SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/132/2016
Hearing Dates: 7th & 8th March 2018
Date of Judgment: 18th April 2018

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING
UPPER TRIBUNAL JUDGE KING
Mr B McCLEARY

Between

X2

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Mr D Friedman QC & Mr E Grieves (instructed by **Birnberg Pierce Solicitors**) appeared on behalf of the Appellant

Ms L Giovannetti QC, Mr S Gray (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

Mr M Goudie QC (instructed by **Special Advocates' Support Office**) appeared as Special Advocate

Introduction

1. The Appellant in this case appeals against a decision of the Secretary of State to deprive him of his British nationality when he was abroad, in Syria. The facts assumed for the purposes of this hearing also include that the Appellant is a national of Morocco, and that the deprivation of his British nationality has had no effect on that second nationality. He is not, therefore, now stateless.

2. As Ms Glovannetti QC, for the Secretary of State, reminded us in her oral submissions, it is assessed that the Appellant went to Syria of his own volition in May 2013. He has therefore been there for nearly five years. On his own case, although he is a Moroccan citizen, he has never been to Morocco, and in the 18 months or so since the decision to deprive him of his nationality, he has not gone, or been forced to go, there.

3. This is our OPEN decision on the preliminary issues in this case. We heard submissions in OPEN and in CLOSED. We have been able to decide all the OPEN legal issues on the basis of the OPEN arguments in this OPEN judgment, but we have also given a separate, CLOSED judgment. Those OPEN issues are recorded in an order made by the Commission on 11 December 2017. The main question is whether the Secretary of State was required to assess potential risks of harm to the Appellant before making her decision to deprive the Appellant of his British nationality, and if so, what risks she should take into account. The issue raised by paragraph (4) of the order is what factors the Secretary of State was required to take into account in making any such assessment. A further question is what would be the consequence for the decision of any breach of any relevant requirement.

4. The Appellant has been represented by Mr Friedman QC and Mr Grieves, and the Secretary of State by Miss Glovannetti QC and Mr Gray. Mr Goudie QC appeared as Special Advocate. We thank all counsel for their helpful written and oral arguments.

5. In her skeleton argument the Secretary of State has sought, helpfully, to narrow the issues for this hearing. She submits that it is common ground that, in a case like this, the Secretary of State may, but will not always, need to consider risks in a third country or in the country of nationality. Whether she is required to in any Glven case will depend on the facts. She submits that the source of her power/obligation to consider such risks is the practice to which we refer below.

6. The Appellant submits that there are three possible sources of an obligation to assess risk. They are

    a. authorities decided in relation to section 40 of the British Nationality Act 1981 ('the 1981 Act'),

b. 'common law requirements when the deprivation of fundamental rights is at stake', and

c. the Secretary of State's practice.

7. The Appellant accepts for the purpose of this hearing that articles 2 and 3 of the European Convention on Human Rights ('the ECHR') do not apply directly: see *S1, T1, U1 and V1 v Secretary of State for the Home Department* [2016] EWCA Civ 560; [2016] 3 CMLR 37, in which the Court of Appeal followed its earlier decision, *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867; [2013] QB 1008 (see also *Khan v the United Kingdom* (App No 11987/11) (2014) 58 EHRR SE15, to which the Court of Appeal in *S1* referred and summarised; see paragraphs 30-33, below).

8. The Secretary of State does not accept that either the 1981 Act or the common law imposes any duty on her to assess risks in the country of nationality, or in any other country, before she decides to deprive a person of his British nationality. Her practice is not ordinarily to assess such risks. But where she considers it appropriate to do so on the facts, she will do so. She submits that the real question is what duties are imposed on her by her published practice. She accepts that it is for the court to interpret that practice. Mr Friedman submitted in his skeleton argument that the key issue of interpretation depends on the correct understanding of the decision of the European Court of Human Rights ('the ECtHR') in *Soering v the United Kingdom* (1989) 11 EHRR 439, and, in particular, of paragraphs 90-91 of the judgment in that case. Ms Glovannetti does not disagree.

The Secretary of State's practice

9. As Ms Glovannetti reminded us during her submissions to us, deprivation decisions are made by the Secretary of State personally, not by officials. This means that a written policy directed to the officials who make decisions, and explaining how to make them, is not necessary. The Secretary of State, instead, in practice, takes into account the equivalent of article 2 and article 3 risks when she makes deprivation decisions.

10. During the passage of the Immigration Act 2014 ('the 2014 Act'), the Secretary of State published a supplementary ECHR memorandum ('the Memorandum'). The decision of this Commission in *S1 and others* was noted. The Memorandum said that 'Nevertheless, the Home Secretary has a practice of not depriving individuals of British citizenship when they are not within the UK's jurisdiction for ECHR purposes if she is satisfied that doing so would expose those individuals to a real risk of treatment which would constitute a breach of Articles 2 or 3 if they were within the UK's jurisdiction and those articles were engaged'.

11. This practice was further explained in a letter dated 14 September 2017 from GLD to the Appellant's solicitors. The letter said that it is the Secretary of State's 'published practice to consider the Article 2/3 risks associated with deprivation action, notwithstanding the legal position that the ECHR does not have extra-territorial effect in this context. That published practice was confirmed in an ECHR supplementary memorandum during the passage of the Immigration Act 2014, which stated as a matter of practice, the (then) Home Secretary would not deprive anyone of their citizenship where she was satisfied that such action would constitute a breach of Articles 2/3 had they been within the UK's jurisdiction and those articles engaged'.

12. This statement is glossed in a further letter to the Appellant's representatives dated 14 September 2017. In that letter, GLD said that the Secretary of State's position was that articles 2 and 3 were not engaged when people were not within the jurisdiction for the purposes of the ECHR. The letter referred to the decision of the Court of Appeal in *S1 and others*. The letter said that 'As a matter of practice the Secretary of State will not deprive if the individual would suffer mistreatment or unlawful killing as a direct consequence of the decision to deprive of British nationality. If the individual would be exposed to such treatment, as a direct consequence of the deprivation decision, the Secretary of State's practice would be not to proceed'.

13. The letter continued, 'The Secretary of State will consider whether, as a direct consequence of the deprivation decision there are substantial grounds for believing that there is a real risk of mistreatment or unlawful killing that would constitute a breach of Articles 2 and/or 3 (if it occurred in the jurisdiction). In approaching the question of whether or not there are substantial grounds for believing there is a real risk, the Secretary of State will take account of issues such as foreseeability, and causation/causal nexus between the deprivation decision and possible future risk that may or may not manifest. The Secretary of State will not, ordinarily, G1ve substantive consideration to the risks that may arise in countries other than the one in which the individual is located at the date of the deprivation decision. Such an approach accords with Articles 2 and/or 3 ECHR in that ordinarily there would be insufficient grounds for believing there to be a real risk that removal of British citizenship would be the direct cause of future mistreatment in a country in which the individual is not located in at the date of the deprivation decision'.

The principal decisions to which we were referred

14. In this part of our judgment we will summarise what seem to us to be the most significant decisions to which we were referred. We will refer to some other decisions, as necessary, when we come to consider the parties' arguments in more detail.

The decisions in Soering and Saadi

15. *Soering* was an extradition case. The applicant was a national of West Germany. He was in the United Kingdom. The Secretary of State made a decision to extradite him to the United States of America to face a charge of capital murder. The applicant argued that there was a real risk that he would be sentenced to death, and if so, that he would experience 'the death row phenomenon', that is, a combination of circumstances which he would face if he were sentenced to death. The United Kingdom Government submitted that article 3 should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction. The ECtHR rejected that submission (see paragraphs 85-91). It held that implementation of the decision to extradite the applicant would be breach of article 3. It would not be compatible with the values underlying the ECHR for a Contracting Party knowingly to surrender a fuG1tive to another state where there are 'substantial grounds for believing that he would be in danger of being subjected to torture, inhuman or degrading treatment or punishment'.

16. In paragraph 90 of its judgment the ECtHR said that it would not normally make decisions about potential violations of the ECHR. But the ECtHR might do so where an applicant claimed that a decision to extradite him would, if implemented, be contrary to Article 3 because of 'its foreseeable consequences in the requesting country', because the suffering which was risked was irreparable, in order to ensure that article 3 provided an effective safeguard. In paragraph 91, it said that a decision to extradite 'may' G1ve rise to an issue under article 3 'where substantial grounds have been shown for believing that, if extradited, the applicant faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. Liability would be incurred by the extraditing state 'by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill treatment.'

17. The ECtHR used similar formulae in *Saadi v Italy* (2009) 49 EHRR 30, a deportation case (see paragraphs 125-127).

18. In both cases, it seems to us that the ECtHR used the test of 'direct consequence' as the criterion for establishing state responsibility: the Contracting State incurs liability if it takes action which has a direct consequence the exposure of the applicant to the relevant risk. In both cases, it also seems to us, the ECtHR used a test of foreseeability as a criterion for establishing whether the applicant has shown that there are substantial grounds for believing that, if he is sent to the third country, he will be exposed to the relevant risk. See, for example, paragraph 130 of *Saadi*, 'In order to determine whether there is a risk of ill treatment, the

Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances'.

19. This is the interpretation of *Soering* which was adopted by the Supreme Court in *Ismail v Secretary of State for the Home Department* [2016] UKSC 37; [2016] 1 WLR 2814. The claimant in that case was in the United Kingdom. He challenged a decision of the Secretary of State to serve an Egyptian judgment on him. He contended, among other things, that it was a breach of his article 6 rights. The Divisional Court granted the claimant's application for judicial review of the decision, and the Secretary of State appealed. The Supreme Court held that the service of the judgment on the claimant in the United Kingdom did not have the direct consequence of exposing him to a risk that his rights under the ECHR would be violated. It might narrow his legal options, but his essential legal position was not affected.

20. Ms Glovannetti accepted that the facts of *Ismail* were very different from the facts of this case but submitted, and we accept, that the Supreme Court was considering the territorial reach of the ECHR, which is an issue with which we are concerned in this case, at any rate by analogy. It is clear to us that the Supreme Court interpreted the criterion for state liability in *Soering* consistently with Ms Glovannetti's submission (and with what we have said, above): see, for example, paragraph 35, per Lord Kerr, '...in effect the UK would have been directly instrumental in exposing Mr Soering to the risk of being executed', paragraph 37, 'It is important to recognise that [the ECtHR] ...found that liability of the UK for a breach of article 3 arose as a *direct consequence* [oriGlnal emphasis] of the actions of the UK authorities', (citing paragraph 91 of *Soering*). See also paragraph 38, in which Lord Kerr used the phrase 'direct consequence' three times; and 'The Secretary of State was quite plainly aware that service of the judgment carried no risk of the claimant being exposed to breach of his Convention rights' (paragraph 43).

21. We must therefore reject Mr Friedman's submission (skeleton argument, paragraphs 21 and 24), which, wrongly, in our judgment, expressly elides the two stages of the analysis which, we consider, the ECtHR described in *Soering*. Those two stages are that the risk must be both foreseeable, and a direct consequence of the impugned decision.

The decision in G1

22. In *G1*, the claimant was a naturalised British Citizen. He had been born in, and was also a citizen of, Sudan. He went to Sudan voluntarily when he was on bail. The Secretary of State deprived him of his British nationality on the grounds that it was conducive to the public good, as he was assessed to be involved in terrorism-related activity. She also made a decision

to exclude him from the United Kingdom. He appealed to the Commission against the decision to deprive him of his nationality and applied for judicial review of the exclusion decision. The basic aim of the challenge to the exclusion decision was to establish that he had a right to be admitted to the United Kingdom in order to conduct his appeal (see paragraph 4 of the judgment of Laws LJ, with which Rix and Lewison LJJ agreed).

23. G1's application for judicial review was refused and he appealed to the Court of Appeal against that decision. The Court of Appeal considered and dismissed a variety of arguments. In particular, the Court of Appeal held that G1 could not rely on EU law as a source of procedural protection, or on article 14 of the ECHR, as citizenship is not one of the substantive rights conferred by the ECHR which is regulated by article 14.

The decision in S1

24. The appellants in *S1* were all members of the same family. They were deprived of their British nationality because the Secretary of State considered that they were active members of a terrorist organisation, and supporters of Al Qaeda. They had all moved to Pakistan some 18 months before the Secretary of State decided to deprive them of their nationality. They appealed to the Commission against that decision. The Commission dismissed their appeals and they appealed to the Court of Appeal.

25. Burnett LJ (as he then was) gave the judgment. Lindblom and Briggs LJJ agreed with it. Burnett LJ listed the arguments which the Court of Appeal considered in paragraph 5 of his judgment. The fourth issue was whether the Commission erred in concluding that the fact that the appellants were living in Pakistan when the decision was made meant that they were outside the jurisdiction of the ECHR for the purposes of article 1 of the ECHR so that their arguments that they were at risk from the government of Pakistan and from terrorists there failed for want of jurisdiction.

26. Burnett LJ considered the fourth issue at paragraphs 88-102 of the judgment. The Commission considered the decisions of the Grand Chamber in *Bankovic v BelG1um (Admissibility)* (55721/07) (2007) 44 EHRR SE5 and in *Al-Skeini v the United Kingdom* (557211/07) (2011) 53 EHRR 18, the decision of the Commission in *East African Asians v the United Kingdom* (1981) 3 EHRR 76 and the decision of the Court in *Genovese v Malta* (53124/09) (2014) 58 EHRR 25. It held that the United Kingdom owed the appellants no obligation to secure for them the rights protected by articles 2 and 3 of the ECHR when the decision was made.

27. At paragraph 89 of the judgment, Burnett LJ said that *Bankovic* and *Al-Skeini* both show that the jurisdiction referred to in article 1 of the ECHR is 'primarily territorial' (paragraph 89)

(see the statement in paragraph 131 of *Al-Skeini*). Acts done by a contracting state, or producing effects, outside its territory can only be an exercise of jurisdiction for the purposes of article 1 in exceptional circumstances. In paragraphs 133-142 the Grand Chamber described the exceptions which the ECtHR had identified (Burnett LJ summarised these in paragraph 90 of his judgment).

28. The appellants accepted that none of the exceptions so far recognised by the ECtHR applied to their case. They submitted that in international law a state has jurisdiction over its nationals and that a deprivation of nationality was a clear example of an exercise of that jurisdiction. It was an administrative process done in the United Kingdom which produced effects outside the United Kingdom. Its practical effect was to prevent the appellants from returning to the United Kingdom (or the EU). They relied on the *East African Asians* case and *Genovese*.

29. Burnett LJ agreed with this Commission's summary of the *East African Asians* case (judgment, paragraph 92). 25 of the applicants were expelled from Uganda on racial grounds. They were all Citizens of the United Kingdom and Colonies but their right of abode had been removed by the Commonwealth Immigrants Act 1968. They were refused permanent admission to the United Kingdom. Some were temporarily detained in the United Kingdom, six were stranded in Belgrade and five were subjected to 'shuttle-cocking'. All were exposed to the risk of ill treatment in Uganda breaching article 3. The Commission held that all were in the jurisdiction of the United Kingdom because they were United Kingdom nationals. This Commission described the reasoning in that report on jurisdiction as 'unstated and unclear'. This Commission considered that the *East African Asians* case was not persuasive and did not cast any light on the likely attitude of the ECtHR to the issue of jurisdiction now.

30. Burnett LJ noted in paragraph 93 of his judgment that the ECtHR had declined, in *Khan v the United Kingdom (Admissibility)* (11987/11) (2014) 58 EHRR SE15, to comment on the *East African Asians* case. The applicant Khan had leave to remain as a student. While his leave was current he was arrested on suspicion of a terrorist offence. He was not charged but was served with notice of an intention to deport him. He left the United Kingdom voluntarily, and the notice was withdrawn. He was notified that his remaining leave had been cancelled on the ground that his presence in the United Kingdom was not conducive to the public good. He appealed to this Commission, and asked this Commission to make a direction to facilitate his return to the United Kingdom on article 3 grounds because, he contended, he was at risk of ill treatment breaching article 3 in Pakistan. This Commission held that the United Kingdom had no jurisdiction over Pakistani nationals in Pakistan, even though it was the Secretary of State's decision to cancel his leave which prevented him from returning to the United Kingdom.

31. In his application to the ECtHR, the applicant argued that there was a difference between a person who had never been in the jurisdiction and one who had left and was refused re-entry. The state's obligations under article 3 had to be taken into account when a decision with a potentially adverse effect, whether in the United Kingdom or abroad, was made.

32. Burnett LJ described the formulation of Khan's claim as 'in substance the same' as the appellants' argument, with a 'difference of degree, not principle' (paragraph 95). The ECtHR said that whether articles 2 and 3 were engaged depended on 'whether, although he is in Pakistan...the applicant can be said to be 'within the jurisdiction of the United Kingdom for the purposes of article 1 of' the ECHR. In paragraph 26 of its decision the ECtHR said that there was 'no principled reason to distinguish' between a person who was in the jurisdiction of a Contracting State and left it voluntarily and a person who was never in that jurisdiction. 'Nor is there any support in the Court's case-law for the applicant's argument that the State's obligations under Article 3 require it to take this article into account when making adverse decisions against individuals who are not within the jurisdiction'.

33. The ECtHR rejected an argument that the positive obligations implied in article 8 could create 'in effect an unlimited obligation on Contracting States to allow entry to an individual who might be at real risk of ill treatment contrary to Article 3, regardless of where in the world that individual might find himself'. It was irrelevant that the applicant's exclusion on grounds of national security might have increased the Article 3 risk he faced in Pakistan. Burnett LJ said that the decision in *Khan* was 'powerful support for the conclusion that the appellants were not within the jurisdiction of the United Kingdom for the purposes of article 1 when the Secretary of State decided to deprive them of their nationality' (judgment, paragraph 98).

34. Burnett LJ noted that jurisdiction was not argued or mentioned in *Genovese*. It was not clear whether the mother and son were in Malta. He said that that decision could not qualify the clear statements of principle in *Al-Skeini*.

35. He then referred to the decision of the Supreme Court in *Sandiford v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44. The claimant, a British Citizen who was facing the death penalty in Singapore, argued that the refusal of the defendant to pay for lawyers for her was a breach of article 6. The Supreme Court noted that there was no general principle that the United Kingdom should take steps within the jurisdiction to avoid exposing people, even the British citizens, to injury to rights which they would have if the ECHR applied abroad. The Supreme Court distinguished cases, like *Soering*, in which a person was surrendered or removed to a third country. We interpose that the Supreme Court said, at paragraph 23, 'The principle recognised in *Soering*...only applies where the United Kingdom is proposing a step such as the surrender or removal from the jurisdiction of a person which

may lead to infringement of that person's Convention rights abroad'. The Supreme Court also said that there was no exercise of authority or control over the claimant, but rather the opposite: a decision not to exercise any relevant authority or control.

36. Burnett LJ said that the 'authority' which, in international law, states have over their nationals is not the same as an exercise of authority or control for the purposes of article 1 of the ECHR (judgment, paragraph 101). Depriving a person of nationality divests the United Kingdom of 'any authority or control over the person concerned. It is the antithesis of the exercise of control necessary to found jurisdiction under article 1'. His conclusion was that both the decisions of the ECtHR and their application by the Supreme Court vindicated the decision of this Commission in that case that 'for the purposes of article 1...the appellants at all times material to these proceedings were outside the jurisdiction of the United Kingdom' (judgment, paragraph 102).

37. In paragraph 17, Burnett LJ noted the decision of the Supreme Court in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1592. He described the effect of the decision thus: '...the removal of British citizenship is of such gravity that the common law would require a degree of intensity of review in any judicial proceedings that for practical purposes would satisfy the EU test of proportionality...The upshot was that there was no practical difference between an EU law approach and the common law approach when a court reviews...a decision to deprive someone of British citizenship'. The Court of Appeal allowed the Appellant to argue that the decision of this Commission in that case could not survive the decision in Pham because the common law requires a deprivation decision to be proportionate and this Commission had not considered whether the decision was proportionate. Having considered the decision of this Commission, the Court of Appeal rejected that argument. Mr Friedman accepted that this part of the decision in *Pham* was obiter, but pointed to the fact that it had been adopted and applied by the Court of Appeal in *S1*.

38. The parties told us that the appellants in *S1* had had difficulty in getting funding to petition the Supreme Court for leave to appeal. An application was refused last year. They had, however, been advised to re-apply in the light of the decision of the Court of Appeal in *W2 v Secretary of State for the Home Department* [2017] EWCA Civ 1246, to which we refer in paragraph 41, below. There is thus a possibility that the Supreme Court will hear an appeal in *S1*. But, for the time being at least, we are bound by *S1*.

The arguments

39. We have listed, in paragraph 6, above, the sources of law on which the Appellant relies for the proposition that the Secretary of State must, when making a deprivation decision in a case

such as this, consider article 2 and article 3 risks arising in the country where the Appellant is and in any other country to which he might travel.

40. We can deal with the cases on deprivation decisions briefly. The Appellant submits that the right of appeal against a deprivation decision is broad. It is said that this Commission can conduct 'a wide-ranG1ng inquiry'. The Appellant argues that the decision of the Upper Tribunal in *Deliallisi v Secretary of State for the Home Department* [2013] UKUT 439 shows that on such an appeal, the focus should be on 'the reasonably foreseeable consequences of deprivation, whether or not involving removal'.

41. The Appellant draws attention to the recent decision of the Court of Appeal in *W2*. In that case the appellant was deprived of his nationality when he was outside the United Kingdom. The Court of Appeal recorded, at paragraph 48, that it was common ground that this Commission could, on an appeal, consider the risks to the Appellant in his country of nationality. In paragraph 68, the Court of Appeal recorded the Secretary of State's submission that 'although appeals are against the decision to make a deprivation order, appeals against that decision consider the necessary effects of a deprivation order, and do so even if no deprivation order has been made at the time of the appeal. See, for instance, *Ahmed v Secretary of State for the Home Department* [2017] UKUT 00118 (IAC)'.

42. We do not consider that we are much helped by the decisions of the Upper Tribunal, for two main reasons. The first is that both cases on which the Appellant relies concerned appellants who were deprived of their nationality while they were in the United Kingdom, so the Upper Tribunal simply did not have the situation in our case in mind. We will describe the second reason towards the end of the next paragraph.

43. Nor are we helped by general concessions or submissions made by the Secretary of State in the Court of Appeal in *W2*. First, it is clear from the passages cited by Mr Friedman that those statements were not made after legal argument. Second, the statements are nowhere near specific enough to provide guidance on the particular issue we are concerned with. Third, W2 was in his alternative country of nationality when he was deprived of his British citizenship. Fourth, and this point is a further reason why the Upper Tribunal decisions are unhelpful in this context, these broad statements concern the jurisdiction of the body hearing an appeal from a deprivation decision. They do not concern the anterior question, which this preliminary hearing is about, which is what risks the Secretary of State is obliged to consider, in a case to which the HRA does not apply, before she decides to deprive a British citizen of his nationality when he is outside the United Kingdom. We do not consider that it is leG1timate to attempt to deduce from the scope of the jurisdiction on an appeal a prior principle which governs the scope of the inquiries which the Secretary of State should make

before making the decision which is then examined in the course of that appeal. Mr Friedman explicitly links the two (skeleton argument, paragraph 26), in our judgment, wrongly. Fifth, the scope of this appeal, because of our decision on the legal issues, will not depend on a review of all foreseeable risks, but on those which we have decided are legally relevant on the facts of an appeal like this.

44. The critical question, to which we will come, is whether article 2 or article 3 risks in third countries are or may be a relevant consideration for the Secretary of State when she decides whether or not to deprive a British citizen of his nationality when he is outside the United Kingdom, because (whether by analogy with the reasoning in *Soering*, or otherwise), she is, or should he held, liable for them. The issue of foreseeability, referred to in the Upper Tribunal decisions and in *W2*, is a different issue; and it is an issue, those cases decide, to be considered (if relevant) by the appellate body on an appeal. Its relevance in this case, in our judgment, is inextricably linked with the scope of any duty which the Secretary of State has to assess risks to an Appellant when she makes a deprivation decision.

45. We turn to the Appellant's reliance on common law protection of fundamental rights. Mr Friedman drew our attention to the constitutional importance of citizenship and to the gravity of the risks which the Appellant might face. We have no difficulty in accepting those points, or in accepting that the common law, to personify it for a moment, has always set its face against unlawful killing and torture. These points are, of course, significant parts of the background. Mr Friedman referred to the decision of the House of Lords in *R v Secretary of State for the Home Department ex p Bugdaycay* [1987] AC 514. We get from that case the uncontroversial proposition that an administrative decision will be scrutinised anxiously if it has potentially serious consequences for an applicant.

46. Mr Friedman also relies on *Pham v Secretary of State for the Home Department* [2015 UKSC 19; [2015] 1 WLR 1591. The discussion of 'common law proportionality' in *Pham* is, as Mr Friedman recognises, obiter, since the appeal to Supreme Court was an appeal against a decision of this Commission on a preliminary issue about statelessness only. Moreover, the appellant in *Pham* was in the United Kingdom when the deprivation decision was made. We note that the Court of Appeal appears to have applied, from *Pham*, a 'common law proportionality' test in *S1*. But if we apply such a test, it does not help us to decide what should weighed in the balance. Mr Friedman urged on us that the Supreme Court apparently considered that the practical utility of the alternative nationality was something to be weighed in a proportionality balance. It may be, on the facts of a particular case, but that seems to us to be an issue for the substantive appeal. In a case where the real concern is a legally relevant article 2/article 3 risk, in any event, it seems to us, provisionally at any rate, that it may not be

a decisive consideration. The point here is that if we are obliged to consider the Secretary of State's decision by reference to 'common law proportionality', that tells us nothing about what the Secretary of State is obliged to take into account when she makes the decision which is the subject of the appeal. That is the decision to which the preliminary issues are directed.

47. The Appellant argues that the Secretary of State's practice borrows language from *Soering* and that the Secretary of State has misinterpreted *Soering*. We of course accept both that, other things being equal, a decision maker errs in law if she fails to follow her published policy or practice, and that the interpretation of any such policy or practice is a question of law for the court. Mr Friedman submits that the Secretary of State puts too much stress on the last words of paragraph 91 of the judgment in *Soering*. He submits that this is just another way of expressing the idea that the consequences must be foreseeable. He relies on *TI v United Kingdom* (7.3.2000, 43844/98) and later decisions of the ECtHR (see, in particular, *MSS v Greece* (2011) 53 EHRR 2) for the proposition that a Contracting State may be liable for a breach of article 3 if it removes a person to a safe country from which there is a (sufficient) risk of onward refoulement. 'Direct consequences' and 'reasonably foreseeable consequences' are the same thing, it is submitted. If, however, the Appellant's construction of the practice is wrong, Mr Friedman's fall-back submission is that the practice is unlawful because it seeks to limit an unlimited right of appeal and/or because it seeks to limit the scope of the standards which the common law would otherwise apply to the decision.

48. We have considered part of this argument in our analysis of *Soering*, above. This part of the Appellant's argument conflates two distinct criteria: the criterion for deciding whether or not the state is liable for exposing a person to a risk and the criterion for deciding whether there are substantial grounds for believing that the requisite risk exists. Further, it is clear from *Ismail* that that is how the Supreme Court has interpreted *Soering*. We are bound by that interpretation. We therefore consider that the Secretary of State's approach to *Soering* is correct.

49. The chain refoulement cases do not help the Appellant, because the start of the chain is an expulsion by the first state of an applicant from its territory to that of a second state which is otherwise safe but from which there is a real risk of expulsion to a third state in which there is a real article 2 or article 3 risk. In such a case, the first state must make sure, before expelling an applicant to a second state, that the asylum procedure in the second state 'affords sufficient guarantees to avoid an asylum seeker being removed, directly or indirectly, to his country of oriG1n without any evaluation of the risks he faces from the standpoint of article 3 of Convention' (*MSS*, paragraph 342). In other words, the liability of the first state is engaged by

its expulsion of the applicant to the second state from which, it is foreseeable to the first state, that he may be removed to a third state where he will be at risk of a violation of article 3.

50. As Ms Glovannetti submitted, the key to the chain refoulement cases, and to the reasoning in *Soering*, is that in those cases, the sending state is responsible because it puts the applicant in a position in which he has no control over his destiny, and no choice about where he goes. There was, she submitted, no authority which required a state to take pre-emptive action to forestall any risk of a breach of articles 2/3. She gave two practical examples of cases in which the Secretary of State's practice would prevent deprivation. The first was if a British citizen is detained in a state which routinely subjects prisoners to article 3 ill treatment, but in which British citizens are better treated in detention than the citizens of other states. In such case, a direct consequence of deprivation would be exposure to the requisite level of risk, and the practice would apply. The second is a British citizen who is detained in a second state which, if he were deprived of his nationality, would deport him, rather than to the United Kingdom, to a third state in which he would be at real risk of torture.

51. The next facet of the Appellant's argument which we should consider is the contention that if her practice is to be interpreted as the Secretary of State suggests, that practice is unlawful because it is too narrow, and it prevents her from taking into account legally relevant risks. Mr Friedman's submission, in effect, was that the Secretary of State was required to assess all foreseeable risks, provided that they 'resulted' from the decision, although at times he seemed to abandon that proviso. He did not clearly articulate whether a causal link was necessary, or if so, what it was. We remind ourselves that articles 2 and 3 are not engaged on these facts, as both sides agree. The Secretary of State has chosen, nonetheless, to consider proxy article 2 and article 3 risks when she deprives a person who is outside the United Kingdom of his nationality. We do not think that Mr Friedman was suggesting that such an inquiry must be open-ended, broad though his approach was, and we would have rejected such a submission, had it been made.

52. There is no express rule of law which dictates the limits of that consideration. None of the sources on which the Appellant relied is capable of generating such limits. Any limits must, in the absence of any such express rule, be set by the general principles of public law. It follows, it seems to us, that the Secretary of State, having accepted that these risks are legally relevant, is obliged to make a reasonable (or perhaps, proportionate) inquiry into them. She has chosen to limit the inquiry by applying, by analogy, the criteria in *Soering*. It seems to us that that approach, which has been adopted by an international human rights court to define those exceptional cases in which the ECHR has extra-territorial reach, is a satisfactory proxy for a reasonable (or proportionate) inquiry into article 2/3 risks in those cases where the ECHR

does not apply. We consider that that is so, even though we have construed *Soering* more narrowly than Mr Friedman submitted that we should. When urG1ng on us his broader interpretation, he described *Soering* as 'reflecting a common approach to questions of causation when states expose people to harm'. We do not consider that there is any principle of the common law which requires a wider enquiry than that mandated by *Soering*, which is the enquiry which the Secretary of State has chosen, by adopting her practice, to conduct.

53. The final facet of Mr Friedman's fall-back submission conflates the scope of the appeal to the Commission with the scope of the inquiry the Secretary of State should make before making the decision to deprive. We have already considered this point, above.

54. The Secretary of State accepts that her practice obliges her to assess the risk of harm in Syria. She submits that she has done that. Her position in OPEN was that she could neither confirm nor deny whether she assessed the risk to the Appellant in any other country, but, that for the purposes of the OPEN argument, she does not accept that she is under any obligation always to assess the risks which a person might face in the country of his remaining nationality or in any other country.

55. Mr Friedman submitted that if the Secretary of State had not considered risks in Morocco, that approach was unlawful for four reasons. As an approach it undervalued the significance of the decision to deprive the Appellant of his nationality, it arbitrarily denied the direct responsibility of the deprivation decision for putting the Appellant in a position where he had to seek citizenship protection in Morocco, it failed to consider the proportionality of a decision which directly exposed the Appellant to the unsafe circumstances of having to rely on Moroccan citizenship and it fettered the exercise by the Secretary of State of her discretion by assuming that if the decision did not make the Appellant stateless, there was no obligation to consider the risks to the Appellant from the other nationality.

56. We doubt whether these are four distinct arguments. They assume that the Appellant will be forced to go Morocco to avail himself of his alternative citizenship, which does not seem to be the effect of all the expert evidence. In any event, they are all answered by the Secretary of State's approach, which we consider is lawful, which is to ask first what the direct consequences of the decision are, and whether those create real article 2/3 risks. She considers that her practice requires her to assess risks which are a direct consequence of deprivation and that those are the risks which are posed to the Appellant in Syria as a direct consequence of the deprivation of his nationality. Risks which he may face in any other country to which he may choose to travel are not direct consequences of the deprivation decision but of his choice to travel, and are, in any event, speculative.

57. We must consider, finally, Mr Friedman's argument that the Secretary of State erred in this case by saying that, 'ordinarily' she would not assess risks in a country other than that country in which the person is when the deprivation decision is made. He submits, among other things, that this qualification is not expressed in the practice, and that is it is an unlawful fetter on the practice. We reject that submission. This qualification is not an absolute rule that the Secretary of State will never consider such risks. What it makes clear, instead, is that there needs to be a feature of the facts of a particular case which makes it necessary for her to assess third country risks, before she will do so. We do not consider that that qualification is unlawful.

Is the practice lawful?

58. We raised with the parties, by email the day before the hearing, our concern, having read some of the authorities, that the Secretary of State's practice might not be lawful. The effect of the practice is in some cases, to limit the Secretary of State's power to deprive British citizens of their nationality on grounds of national security when they have voluntarily left the United Kingdom. We wondered if article 2/3 risks for which the Secretary of State is not liable under the Human Rights Act 1998 ('the HRA') (see *S1*) were legally relevant considerations when the Secretary of State decides whether or not to deprive a British citizen of his nationality.

59. Having heard argument, we are satisfied that the practice is lawful. The Secretary of State is not obliged to deprive a person of his nationality on national security grounds when such grounds exist. She has a power to do so. It follows from *S1* that section 6 of the HRA does not prevent the Secretary of State from exercising her power to deprive a person who is outside the United Kingdom of his British citizenship when he might be exposed to article 2/3 risks as a direct consequence of deprivation. Nonetheless, we consider that when she decides whether to exercise that power, she is entitled to take into account, to the extent her practice requires, the equivalent of article 2 and article 3 risks to which the decision might expose him. Unlawful killing, torture and degrading treatment are not permitted by the common law. We consider that it is open to the Secretary of State to recognise that, to the extent which she does, in her practice.

Conclusion

60. For those reasons, we decide the preliminary issues as follows.

    i. The Secretary of State is required by her stated practice, on its proper construction, to assess potential risks of harm to the Appellant.

ii. The risks which she is required to assess are risks of harm which would breach articles 2 or 3 of the ECHR (if they applied, which, it is agreed, they do not) which are a direct consequence of the decision to deprive him of his nationality.

iii. Does not arise.

iv. When making that assessment, the Secretary of State is only required to assess risks in Syria.