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36 PUBLIC & HUMAN RIGHTS

Challenging Deprivation of Nationality

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This seminar will cover the following:

A. British nationality and ‘citizenship status’

B. Bases for deprivation of British nationality (citizenship)

i. ‘conducive’ (s 40(2)) British Nationality Act 1981 (‘BNA 1981’);

ii. Deprivation of nationality acquired by fraud, false representation, or concealment of material fact (s 40(3)) BNA 1981;

C. Notice

D. Means of challenge

-administrative review

-statutory appeal

-judicial review

E. Grounds

F. Conclusions

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A. British nationality and 'citizenship status'- application

s 40 BNA

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.*

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B. Bases for deprivation of British nationality (citizenship)

<u>Basis for deprivation 1</u>- 'Conducive' deprivation- s 40(2) BNA

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

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

(4A) [NB 40(4) does not prevent deprivation if] a) person naturalised, (b) SSHD] satisfied deprivation is conducive to public good because of conduct 'seriously prejudicial to the vital interests of the United Kingdom [etc]', and (c) SSHD has reasonable grounds to believe person may become national of another country or territory.

‘*Conducive*’ deprivation- s 40(2) BNA

Re content of ‘*conducive to the public good*’ per SSHD’s policy *Deprivation and Nullity of British citizenship* (Nationality Instructions chapter 55) 55.4.4

> *55.4.4 “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*

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S 40(4) BNA 1981 and statelessness

Statelessness is in essence the condition of having no nationality. The Convention relating to the Status of Stateless Persons 1954, article 1(1), defines statelessness *in limine* with '*stateless person*':

> 1(1) *For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law.*

This is the meaning applied in section 40(4) BNA 1981-
Pham v SSHD [2015] UKSC 19; [2015] 1 WLR 1591, §20
R (otao KV) v SSHD [2018] EWCA Civ 2483; [2018] 4 WLR 166, §28

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Basis for deprivation 2-
<u>Registration or naturalisation obtained by fraud, false representation, or concealment of a material fact- s 40(3) and (6) BNA 1981</u>

> *[40](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.*

S 40(6) extends the fraud withdrawal regime to pre-BNA 1981 acquisition of nationality

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Registration or naturalisation obtained by fraud, false representation, or concealment of a material fact- relevant definitions per SSHD's policy (NIs ch 55) 55.4.1-3

55.4.1 "False representation" means a representation which was dishonestly made on the applicant's part i.e. an innocent mistake would not give rise to a power to order deprivation under this provision.

55.4.2 "Concealment of any material fact" means operative concealment i.e. the concealment practised by the applicant must have had a direct bearing on the decision to register or, as the case may be, to issue a certificate of naturalisation.

55.4.3 "Fraud" encompasses either of the above

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Nullity-

Note- in some cases registration or naturalisation will be a nullity because there was never a valid grant to that person- if the purported recipient was not the person intended to receive the grant but had created an entirely new false identity or adopted some else’s identity (impersonation), the grant would be a nullity- see *R (Hysaj) v SSHD* [2017] UKSC 82; [2018] 1 WLR 221 and SSHD’s policy (NIs ch 55) 55.1.3 and 55.9

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C. Notice

Requirement for notice of decision- s 40(5) BNA 1981

[40](5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—(a) that the Secretary of State has decided to make an order,
(b) the reasons for the order, and
(c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68).

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Exception to notice requirement- s 40(5A)-(5D) BNA 1981- amendment under s 10 Nationality and Borders Act 2022 allows SSHD to dispense with notice under s 40(5) (in effect from 10 May 2023)

> *[40](5A) Subsection (5) does not apply if—(a) the Secretary of State does not have the information needed to be able to give notice under that subsection,*
> *(b) the Secretary of State reasonably considers it necessary, in the interests of—(i) national security,*
> *(ii) the investigation or prosecution of organised or serious crime,*
> *(iii) preventing or reducing a risk to the safety of any person, or*
> *(iv) the relationship between the United Kingdom and another country,*
> *that notice under that subsection should not be given….*

(Designed to circumvent restriction on SSHD emphasised by *R (otao D4) v SSHD* [2022] EWCA Civ 33; 2 WLR 785 (weaker notice provisions inserted into regulations *ultra vires* BNA 1981)

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Pre-notice? ('Minded to' indications)

Kolicaj (Deprivation: procedure and discretion) Albania [2023] UKUT 294 (IAC) – generally 'minded to' notice of section 40(2) decision, but SSHD could omit if obvious danger such as renunciation of second nationality. (§§57-58)

57. It is necessary for the respondent to establish that there was a clear justification for the departure from the normally applicable principles set out in Balajigari which occurred in the making of this decision without the opportunity for the appellant to make any representations about whether or not he should be deprived of his citizenship….

58. Notwithstanding [fairness/notice] in the circumstances of this case the risk of the entire decision-making process being frustrated by the appellant renouncing his Albanian citizenship so as to disqualify him from a decision to deprive him of his citizenship on the basis that to do so would render him stateless justified the respondent proceeding without affording the appellant an opportunity to make representations…

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D. Means of challenge

Administrative review- does not apply to deprivation of nationality- see HO policy Administrative Review, v12.0, 3 September 2021, '*Decisions which are eligible for administrative review*'

Statutory appeal- section 40A BNA 1981 or (if SSHD certifies national security context per s79 Nationality Immigration and Asylum Act 2002) section 2B Special Immigration Appeals Commission Act 1997

Otherwise, if no alternative remedy (for instance because of restrictions on scope of appeal or absence of appeal, as per *R (Begum) v SIAC; etc* [2021] UKSC 7; [2021] AC 765), **judicial review,**

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<u>Statutory appeal</u> (s 40A BNA 1981- s 2B SIACA 1997)

40A Deprivation of citizenship: appeal

(1) A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against the decision to [the First-tier Tribunal] .

(2) Subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public—(a) in the interests of national security,

(b) in the interests of the relationship between the United Kingdom and another country, or

(c) otherwise in the public interest.

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<u>Statutory appeal</u> (s 40A BNA 1981- s 2B SIACA 1997)

2B

A person may appeal to the Special Immigration Appeals Commission against a decision to make an order under section 40 of the British Nationality Act 1981 (c. 61) (deprivation of citizenship) if he is not entitled to appeal under section 40A(1) of that Act because of a certificate under section 40A(2) (and section 40A(3)(a) shall have effect in relation to appeals under this section).

E. Grounds

<u>Statutory appeal- background to scope/limitations</u>

R (Begum) v SIAC; etc [2021] UKSC 7; [2021] AC 765, §40 per Lord Reed *'[t]here does not appear ever to have been any statutory provision relating to the grounds on which an appeal … may be brought, the matters to be considered, or how the appeal is to be determined.*'- applies both to s 40A BNA 1981 and s 2B SIACA 1997

R (Begum) §67- The right of appeal '*enables [the SSHD's] conclusion that he was satisfied to be challenged' but 'does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied.*'

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Main points re appeals:

'review' of SSHD- *R (Begum)* §68- '*in general… considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals*' (nb '*essentially* Wednesbury *principles*' per Underhill LJ in *Laci v SSHD* [2021] EWCA Civ 769, §40)

HRA grounds given substantive consideration- *R (Begum)* §69- statutory appeal must encompass scope for appeal v breach of protected HRA 1998/ECHR rights, tribunal considers these for itself- '*if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment.*'

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U3 v SSHD [2023] EWCA Civ 811; [2024] 3 All ER 17

Appeal in national security cases

i. Approach in *Begum* to scope of section 2B appeal was not *obiter* and would be followed by CA (E Laing LJ, §166)

ii. Appeal under section 2B SIAC 1997 against a section 40(2) BNA 1981 decision '*fundamentally different from*' judicial review, in that an appellant under section 2B of the 1997 Act would be able to challenge the merits of that decision (Laing LJ, §170)

iii. SIAC has power to make findings of fact, on balance of probabilities, where relevant to assessment of national security and where, in its expert judgment, SIAC considered that it was appropriate to make them; that, having made any such factual findings, SIAC would then ask, among other things, whether the SSHD's assessment of national security had no factual basis or was one which no reasonable Secretary of State could have reached (Laing LJ, §173-8)

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U3 v SSHD [2023] EWCA Civ 811; [2024] 3 All ER 17

iv. when asking whether the SSHD's assessment of national security had no factual basis or was one which no reasonable Secretary of State could have reached SIAC was required to show proper regard to the SSHD as primary decision-maker, whose decision under section 40(2) of the 1981 Act depended on knowledge, expertise and political accountability which SIAC lacked; that, further, SIAC would have to remember that the Secretary of State's assessment of national security was frequently not solely or even primarily based on specific findings of fact, but on broader questions such as motivation (Laing LJ, §175)

NOTE- Appeal to the SC is listed for 20-21 November 2024, ref UKSC 2023/0145- questions arising identified on next slide.

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UKSC- Questions for Court (SC Registry summary on website https://www.supremecourt.uk/cases/uksc-2023-0145.html)

“What are the functions of the Special Immigration Appeals Commission ("SIAC") when it hears an appeal against the Home Secretary's decisions to deprive a person of their British citizenship and/or to refuse a person entry clearance on national security grounds?

Can SIAC engage in a full merits-based review of the Home Secretary's decisions or is it confined to a more limited review of the decision on public law grounds?

To what extent can SIAC interfere with the Home Secretary's assessment of the risk to national security posed by the affected person?”

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Statutory appeal (guidance re scope)

Chimi (deprivation appeals; scope and evidence) Cameroon [2023] UKUT 115 (IAC)- relevant questions:

1(a) Did [SSHD] materially err in law when she decided that the condition precedent in s40(2) or s40(3) …was satisfied? If so, the appeal falls to be allowed. If not,
(b) Did [SSHD] materially err in law when she decided to exercise her discretion to deprive the appellant of British citizenship? If so, the appeal falls to be allowed. If not,
(c) Weighing the lawfully determined deprivation decision against the reasonably foreseeable consequences for the appellant, is the decision unlawful under s6 of the Human Rights Act 1998? If so, the appeal falls to be allowed on human rights grounds. If not, the appeal falls to be dismissed.

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Chimi (deprivation appeals; scope and evidence) Cameroon [2023] UKUT 115 (IAC)- evidence

(2) In considering questions (1)(a) and (b), the Tribunal must only consider evidence which was before the Secretary of State or which is otherwise relevant to establishing a pleaded error of law in the decision under challenge. Insofar as Berdica *[2022] UKUT 276 (IAC) suggests otherwise, it should not be followed.*

(3) In considering question (c), the Tribunal may consider evidence which was not before the Secretary of State but, in doing so, it may not revisit the conclusions it reached in respect of questions (1)(a) and (b).

Statutory appeal- effect

Successful appeal does not lead to relief or impugn the original order but creates a situation in which SSHD must withdraw decision, without retrospective effect as SSHD being ‘satisfied’ of something is not a condition precedent (as might be the case if section provided SSHD ‘*may not make an order under section 40(2) if the effect of the order would be to make a person stateless*’:

E3 v SSHD [2022] EWHC 1133 (Admin)

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Appeal under section 40(2) BNA 1981

Cases are generally highly focussed upon section 40(4) statelessness barrier, but see also

-(outside jurisdiction) SSHD's '*extra-territorial human rights policy*' by which deprivation of British nationality would not be entered into if a foreseeable risk of harm (which would breach arts 2 or 3 ECHR if within the jurisdiction) would arise as a direct consequence (*Begum v SSHD* [2019] UKSIAC 163, §§ 129-139 et al)- but approachable only on 'review' type basis- per Lord Reed in *Begum v SSHD* (SC) §§ 112-117.

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ECtHR, deprivation of nationality, art 8 ECHR

Usmanov v Russia appn 43936/18 (22 Dec 2020), §53- '*In the case of Ramadan v. Malta, (no. 76136/12, § 84, 21 June 2016) the Court held that although the right to citizenship is not as such guaranteed by the Convention or its Protocols, it cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual. To establish whether "an issue" arose under Article 8 of the Convention the Court assessed whether the revocation of the citizenship was "arbitrary" and the "consequences" of revocation for the applicant (see §§ 85, 90 and 91 ibid). In the case of K2 v. the United Kingdom ((dec.), no. 42387/13, §§ 52-64 7 February 2017), which followed, the Court accepted that the revocation of citizenship amounted to an interference and applied the two-steps test to determine whether there has been a breach of Article 8 of the Convention…*'

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Usmanov v Russia (II)

The ECtHR held annulment of Russian citizenship for omission of information about siblings when applying for naturalisation 10 years before, breached art 8 ECHR. Measure arbitrary, given lack of clarity of domestic law, its excessively formalistic approach, and inadequate procedural safeguards - Absence of a balancing exercise carried out by authorities

-Expulsion by reason of deprivation of nationality also arbitrary- No explanation why the applicant was considered a national security threat – There had been failure in domestic proceedings to balance the interests at stake adequately.

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Johansen v Denmark appn 27801/19 (3 Mar 2022)– dual Danish/Tunisian national born in Denmark subjected to order depriving him of Danish nationality and expelling him following conviction for going to Syria to fight for terrorist group- his application to ECtHR was declared inadmissible:

> *70. …in the Court's view, taking into account that the applicant was convicted of serious terrorist offences, which themselves constituted a serious threat to human rights, and which to a large extent showed his lack of attachment to Denmark and its values… the fact that the applicant in the present case had obtained Danish nationality by birth does not significantly alter or add to the consequences for the applicant.*

> *71. …the Supreme Court's assessment of the decision to revoke the applicant's nationality was adequate and sufficient, and does not disclose any appearance of arbitrariness or omission with regard to the applicant's arguments.*

Article 8 ECHR may be relevant both to private and to family life.

Re family life best interests of children per section 55 Borders Citizenship and Immigration Act 2009

Appeal under section 40(3) BNA 1981

Aziz & ors v SSHD [2018] EWCA Civ 1884; [2019] 1 WLR 266 - Avoid 'Proleptic analysis'-

28. …It was unnecessary for the FTT to go further, as it did in each case, and conduct a proleptic analysis of whether each appellant would be likely to be deported or removed at a later stage.

29. …In such a case, again it seems to me that it is likely to be unnecessary and inappropriate for the FTT on an appeal against deprivation of citizenship to conduct a full proleptic assessment of whether a deportation order will or will not ultimately be made at some time in the future (and after a separate appeal to the FTT in relation to the decision to make such an order).

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Laci v SSHD [2021] EWCA Civ 769; [2021] 4 WLR 86, §35- takes 6 point guidance of UTIAC in *BA (Deprivation of citizenship: appeals)* [2018] UKUT 85 (IAC), §45, modified per *Aziz & ors v SSHD* [2018] EWCA Civ 1884; [2019] 1 WLR 266 and *R (otao KV) v SSHD* [2018] EWCA Civ 2483; [2018] 4 WLR 166, §6. (Re *KV* see *Laci* §35 per Underhill LJ: '*we now have Leggatt LJ's summary of the relevant principles in* KV [at §6]*, which covers much of the same ground and should be taken as the starting-point in future cases: I appreciate that that summary was not the result of argument, but I can see nothing in it that seems likely to be contentious*')

BUT consider effect of UKSC in *Begum: Laci,* §40.

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Laci §38 per Underhill LJ:

> *38. As to point (5) in BA, it is now clear from* Aziz *that the FTT ought not, at least normally, to undertake any "proleptic assessment" of the likelihood of removal. Loss of British citizenship and loss of leave to remain are different things, appealable by different processes. However, [this] does not apply to other adverse consequences of a deprivation decision. One example of such an adverse consequence was statelessness, which was the issue in KV . Another may be a "limbo period": I discuss this further below…*

Laci §80 per Underhill LJ, re '*limbo period*':endorsing decision of UT in *Hysaj*, §110:

> *"There is a heavy weight to be placed upon the public interest in maintaining the integrity of the system by which foreign nationals are naturalised and permitted to enjoy the benefits of British citizenship. That deprivation will cause disruption in day-to-day life is a consequence of the appellant's own actions and without more, such as the loss of rights previously enjoyed, cannot possibly tip the proportionality balance in favour of his retaining the benefits of citizenship that he fraudulently secured."*

I respectfully agree with that passage, which is entirely in line with the overall approach to cases where an applicant has obtained British citizenship by fraud. But it is important to note the "without more". Where there is something more (as, here, the Secretary of State's prolonged and unexplained delay/inaction), the problems that may arise in the limbo period may properly carry weight in the overall assessment.

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Laci §80 per Underhill LJ, re '*limbo period*' –other decisions

Hysaj v SSHD [Deprivation of citizenship: delay) [2020] UKUT 00128 (IAC)

Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238

Muslija (deprivation: reasonably foreseeable consequences) [2022] UKUT 337 (IAC)

On use of SSHD’s discretion see SSHD’s policy (NIs ch 55) 55.6-7 including:

-’In general’ SSHD will not deprive where fraud postdates the application, or the applicant was a minor when application made or an earlier status achieved by fraud- 55.7.5

-’*Length of residence in the UK alone will not normally be a reason not to deprive a person of their citizenship*’

Re deprivation in fraud cases and arbitrariness: *KV*, (§18), per Leggatt LJ (as he then was)

> *But as the CJEU recognised in* Rottmann v Friestadt Bayern *(Case C-135/08) [2010] QB 761, para 53, when a state deprives a person of his nationality because of acts of deception, legally established, that deprivation cannot be considered to be an arbitrary act.*

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Significant cases/outcomes:

-*KV* (2018)- UT(IAC) erred as to question of whether A would be rendered stateless, remitted for reconsideration (§63)

-*Hysaj v SSHD (Deprivation of Citizenship: Delay) Albania* [2020] UKUT 128 (IAC) Delay while 'nullity' litigation ongoing and other factors insufficient- appeal dismissed- (§§46-118)

-*Laci* (2021) FTT entitled to allow appeal taking account of SSHD's unexplained inaction for 9 years, A's original self-disclosure, good citizenship and long residence in the UK, effect of 'limbo' period on employment and ability to support family. FTT decision restored (§§41-82 -but §83 '[no] *indulgent view [of s 40(3) cases]... On the contrary, in all ordinary circumstances they can expect to have it withdrawn. It is only because of the exceptional combination of circumstances in the present case that the FTT was entitled to come to the decision that it did.)*

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G. Conclusions

-substantial challenges to applicants are likely in most cases, particular as regards s 40(2) BNA 1981 cases, but also s 40(3) and (6) BNA 1981 appeals;

-at least in national security cases the decisions of the UKSC in *Begum* and CA in *U3* have decisively moved the ground, in non-HRA 1998 matters, from '*full reconsideration*' as envisioned in *Deliallisi (British Citizen: deprivation appeal; Scope)* [2013] UKUT 439 (IAC) and other previous authorities;

-generally some clarity now reached re other important matters- appeal grounds (*Begum*, *KV*, *Laci*), difference between deprivation appeal and appeal against any subsequent refusal of LTR (*Aziz*, *Laci*).

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