *de facto* approach.¹³⁵ In the case of *B2 v Secretary of State for the Home Department*, B2 was a Vietnamese by birth. He had come to the UK aged 12 and had acquired British citizenship. Later he converted to Islam and was suspected of involvement in terrorist activities. The Secretary of State took steps to deprive him of his British citizenship. The issue was whether this decision rendered him stateless. Inquiries of the Vietnamese government said he was no longer a Vietnamese citizen. The Court of Appeal, however took a different view. The word 'stateless' in section 40(4) meant *de jure* stateless, not *de facto* stateless. The Court held that if it was clear that, under the law of a foreign state, an individual was a national of that foreign state, then he was not *de jure* stateless. If the Government of that foreign state chose to act contrary to its own law, it could render the individual *de facto* stateless, but the English courts had to respect the rule of law and could not characterise the individual as *de jure* stateless. The combined effect of the secretary of state's order and the subsequent responses of the Vietnamese Government was therefore to render B *de facto* stateless, but not *de jure* stateless.¹³⁶ See also *Al Jedda v SSHD*.¹³⁷

In May 2014 Minister for Immigration and Security, gave figures for the number of deprivation orders issued since 2006: 27 deprivations had occurred on conducive to the public good grounds;

¹³² BNA 1981, s 40(3) as substituted.

¹³³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460101/Chapter_55_-_Sept_2015.pdf

¹³⁴ NI Guidnace chp. 55.4

¹³⁵ *Hamza v Secretary of State for the Home Department* [2006] EWCA Civ 400, [2006] All ER (D) 173 (Apr).

¹³⁶ [2013] EWCA Civ 616 at [81-93].

¹³⁷ (2014) Sp Imm App Comm 18/07/2014

and 26 deprivations had occurred on fraud, false representations or concealment of material fact grounds, and another case was outstanding.¹³⁸

Judicial framework

Challenging naturalisation decisions

The award of British citizenship by naturalisation is discretionary. There is no appeal to the FT and until recently the SoS was not obliged to give reasons for any refusal and her decision was no subject to appeal to or review in any court.¹³⁹ There is still no right of appeal against refusal to register or naturalise as a British Citizen, however, reasons for any refusal must be given and the ouster clause has been removed. A decision can be challenged on all judicial review grounds.

Challenging deprivation orders

Section 40(5) of the BNA 1981 (as amended) states that before making an order for deprivation of citizenship, the Secretary of State must give the person written notice specifying the reasons for the order and the person's right of appeal. The British Nationality (General) Regulations 2003¹⁴⁰ specify the procedure for giving notice of a proposed deprivation of citizenship order and cancelling registration or naturalisation. For example, if the person's whereabouts are known, written notice may be personally delivered or sent by post. If their whereabouts are not known, notice is sent to their last known address. Section 40A of the BNA 1981 sets out the rights of appeal. An appeal against the decision to make an order for deprivation is made to the FT.¹⁴¹ Onward appeals are to the UT and the Court of Appeal. If the SoS certifies that the decision was taken wholly or partly in reliance on information which should not be made public for national security, political or other public interest reasons, the appeal is to the SIAC.¹⁴²

There are two important UT decisions on the ambit of the deprivation appeal. In *Arusha &*

¹³⁸ HC Deb 7 May 2014 c191

<https://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140507/debtext/140507-0002.htm>

¹³⁹ BNA 1981, s.44(2) and (3), Repealed by Nationality, Immigration and Asylum Act 2002 c. 41 Pt 1 s.7(1) (November 7, 2002)

¹⁴⁰ SI 2003/548, r10 <http://www.legislation.gov.uk/uksi/2003/548/contents/made>

¹⁴¹ s.40A(1) as inserted and amended by Asylum and Immigration (Treatment of Claimants, etc) Act 2004, Sch 2, para 4.

¹⁴² s.40A(2) as inserted; Special Immigration Appeals Commission Act 1997, s.2B (inserted by NIAA 2002, s.4(2)).

*Demushi (deprivation of citizenship - delay)*¹⁴³ the Tribunal held:

- that the absence of prescribed grounds of appeal means that the Tribunal has wide ranging power to consider, by way of appeal not a review, what the decision in an appellant's case should have been;
- the Tribunal will be concerned with the facts as it finds them and not with the Secretary of State's view of them; and
- an appellant can raise general human rights grounds but they must be framed to deal with the breach alleged to be caused by the decision to deprive the appellant of his nationality, and giving effect to that decision, and not framed to deal with the fiction that the appellant would be removed.

In *Deliallisi (British citizen: deprivation appeal: Scope)*¹⁴⁴ the UT held that:

- an appeal under section 40A of the BNA 1981 against a decision to deprive a person of British citizenship requires the Tribunal to consider whether the SoS's discretionary decision to deprive should be exercised differently. This will involve (but not be limited to) ECHR Article 8 issues, as well as the question whether deprivation would be a disproportionate interference with a person's EU rights;
- if, on the facts, the appellate tribunal is satisfied that deprivation of citizenship would constitute a disproportionate interference with the Article 8 rights of that person or his or her family the appellate tribunal must re-exercise discretion by finding in favour of the appellant. However, in a case where Article 8(2) is not engaged, because the consequences of deprivation are not found to have consequences of such gravity as to engage that Article, the Tribunal must still consider whether discretion should be exercised differently. This is because the scope of a section 40A appeal is wider than Article 8;
- as regards EU law, where a person affected by a deprivation decision has made actual use of rights flowing from EU citizenship, in particular, the right to work in another EU State, then the effect of removing such citizenship may well have a greater practical impact, compared with the position where such rights have not been exercised. Depending on the

¹⁴³ [2012] UKUT 80 (IAC).

¹⁴⁴ [2013] UKUT 439(IAC).

circumstances, that degree of impact may well require a greater degree of justification on the part of the national authorities, as regards their deprivation decision;

- although, section 40A of the BNA 1981 does not involve any statutory hypothesis that the appellant will be removed from the United Kingdom in consequence of the deprivation decision, this does not mean that removal as a consequence of deprivation is automatically excluded from the factors to be considered by the Tribunal hearing a section 40A appeal. Removal will be relevant if, and insofar as the Tribunal finds, as a matter of fact, that in the circumstances of the particular case, it is a reasonably foreseeable consequence of depriving the person of British citizenship; and
- a person who, immediately before becoming a British citizen, had indefinite leave to remain in the United Kingdom, does not automatically become entitled to such leave, upon being deprived of such citizenship.

HUMAN RIGHTS GENERALLY

The ECHR is given effect in UK law via the Human Rights Act 1998 (the “HRA”). The HRA requires a court or tribunal determining questions in connection with HER rights to take into account the jurisprudence of the ECtHR.¹⁴⁵ It also requires all legislation, primary and subordinate, past and future, to be read and given effect so far as possible in a way which is compatible with ECHR rights.¹⁴⁶ This also applies to the Immigration Rules.¹⁴⁷ If subordinate legislation cannot be interpreted in a way which is compatible with ECHR rights and there is nothing in the parent Act requiring its incompatibility it can be disapplied or struck down as *ultra vires*. However a tribunal has no power to strike down incompatible rules, although it can set aside an immigration decision which is unlawful as being incompatible with the appellant’s Convention rights regardless of whether it is in accordance with the rules.¹⁴⁸ If incompatible primary legislation cannot be remedied by interpretation, a declaration of incompatibility can be made, but only by the higher courts – High Court upwards.

There is also an obligation on public authorities to act compatibility with the Convention under

¹⁴⁵ HRA, s.2

¹⁴⁶ HRA, s.3(1)(a).

¹⁴⁷ *R v SSHD ex p Ali (Arman)* [200] INLR 89.

¹⁴⁸ NIAA 2002, s.84(1)(c), (g). *Huang v SSHD* [2007] UKHL 11.

section 6 HRA. This includes a court or tribunal, the SSHD and immigration officers. In cases involving human rights the appellate authorities therefore have a dual function – to review the decision of an immigration officer, SoS or lower court or tribunal for compatibility with the Convention and to act compatibly with the Convention themselves. In the performance of this dual function, the courts are bound to determine for themselves whether the act the appellant complains of is unlawful.

The proportionality test under the Convention is more rigorous and intrusive than ordinary standards of English judicial review (the *Wednesbury* test).