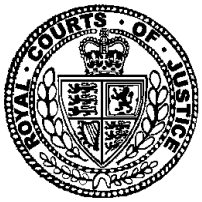

Neutral Citation Number: [2018] EWCA Civ 2064

Case No: T2/2017/0561

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL
IMMIGRATION APPEALS COMMISSION
MITTING J
[2012] UKSIAC 114/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/09/2018

Before :

LADY JUSTICE ARDEN

LORD JUSTICE SINGH

And

LORD JUSTICE COULSON

- -

Between :

Pham	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -
- -

Hugh Southey QC and Alex Burrett (instructed by **Jd Spicer Zeb**) for the **Appellant**
Robin Tam QC and Natasha Barnes (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 18-19 July 2018

- -

Approved Judgment

Lady Justice Arden:

1. PRINCIPAL ISSUE: NEED TO SHOW CURRENT RISK OF HARM FOR CITIZENSHIP DEPRIVATION

1. The appellant, by birth a Vietnamese national, now appeals from the summary dismissal by Mitting J, sitting in the Special Immigration Appeals Commission ("SIAC"), of the appellant's appeal against the order ("the Deprivation Order") dated 22 December 2011 of the Secretary of State under section 40(2) British Nationality Act 1981 (as amended) ("BNA"). The Deprivation Order deprived the appellant of his British nationality on the ground that deprivation was conducive to the public good. The Secretary of State made the order on the ground that:

> the Security Service assess that you are involved in terrorism-related activities and have links to a number of Islamist extremists.

2. The relevant provisions of section 40 BNA and its legislative history appear in the appendix to this judgment.

3. The evidence was that the appellant had travelled, in 2011, to Yemen, that he had stayed there for six months and while there had received terrorist training, including weapons training, and had engaged in terrorism-related activities there. The assessment was that, in consequence, he was a committed Islamist extremist. The appellant initially contended that he had travelled to Yemen not for terrorism-related purposes, but for entirely innocent purposes. There was lengthy litigation about whether the Secretary of State's Deprivation Order would make him stateless and so was prohibited under section 40(4) BNA. The Supreme Court held that he was not relevantly stateless because he was not made *de jure* stateless by the decision. He was born Vietnamese, but Vietnam, when it learned what the British government told the Vietnamese government about him, was determined that he should not return to Vietnam and so refused to acknowledge his Vietnamese citizenship. He was thus *de facto* stateless even though he was not *de jure* stateless.

4. The appellant appealed against the Deprivation Order to SIAC, and thence to this Court. He argued that the Deprivation Order was disproportionate under EU law. But the scope of the appeal from SIAC was limited and no EU law point arose on it, so the decision of the Supreme Court was restricted to the meaning of statelessness for the purposes of section 40 BNA. The Supreme Court decided that a person was not stateless for that purpose if he had *de jure* nationality in another country, even if he was *de facto* stateless: see *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591. The Supreme Court adopted a flexible approach to principles of judicial review, particularly where fundamental rights are at stake. Thus the intensity of review was unlikely to differ whether it was under domestic law or EU law. In *R (Lumsdon) v Legal Services Board* [2015] UKSC 41 [23] to [74], the Supreme Court considered the principle of proportionality and explained the test for proportionality under EU law, which differs from that under the European Convention on Human Rights.

5. The Supreme Court remitted the appellant's appeal from the Deprivation Order to SIAC, and the judge's order now under appeal was on that remitted application. The primary question of law both before SIAC and on this appeal is whether a Deprivation Order can be made where the appellant no longer poses a current risk of harm to the UK because, since the Secretary of State's deprivation order and the date of the Supreme Court's decision, the appellant, having admitted certain terrorism charges, has been sentenced in the US to 40 years' imprisonment and is currently serving that term in a high security prison there.

6. The appellant was extradited to the United States subsequent to the original SIAC hearing. He was prosecuted in the US on an indictment containing five counts. In 2016, subsequent to the decision of the Supreme Court, by a plea bargain he pleaded guilty to three counts. The conduct which he admitted by his guilty pleas substantially encompassed the basis of the Secretary of State's Deprivation Order. He admitted in summary that he had provided and attempted to provide material and resources to Al Qaeda in the Arabian Peninsula ("AQAP"); that he had conspired to receive military-type training from and on behalf of AQAP (a militant organisation); and that he had, knowingly, carried and used a Kalashnikov assault rifle in furtherance of crimes of violence. As explained, the appellant was sentenced to 40 years' imprisonment. The sentencing judge held that she was satisfied that he had not recanted by the time he arrived back in the UK in July 2011 (some five months before the citizenship deprivation decision), but that he had done so by the time of his arrival in the United States.

7. The appellant made copious admissions to the US Court. According to the open material, it was part of the Secretary of State's case that the appellant had returned to the UK to conduct operational activity on behalf of AQAP. There is a witness statement from the appellant in which he has admitted, among other serious terrorist activities, being trained in how to make a bomb, with the suggestion that the bomb was to be used to target the arrivals area at Heathrow Airport, and being provided with funds for this attack plan. It was accepted before SIAC that the appellant could not deny serious criminal conduct.

8. On remittal to SIAC, the Secretary of State applied to strike out the appellant's Notice of Appeal under Rule 11(b) of the SIAC Procedure Rules on the basis that it disclosed no reasonable grounds for an appeal.

2. JUDGMENT OF MITTING J

9. On the strike-out application, Mr Hugh Southey QC, for the appellant, submitted to the judge that, by the time that the appellant is at liberty again and free to return to the United Kingdom, any risk that the appellant might in the past have posed a risk to national security and public security will have gone. He contended that this factor should be taken into account. There was a balancing exercise to be carried out as Lord Sumption had made clear at [108] of his speech, with which Lord Neuberger, Lady Hale and Lord Wilson agreed, on the appellant's appeal to the Supreme Court, where he held:

> Although the full facts have not yet been found, it seems likely that the outcome of this case will ultimately depend on the approach which the court takes to the balance drawn by the

> Home Secretary between Mr Pham's right to British nationality and the threat which he presented to the security of the United Kingdom. A person's right in domestic law to British nationality is manifestly at the weightiest end of the sliding scale, especially in a case where his only alternative nationality (Vietnamese) is one with which he has little historical connection and seems equally to be of any practical value even if it exists in point of law. Equally, the security of this country against terrorist attack is on any view a countervailing public interest which is potentially at the weightiest end of the scale, depending on how much of a threat Mr Pham really represents and what (if anything) can effectually be done about it even on the footing that he ceases to be a British national. The suggestion that at common law the court cannot itself assess the appropriateness of the balance drawn by the Home Secretary between his right to British nationality and the relevant public interests engaged, is in my opinion mistaken. In doing so, the court must of course have regard to the fact that the Home Secretary is the statutory decision-maker, and to the executive's special institutional competence in the area of national security. But it would have to do that even when applying a classic proportionality test such as is required in cases arising under the Convention or EU law, a point which I sought to make in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] 3 WLR 1404 , paras 31–34.

10. The judge, in his judgment under appeal, declined to read into Lord Sumption's statement the proposition that the Secretary of State can only determine that the appellant should be deprived of British nationality by balancing those two factors. The judge added:

> Of course, his right to citizenship is a weighty right; that I accept, as no doubt did she. At the stage at which Lord Sumption was considering the matter, the appellant had not been extradited to the United States, he had not pleaded guilty and he had not been sentenced. Lord Sumption was, I think, considering what would happen on the basis that it remained necessary to control such risk as the appellant posed to the United Kingdom by measures that could be taken by the British State. ([15]).

11. The judge recorded that Mr Robin Tam QC, for the Secretary of State, submitted that those were not the only factors that the Secretary of State either was entitled to take into account when she made her decision or would now be entitled to take into account in light of the radically-changed circumstances since her decision. He submitted that the Secretary of State was and remained entitled to take the decision on the simple basis that by his actions the appellant has repudiated his obligation of loyalty to the United Kingdom and it is right that, given the facts that he has admitted, he should no longer remain a British citizen.

12. The judge held:

> In my judgment, Mr Tam's submissions are right. This was not just an exercise in balancing risks. British citizenship is an important right, but it carries with it obligations, fundamentally, of loyalty. They have existed for centuries. The treason legislation would, if applied to the appellant's acts, have given rise to a viable case against him and in former times he would have faced far more severe consequences than the deprivation of his British citizenship. ([16])

13. The judge held that a state could deprive a person of his citizenship if he had repudiated the obligation of loyalty provided that it did not make him *de jure* stateless, because "by his actions he has repudiated those obligations of loyalty" ([17]). By implication the Secretary of State did not then have to consider whether the action of citizenship deprivation was proportionate.

14. The judge applied alternative approaches to reach his ultimate decision. On one alternative, applying Lord Sumption's approach, the Secretary of State could decide to make the citizenship deprivation order because he had gone to Yemen and joined AQAP and had not recanted those views by the time of his return to the UK. "He plainly posed a real and very serious risk to national security" ([18]). The judge's alternative approach contemplated a decision taken at the time of the hearing or, indeed, at any time in the future, when the balance is different. The appellant no longer posed a risk to national security and it was extremely unlikely that he would do so when released from his sentence of imprisonment in the United States. The judge continued:

> The principal rights which would be in play here are above all his right to return and, to a subsidiary extent, the opportunity of receiving consular access under Article 36 of the Vienna Convention. Balanced against the Secretary of State's right, as it is, in my judgment, to treat him as having repudiated his obligation of loyalty to the United Kingdom, those are issues of little weight. In my judgment, however this case is approached, whether on the historical basis or on the current and prospective basis, his appeal is bound to fail. It has not merely no realistic prospect of success, it has, in my judgment, no prospect of success. For those reasons, this appeal should be ended now by my striking out the appeal notice.([18])

15. The judge did not, therefore, decide whether on appeal to SIAC the facts should be taken as of the date of the decision of the Secretary of State or the date of the hearing by SIAC. In my judgment, for the reasons given below, it is likewise not necessary to decide that point on this appeal.

3. THE ISSUES TO BE DECIDED ON THIS APPEAL

16. Counsel have helpfully agreed a list of the precise issues raised by this appeal:

> 1. Whether a person can be deprived of his status as a British citizen on the basis that he has repudiated his obligation of loyalty.
>
> 2. Whether a person can be deprived of that status on that basis if he does not pose a risk to national security.

> 3. Whether SIAC wrongly failed to consider the proportionality of the decision to deprive the Appellant of his British citizenship when deciding to strike out his appeal.
>
> 4. If the outcome of issue 3 depends on whether or not the EU law concept of 'proportionality' is relevant and if it is open to the Court of Appeal to consider this, whether and to what extent EU law was applicable to the decision to deprive the Appellant of his British citizenship.
>
> 5. Whether SIAC applied the wrong legal test when deciding to strike out the Appellant's appeal because the strike-out provision in the SIAC Procedure Rules should be construed in the same way as a similar provision in the Family Procedure Rules.

17. It is important to note that the appellant does not challenge the judge's conclusion if it was open to him to rely on the historic behaviour of the appellant, unless he can also show that the judge did not apply any test of proportionality. The appellant does not challenge the conclusion on proportionality if a proportionality exercise was indeed carried out.

18. I will take the submissions on the first four issues and state my conclusion on them, and then deal with the fifth question concerning the judge's procedural powers.

4. UN CONVENTION ON THE REDUCTION OF STATELESSNESS 1961 AND SOME RELATED STATUTORY HISTORY

19. The parties refer in their submissions to the United Nations Convention on the Reduction of Statelessness 1961 ("the 1961 Convention").

20. The General Assembly of the United Nations has given the United Nations High Commission for Refugees ("UNHCR") a mandate to identify stateless people, prevent and reduce statelessness around the world, as well as to protect the rights of stateless people and assist individuals under the 1961 Convention.

21. For the purposes of this appeal, the relevant provisions of the 1961 Convention are:

> Article 8
>
> 1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.
>
> 2. Notwithstanding the provisions of paragraph 1 of this Article, a person may be deprived of the nationality of a Contracting State: (a) in the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality; (b) where the nationality has been obtained by misrepresentation or fraud.
>
> 3. Notwithstanding the provisions of paragraph 1 of this Article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more

> of the following grounds, being grounds existing in its national law at that time: (a) that, inconsistently with his duty of loyalty to the Contracting State, the person (i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State; (b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.
>
> 4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this Article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

22. The UK ratified the 1961 Convention in 1966. The UK entered a reservation as permitted by Article 8(3) above.

23. The legislation in force in 1966 contained the same provisions as appeared in section 40(3)(a) and (b) and (5) BNA as originally enacted: see the British Nationality Act 1948, section 20(3)(a) and (b) and (5). Accordingly, the statutory pre-condition to citizenship deprivation has therefore used the same phrase - "conducive to the public good" - since 1948 save for the brief period when the amendment made by the 2002 Act was in force. Until 2002, the legislation also used the word "disloyal". Its disappearance happened at the same time as the commission of a criminal offence ceased to be a ground for the deprivation of the citizenship of a naturalised person.

5. SUBMISSIONS

(1) Submissions on Issues 1 to 4

24. *Need for current harm*: Mr Hugh Southey QC, for the appellant, submits a person cannot be deprived of citizenship where that would have no effect on the management of the risk which the individual posed. In this case, whatever risk the appellant had posed had been managed by the criminal justice system. For the foreseeable future, the appellant is unlikely to pose any risk. He had recanted his views before being sentenced. The sentencing judge in the United States had accepted that he was no risk. Under US law, the appellant will have to serve some 35 years of his sentence in prison, which is a maximum security prison.

25. Mr Southey submits that a finding that citizenship deprivation is conducive to the public good is a condition precedent to the exercise of the discretion. Therefore, there is a need for current harm. This would appear to make it irrelevant that there is a benefit resulting from his ceasing to be a citizen in terms of deterrence or the fact that the policy of the UK is to prevent persons who have participated in war crimes or crimes against humanity from having a "hiding place" in the United Kingdom.

26. Mr Southey submits that normally the risk of historic behaviour is dealt with by prosecution. EU law recognises that rights flow from EU citizenship including the right of free movement. The approach in C-135/08 *Rottman v Friestadt Bayern* [2010] QB 761, which the Supreme Court considered in their decision in this case, was essentially based on the proposition that although national citizenship is a matter for each EU member state, it has to comply with EU law. Domestic law must therefore comply with the doctrine of proportionality.

27. Mr Southey submits that the language of the section has moved away from past acts. Mr Southey submits that there has been no case in SIAC where citizenship deprivation has taken place on the basis of past conduct alone.

28. *High threshold needs to be overcome for citizenship deprivation*: Mr Southey submits that there is a high threshold for citizenship deprivation. The starting point is that citizenship is a fundamental status. He refers to the statelessness conventions of 1954 and 1961. In addition, the UNHCR attaches a particular role to citizenship. It has issued guidance under the 1961 Convention in a document entitled *Preventing and Reducing Statelessness*. This states:

> In deciding whether to deprive an individual of his or her nationality, the State should consider the proportionality of this measure, taking into account the full circumstances of the case. Due process guarantees need to be respected throughout the procedure regarding deprivation.

29. The proportionality doctrine referred to here is not further defined and may, Mr Southey fairly accepts, be different from that which applies in domestic law.

30. Lord Goldsmith QC's Citizenship Review (*Citizenship: Our Common Bond)* (2008), the Vienna Convention on Diplomatic Relations and Article 46 of the Charter of Fundamental Rights and Freedoms all emphasise the importance of citizenship. Citizenship has been called "the right to have rights" (per Chief Justice Warren in *Trop v Dulles* 356 US 86 (1957) 102).

31. In *Pham* at [108], Lord Sumption gave guidance on the facts. The Supreme Court clearly considered that domestic law and EU law would both require the application of a proportionality test and that there would be little difference in the result. Lord Sumption considered that the impact of citizenship deprivation on the individual has to be taken into account. It is not open to the UK to take the view that the individual has done something so heinous that he cannot be thought of as a British citizen. Past actions are only relevant to the extent that they throw light on future risk, but the court still has to carry out a proportionality assessment.

32. Mr Southey conceded during the hearing before the judge that it was not possible to argue that there was no serious criminal conduct in this case, but this concession does not go to the question of current risk. There needs to be a balancing exercise conducted by SIAC itself: see *L2 v SSHD,* citing *Al Jedda v SSHC* [2009] SC/66/2008, which in turn cited *Y1* (2009) SC/112/2011 on the question of the weight to be given to the Secretary of State. In *YI,* Irwin J sitting in SIAC held that the essence of the test of a threat to national security was that there should be a danger to national security.

33. As explained in paragraph 23 of this judgment, and as can be seen from the appendix, the relevant provisions of section 40 have undergone several changes. As Mr Tam accepted in his post-hearing submissions, the UK has in part implemented parts of the Convention even though it has not incorporated it as a whole into domestic law, and sought to bring its legislation into line with the provisions of the Convention on citizenship deprivation so far as appropriate. For example, the Explanatory Notes accompanying the Immigration Act 2014 state that:

> "[section 40(4A)] is intended to be more closely aligned with the 1961 UN Convention on the Prevention of Stateless, which allowed states to declare on ratifying the Convention that they retained the right to detain a person and render them stateless in specific circumstances." (Paragraph 406)

34. The fact that there are parts of the 1961 Convention which the UK has not incorporated into domestic law does not prevent the 1961 Convention having relevance in the UK through either Strasbourg jurisprudence or that of the Court of Justice of the European Union ("CJEU"), which term includes the predecessor of the Court, the European Court of Justice. The policy of the UK has been to bring the provisions of the BNA on citizenship deprivation into line with the 1961 Convention only so far as it was appropriate to do so.

35. *Individualised approach needed*: On Mr Southey's submission, the court has to weigh the individual interests of the appellant against the public interest. Mr Southey further submits that the appellant had a significant level of ties with the United Kingdom. His wife and children were in the UK and he worked here. In addition, he submits that it is relevant that he was *de facto* stateless. So without his UK citizenship he would be denied all the benefits of consular protection. Citizenship withdrawal may have an effect both on him and his dependants. The judge was wrong not to look at the effect on the individual and the fact in particular that the appellant had not offended since the date of his return to the United Kingdom (a period of some 5 months): this confirmed that the current risk was negligible. On the contrary, the judge treats his admissions of guilt as conclusive. It was necessary to consider proportionality. Moreover, the judge performed the balancing exercise incorrectly.

36. The appellant's children were born on 8 January 2011 and 14 March 2012 and they are in the United Kingdom with their mother. Mr Southey submits that it is in their best interest that there should be consular access because that can be used to facilitate contact and more generally some prospect of the children being reunited with their father. This submission carries little weight because the father is not going to be released until they are about 35 years of age.

37. Mr Southey submits that under paragraph [18] of the judge's judgment, the risk on release was found to be unlikely and this was not an insignificant point. It is not enough to say that the US would comply with the rule of law since there are questions of discretion when the intervention of a diplomat from the country of nationality would assist.

38. *Proportionality:* Mr Southey accepts that the judge carried out a balancing exercise in paragraph [18] of his judgment (paragraph [14] above), but he submits that it is not the right one. The fact that the appellant has only *de jure* citizenship is not a factor of any

weight in the judge's judgment. But there is a very real difference because he has no real ties with Vietnam. Mr Southey accepts that he may be able to establish that he is a refugee in some country other than Vietnam.

39. Mr Southey emphasises that under the principles of proportionality, the court has to find the least restrictive and invasive means of achieving the purpose of the legislation. So in *Bank Mellat v HM Treasury (No 2)* [2013 UKSC 39; [2014] AC 700, it was not just a question of punishing the defendants but of halting something which was harmful for the United Kingdom.

40. Mr Southey submits that EU law is relevant because it would be odd if domestic law did not provide the same level of protection. EU law does not say who is a national. If the intensity of review under domestic law were less than EU law, that would give rise to the question of the status of the decision of the CJEU in *Rottmann*, and there is a greater weight to be attached to the CJEU. Mr Southey submits that it is necessary to determine whether EU law applies because EU law requires a more demanding requirement of disclosure. In the Supreme Court the majority decided not to look at the question of incorporation. What follows from this is at page 94 of the decision.

41. Mr Robin Tam QC, for the Secretary of State, submits that the judge's reasoning was correct.

42. *No need to show current harm:* Mr Tam points out that there was a repudiation by the appellant of his obligation of loyalty and that this is in itself a proper basis for citizenship deprivation. Paragraph 16 of the judge's judgment envisaged that there was a risk which might need to be controlled but the judgment shows that these are not the only factors. One of the factors is that he will have to spend a long time in the United States and it is not clear what his wish will be in 2040. It was submitted to the judge that there was a fundamental bond between an individual and a state. The judge referred in his judgment to treason.

43. Mr Tam also submits that it is not always necessary that a person should pose some current risk. The duty of loyalty is fundamental to citizenship. The oath of allegiance demonstrates this. So does the treason legislation (considered in paragraph 56 of Lord Goldsmith's paper). Section 40A BNA uses the past tense. In the 2003 version there was no not-conducive ground but the current section 40(2) and also the new section 40(4A) are again in the past tense. It inevitably follows from that that it must be a proper basis for citizenship deprivation, subject always to balancing. It is important not to confuse citizenship deprivation with immigration decisions but this situation is not unlike the deportation cases.

44. Mr Tam submits that section 40 contains no requirement for the current risk of harm to be established first as a pre-condition. It is what is required by TPIM. Mr Tam notes that the 1983 version of the BNA at (c) involved conduct which was not particularly serious. Nonetheless there was focus on the past. There was no requirement of either a current or a future risk. In 2003 all reference to past acts and also the non-conducive grounds were removed. In 2006, section 40 was streamlined and it was only the not-conducive ground that was present. In 2014 Parliament extended the powers applicable as it was considered that the deprivation should be conducive to the public good. This means it can be conducive to the public good because of past acts: section 40(a)(b) that

makes sense in relation to traitors. It does not make any sense that any person cannot be deprived of their nationality because he is not a current threat.

45. Mr Tam submits that, if EU law required a risk to national security from the appellant, Mr Southey would have put that at the forefront of his submission. Mr Tam relied on Case 340/97 *Nazli v Stadt Nurnberg* (which is only partially reported in the version in the authorities bundle but which is fully reported online) as authority for the proposition that it is not permitted for a member state to expel a person on a general basis simply in order to deter others. The full report of that case shows that the CJEU sought to apply *Bouchereau* as to the meaning of a threat to the fundamental interests of society, though there was no express reference to the paragraphs cited above. As was stated at paragraph 23 of *Robinson*, EU legislation in issue in *Nazli* involves a specific risk test, i.e. a risk caused by the individual's own conduct. In other contexts, EU law does not require a present threat.

46. *Lack of proportionality not arguable on the facts here:* Mr Tam submits that this is a hopeless case and that on the facts there was no question of proportionality yielding any different answer. If the relevant time is the date of the remittal hearing, it is a different balance, but the answer again is that it is a hopeless case. It is not a case about fine distinctions in different areas of law. If SIAC is entitled to reach a conclusion summarily, there was no prospect of success at all. There was a question of balancing and this could be called proportionality. SIAC had to weigh matters. The judge understood there had to be balancing.

47. As far as access by the appellant's family is concerned this is a matter governed by US law. The rift between the appellant and his family is caused by the conviction not by the deprivation of his citizenship. Consular access can facilitate communication with the family, but this is the case of an appellant in the United States, which has a legal system which respects the rule of law so if the family were denied the access they could enforce their rights through the courts. Consular access cannot give greater rights than domestic law provides. But the fact is the appellant has rights under US domestic law. Any suggestion that SIAC threw proportionality out of the window cannot be sustained. The judge expressly recognised that citizenship is a weighty right. Mr Tam submits that the lack of reference in the judgment to the effect of citizenship deprivation on the appellant's family reflects the way the argument was put.

48. Mr Tam submits that *Pham* discusses proportionality in an academic context. In any event, in paragraph 108 Lord Sumption is clearly discussing the case as it appeared at the time. That is how the case was then being put. Accordingly, paragraph 108 is not authority that the risk is always required. Had this been illustrated by other cases that have been referred to. All of the other cases concerned risk to national security. That was already a given in those cases.

(2) Conclusions on Issues 1-4

49. The right to nationality is an important and weighty right. It is properly described as the right to have other rights, such as the right to reside in the country of residence and to consular protection and so on. But it is a right which carries obligations: it derives from feudal law where the obligation of the liege was to protect, and the obligation of

the subject was to be faithful. As the judge pointed out, treason was a betrayal of that trust and treason was recognised as such by the common law even before the Treason Act 1351 (*Joyce v DPP* [1947] AC 347). The CJEU recognises the reciprocal nature of citizenship, as may be seen from *Rottman* at [51]:

> In this regard [the public interest], it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.

50. *Rottman* concerned the deprivation of citizenship where it had been obtained by deception. Proportionality still had to be applied but in the succeeding paragraphs it gave a firm steer to the national court that in principle citizenship deprivation on these grounds would be proportionate:

> 51. A decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality.
>
> 52 That conclusion relating to the legitimacy, in principle, of a decision withdrawing naturalisation adopted in circumstances such as those in the main proceedings is borne out by the relevant provisions of the Convention on the reduction of statelessness. Article 8(2) thereof provides that a person may be deprived of the nationality of a Contracting State if he has acquired that nationality by means of misrepresentation or by any other act of fraud. Likewise, Article 7(1) and (3) of the European Convention on nationality does not prohibit a State Party from depriving a person of his nationality, even if he thus becomes stateless, when that nationality was acquired by means of fraudulent conduct, false information or concealment of any relevant fact attributable to that person.
>
> 53 That conclusion is, moreover, in keeping with the general principle of international law that no one is arbitrarily to be deprived of his nationality, that principle being reproduced in Article 15(2) of the Universal Declaration of Human Rights and in Article 4(c) of the European Convention on nationality. When a State deprives a person of his nationality because of his acts of deception, legally established, that deprivation cannot be considered to be an arbitrary act.
>
> 54 Those considerations on the legitimacy, in principle, of a decision withdrawing naturalisation on account of deception remain, in theory, valid when the consequence of that withdrawal is that the person in question loses, in addition to the

> nationality of the Member State of naturalisation, citizenship of the Union.
>
> 55 In such a case, it is, however, for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law.
>
> 56 Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.
>
> 57 With regard, in particular, to that last aspect, a Member State whose nationality has been acquired by deception cannot be considered bound, pursuant to Article 17 EC, to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his Member State of origin.
>
> 58 It is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin.
>
> 59 Having regard to the foregoing, the answer to the first question and to the first part of the second question must be that it is not contrary to European Union law, in particular to Article 17 EC, for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality has been obtained by deception, on condition that the decision to withdraw observes the principle of proportionality.

51. In the present case, the appellant has over a significant period of time fundamentally and seriously broken the obligations which apply to him as a citizen and put at risk the lives of others whom the Crown is bound to protect. I do not consider that it would be

sensibly argued that this is not a situation in which the state is justified in seeking to be relieved of any further obligation to protect the appellant.

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 pre-condition that there should be a risk of current harm.

53. If the appellant's interpretation were correct, the longer the sentence and the more serious the offence, the lower the risk that needs to be managed and therefore the greater the likelihood is that a person will retain citizenship. That would be an illogical effect and the interpretation is not one which the Court is bound to accept as correct.

54. Mr Southey submits that the various changes to section 40 BNA (see the appendix to this judgment) support his submission that a risk of current harm by the appellant must be shown. With respect, it seems to me that the wording does not bear that out since, as I have already explained, the words "conducive" do not necessarily imply a current threat. Lord Justice Singh pointed out in argument that the CJEU has accepted, in the context of public policy, that, while, in general, public policy is only engaged where there has been past conduct giving rise to a propensity to wrongful conduct in the future, there may be circumstances in which past conduct alone is enough to constitute a present. This was established in Case 30/77 *R v Bouchereau* [1978] QB 732.

55. This was a decision about the member state's ability to deport an individual under Directive 64/221/ EC. The relevant question for the CJEU was:

> whether the wording of article 3 (2) of Directive No. 64/221, namely, that previous criminal convictions shall not 'in themselves' constitute grounds for the taking of measures based on public policy or public security means that previous criminal convictions are solely relevant in so far as they manifest a present or future propensity to act in a manner contrary to public policy or public security; alternatively, the meaning to be attached to the expression 'in themselves' in article 3 (2) of Directive No. 64/221.

56. As Lord Justice Singh discussed in his recent judgment in *Robinson (Jamaica) v Secretary of State for the Home Department* [2018] EWCA Civ 85; [2018] 4 WLR 81, with which Lord Justices Lindblom and Underhill agreed, the CJEU held in *Bouchereau*:

> 27. The terms of article 3 (2) of the Directive, which states that "previous criminal convictions shall not in themselves constitute

> grounds for the taking of such measures." must be understood as requiring the national authorities to carry out a specific appraisal from the point of view of the interests inherent in protecting the requirements of public policy, which does not necessarily coincide with the appraisals which formed the basis of the criminal conviction.
>
> 28. The existence of a previous criminal conviction can, therefore, only be taken into account in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy.
>
> 29. Although, in general, a finding that such a threat [i.e. a present threat] exists implies the existence in the individual concerned of a propensity to act in the same way in the future, it is possible that past conduct alone may constitute such a threat [i.e. a present threat] to the requirements of public policy.
>
> 30. It is for the authorities and, where appropriate, for the national courts, to consider that question in each individual case in the light of the particular legal position of persons subject to Community law and of the fundamental nature of the principle of the free movement of persons.

57. While in deportation while there may be other issues which arise which are not applicable to citizenship deprivation, the CJEU clearly indicated in that passage that in terms of the public good, serious past conduct alone may be enough to create a sufficient risk. That may be because the risk may come from the consequences of what the malefactor has done and that risk might be reduced by deprivation of his citizenship. Or it may be because he has breached his duty of loyalty so fundamentally that it cannot be reasonable to expect the state to continue to provide him with the protection which flows from citizenship. The protection for the individual is that the national court must decide whether that is so on the individual facts of his case (see paragraph 30 of the CJEU's judgment).

58. Mr Southey argues that in 2002 Lord Filkin made a statement in Parliament that there would be no deprivation of citizenship based on past misconduct alone. Lord Filkin in my judgment was making the different point that citizenship deprivation would not be based on general criminal conduct and as I have explained the legislation was amended with that effect in 2002. Mr Southey submitted a number of extracts from Hansard after the hearing designed to show that there was no Parliamentary intention that the Secretary of State should have power to remove citizenship on past conduct which did not reveal any present risk. I agree with the Secretary of State that these extracts are not admissible on interpretation of section 40 BNA.

59. Citizenship should not be arbitrarily withdrawn or withheld, as occurred in Europe in the twentieth century, as where people fleeing their country have had their citizenship removed or where people have not been granted citizenship when their state was

created. The 1961 Convention protects a national against the arbitrary deprivation of his nationality and aims at reducing statelessness.

60. Although the UK Parliament has not incorporated the 1961 Convention wholesale into domestic law, the CJEU has had regard to it (see *Rottman*). There is a question here as to the extent to which it is competent for EU law to expand into an area that affects nationality of the individual member states, but it is sufficient to assume that the EU principle of proportionality applies to citizenship deprivation without deciding that question. It may be that proportionality in this context goes no further than protecting a citizen from arbitrary removal of citizenship but, even if it does, I do not see any basis on which it could be said that it was disproportionate in this case. Lord Sumption in [108] of his judgment in *Pham*, with which all the other members of the Supreme Court agreed, was considering the case as it then appeared to be without any of the admissions of guilt which the appellant has since made and on which he has been sentenced to forty years' imprisonment.

61. The only real disadvantage in the foreseeable future to the appellant is that he is deprived of consular protection. That may assist him to obtain benefits in terms of the visits he receives and conditions in which he is held. But citizenship is not exclusive. It is open to a host state to protect non-citizens within its territory. There is no evidence to suggest that the appellant would not be able to obtain all the relief to which he is entitled throughout using the domestic legal system of the United States and without consular protection.

62. In so far as the appellant continues to argue otherwise, the judge carried out a balancing exercise and his judgment therefore met the requirement of the UNHCR guidance set out in paragraph 28 above.

63. Accordingly, in my judgment, Issues 1 and 2 above must each be answered: Yes. Therefore Issues 3 and 4 do not arise.

(3) Submissions on Issue 5

64. Rule 11B of the Special Immigration Appeals Commission (Procedure) Rules 2003 provides:

> The Commission may strike out-
>
> (a) a notice of appeal, a notice of application for review or a reply by the Secretary of State, if it appears to the Commission that it discloses no reasonable grounds for bringing or defending the appeal or for seeking or opposing the application for review, as the case may be; or
>
> (b) a notice of appeal or a notice of application for review, if it appears to the Commission that it is an abuse of the Commission's process.

65. Mr Southey submits that under this Rule, SIAC can only strike out an appeal if there are no reasonable grounds or an abuse of process. He submits that there is no power to grant a summary judgment, taking into account evidence. The rules do not contain the

overriding objective to be found in the CPR. There is no general duty on the Commission to deal with a case in a particular way. It is consistent with that that there is a specific duty to provide an exculpatory material for review and provisions in the SIAC rules for special advocates. SIAC has to ensure that it is fully informed and it has to provide safeguards for appellants. In *W (Algeria)* at 43, the absence of a particular power was deliberate, and it led to potential unfairness. An analogy can be drawn with the Family Procedure Rules ("FPR"): see *Wyatt v Vince* [2015] 1 WLR 1228, where the Supreme Court held that a power similar to Rule 11B deliberately did not give power to grant a summary judgment as opposed to a power to strike out proceedings which did not disclose reasonable grounds for bringing or defending a claim or were an abuse of the process of the court. Moreover, submits Mr Southey, no reasonable grounds must mean no grounds known to the law.

66. If there had been no strike out, the judge would have received evidence from the appellant, subject to this being arranged with the authorities in the United States.

67. Mr Southey further submits that the Supreme Court in *Pham* approached the matter on the basis that the judge would exercise the discretion conferred by section 40(2) BNA in accordance with domestic public law principles: see the authorities as to the practice of SIAC to which I have already referred. The judge did not do that.

68. Mr Southey does not submit that it is not possible in any circumstances to have a summary judgment procedure where the principal issue is one of proportionality. But he submits summary judgment is difficult to justify in this situation where the court has only a limited picture. Mr Southey submits that if there were a full hearing the appellant could argue that he was a low risk and also that citizenship was important to him and his family. He does not, however, contend that there was any material matter of which the judge was unaware.

69. Mr Tam submits that at face value the SIAC rules are very similar to the FPR in issue in *Wyatt v Vince* but that the context is very different. The family courts are required by statute to take into account certain specified matters and this is inconsistent with a power in the court to give summary judgment. In *Roocroft v Ball* [2016] EWCA Civ 1009; [2017] 1 WLR 1137, this Court held that *Wyatt v Vince* applied to applications which were in substance summary judgment applications, even if the judge considered that there were not. However, submits Mr Tam, Rule 11B should be interpreted differently from the FPR. Rule 11B(a) includes a reference to the Secretary of State's reply. This would include evidence so the SIAC Rules therefore contemplated that under Rule 11B SIAC would in appropriate circumstances consider the evidence and not just the form of the pleading.

Conclusions on Issue 5

70. This is a short point. In *Wyatt v Vince*, the absence from the FPR of a power to give summary judgment was held by the Supreme Court to be a deliberate step. In the case of the SIAC Rules, however, it is clear from the reference in Rule 11B to the Secretary of State's reply that in the context of the SIAC there is no inherent reason for concluding that SIAC should not also, in an appropriate case, consider the incontrovertible evidence at this preliminary stage. On this basis there is no reason why SIAC's function under this Rule should be limited to considering whether, on the face of the notice of appeal, a recognisable point of law is pleaded.

71. As Mr Southey submits, the SIAC rules contain provisions which would not apply to normal adversarial litigation but those points do not in my judgment lead to the conclusion that there was some deliberate reason for omitting to mention summary judgment in Rule 11B.

72. Accordingly, in my judgment, there was no procedural objection to the judge taking the course that he did.

5. OVERALL CONCLUSION

73. For the reasons given above, I would dismiss this appeal.

Lord Justice Singh

74. I agree.

Lord Justice Coulson

75. I also agree.

APPENDIX TO JUDGMENT OF ARDEN LJ

RELEVANT PROVISIONS OF SECTION 40 BRITISH NATIONALITY ACT 1981 IN FORCE AT THE DATE OF THE DEPRIVATION ORDER

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

(a)a British citizen,

(b)a British overseas territories citizen,

(c)a British Overseas citizen,

(d)a British National (Overseas),

(e)a British protected person, or

(f)a British subject.

(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.

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

(a)fraud,

(b)false representation, or

(c)concealment of a material fact.

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

(5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—

(a)that the Secretary of State has decided to make an order,

(b)the reasons for the order, and

(c)the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997.

(6) Where a person acquired a citizenship status by the operation of a law which applied to him because of his registration or naturalisation under an enactment having effect before commencement, the Secretary of State may by order deprive the person of the citizenship status if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—

(a)fraud,

(b)false representation, or

(c)concealment of a material fact.

Legislative History

The material provisions of section 40 have been amended since original enactment as appears below:

1. Subsections (1) to (5) as originally enacted read as follows:

> (1) Subject to the provisions of this section, the Secretary of State may by order deprive any British citizen to whom this subsection applies of his British citizenship if the Secretary of State is satisfied that the registration or certificate of naturalisation by virtue of which he is such a citizen was obtained by means of fraud, false representation or the concealment of any material fact.
>
> (2) Subsection (1) applies to any British citizen who—
>
> (a)became a British citizen after commencement by virtue of—
>
> (i)his registration as a British citizen under any provision of this Act; or
>
> (ii)a certificate of naturalisation granted to him under section 6 ; or

(b)being immediately before commencement a citizen of the United Kingdom and Colonies by virtue of registration as such a citizen under any provision of the British Nationality Acts 1948 to 1964, became at commencement a British citizen ; or

(c)at any time before commencement became a British subject (within the meaning of that expression at that time), or a citizen of Eire or of the Republic of Ireland, by virtue of a certificate of naturalisation granted to him or in which his name was included.

(3) Subject to the provisions of this section, the Secretary of State may by order deprive any British citizen to whom this subsection applies of his British citizenship if the Secretary of State is satisfied that that citizen—

(a) has shown himself by act or speech to be disloyal or disaffected towards Her Majesty ; or

(b) has, during any war in which Her Majesty was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist an enemy in that war; or

(c) has, within the period of five years from the relevant date, been sentenced in any country to imprisonment for a term of not less than twelve months.

(4) Subsection (3) applies to any British citizen who falls within paragraph (a) or (c) of subsection (2); and in subsection (3) " the relevant date ", in relation to a British citizen to whom subsection (3) applies, means the date of the registration by virtue of which he is such a citizen or, as the case may be, the date of the grant of the certificate of naturalisation by virtue of which he is such a citizen.

(5) The Secretary of State—

(a)shall not deprive a person of British citizenship under this section unless he is satisfied that it is not conducive to the public good that that person should continue to be a British citizen ; and

(b)shall not deprive a person of British citizenship under subsection (3) on the ground mentioned in paragraph (c) of that subsection if it appears to him that that person would thereupon become stateless.

2. The following section 40 was substituted by the Nationality, Immigration and Asylum Act 2002:

40 Deprivation of citizenship

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

(a) a British citizen,

(b) a British overseas territories citizen,

(c) a British Overseas citizen,

(d) a British National (Overseas),

(e) a British protected person, or

(f) a British subject.

(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of—

(a) the United Kingdom, or

(b) a British overseas territory.

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

(a)fraud,

(b)false representation, or

(c)concealment of a material fact.

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

(5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—

(a) that the Secretary of State has decided to make an order,

(b) the reasons for the order, and

> (c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68).
>
> (6) Where a person acquired a citizenship status by the operation of a law which applied to him because of his registration or naturalisation under an enactment having effect before commencement, the Secretary of State may by order deprive the person of the citizenship status if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
>
> (a)fraud,
>
> (b)false representation, or
>
> (c)concealment of a material fact.

3. Subsection (2) as first shown above was substituted by the Immigration, Asylum and Nationality Act 2006.

4. Subsection (4) was extended by the Immigration Act 2014 (not applicable to this appeal):

> (4A) But that [i.e. sub-section (4)] does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—
>
> (a) the citizenship status results from the person's naturalisation,
>
> (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
>
> (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.