Neutral Citation Number: [2015] EWHC 3513 (Admin)

Case No: CO/5138/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2015

Before :

THE HON MR JUSTICE OUSELEY

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Between :

MM & GY & TY	**Claimants**
- and -	
Secretary of State for the Home Department	**Defendant**

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- -

Michael Fordham QC & Alasdair Mackenzie (instructed by **Birnberg Peirce**) for the **Claimants**
Robin Tam QC & Rosemary Davidson (instructed by **GLD**) for the **Defendant**

Hearing date: 28/10/15

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Approved Judgment

MR JUSTICE OUSELEY :

1. The Claimants are a mother and her two adult children. The husband and father of these Claimants is Hany El Sayed El Sabaei Youssef, HY, as he was previously known in other proceedings before UTIAC. He is assessed by the Secretary of State for Home Department, SSHD, to be an Islamist extremist and is listed by the UN Sanctions Committee as associated with Al-Qa'eda, through Egyptian Islamic Jihad, EIJ.

2. The Claimants challenge by judicial review the refusal of the SSHD to grant them citizenship by naturalisation. They each satisfy the statutory requirements for naturalisation but the SSHD exercised her statutory discretion to refuse naturalisation because she wanted to deter potential extremists from their activities through knowing that family members would not be naturalised in consequence. Michael Fordham QC who appeared for the Claimants says that that was an unlawful exercise of her discretion for a variety of reasons. The SSHD through Mr Tam QC submits that the discretion is very general and the sort of consideration she took into account is rational, and connected to the broad purpose for which the discretion was created.

3. HY and the Claimants are Egyptian nationals who entered the UK in 1994. HY's 1994 asylum claim was rejected in 1998. Attempts to deport him failed in 1999 because of the risk he would face in Egypt of treatment breaching Article 3 ECHR, whereupon he was granted exceptional leave to remain, ELR. He remains liable to deportation on the grounds that deportation would be conducive to the public good. In 2005, though not at the UK's request, HY was placed on the United Nations Terrorism and Al-Qa'eda sanctions list pursuant to UN Security Council Resolution 1617 (2005). In 2009, the UK sought his removal from that list since, though he continued to hold extremist views, he was unlikely to re-engage in terrorist activities. He is not seen as a current threat to UK national security. Subsequent attempts by the UK to have HY's name removed from the list have failed.

4. In November 2012, the SSHD decided that HY would not be granted refugee status, on the grounds that he was excluded under Article 1 F(c) of the Refugee Convention, because he was guilty of acts contrary to the purposes and principles of the United Nations. His appeal to the First-tier Tribunal was allowed but the SSHD's appeal to UTIAC succeeded, and UTIAC will re-determine the case.

5. The basis of his exclusion was that he was a member of EIJ until 1999. EIJ was proscribed under the Terrorism Act 2000 in 2001. While he was in the UK he had remained an active member of EIJ, involved in the supply of false documents on its behalf, in the preparation of an attack on a US embassy, expressing extreme Islamist views in public and stating support for Osama Bin Laden. The UN Security Council Committee Resolution 1267 Committee accepted that he had provided material support to Al-Qa'eda and its leadership, publicly praising and glorifying it, and encouraging others to treat it as an exemplar.

6. On 21 May 2009 all three Claimants were granted indefinite leave to remain, ILR. The Claimant wife, in poor health, lives with HY. She applied for naturalisation in September 2011. The Claimant son was 6 when the family arrived in the UK. He moved out of the family home in 2010 and now lives with his wife; he has responsible employment. He applied for naturalisation in August 2012. The Claimant daughter

was 5 when she arrived in the UK. She left the family home in 2008 and is married with two children. She is a teacher. Both her children are British and her husband has ILR. She applied for naturalisation in August 2011.

7. After some delay, the SSHD refused these applications in decisions dated 7 and 8 August 2014 in materially similar terms. The letter to the Claimant wife states that the application has been refused on the basis of her close association with HY, referring to his links to EIJ, to his exclusion under the Refugee Convention and to the UN listing. The letter continues:

> "In light of your close association with an extremist, therefore, your application for naturalisation as a British citizen has been refused. The Home Secretary considers in particular that it is important to deter potential extremists from involvement in extremist activities, including by making it clear that any extremist activity could affect the immigration and nationality status of close members."

8. As there is no appeal against that decision, the SSHD offered to reconsider it if a Claimant identified which aspect of law or policy the SSHD had not applied correctly. All three Claimants sought reconsideration and, by letters of 11 November 2014, the SSHD maintained her decisions. After referring to recent UK attempts to have HY removed from the UN sanctions list, to the fact that that did not mean that she accepted that HY had not been involved in extremist activity and saying that she was continuing to try to facilitate his removal to Egypt, the letter continued, in materially similar terms for all three Claimants:

> "It is this association with Mr Youssef that causes your client to be considered unsuitable for naturalisation by the Secretary of State for the reasons set out in the original decision letter. While the Home Secretary knows of nothing about the applicant's own conduct that should be taken into account against her in respect of the statutory requirement of 'good character', her discretion permits her to include other factors as well. In this instance, the Home Secretary considers in particular that it is important to deter potential extremists from involvement in extremist activity, including by making it clear that any extremist activity could affect the immigration status of close family members."

9. Mr Tam confirmed that each Claimant had met all the statutory requirements, including that of being of 'good character'. Refusal of naturalisation did not reflect some unexpressed doubt held by the SSHD about whether they were providing moral support to HY or that they held or encouraged him in his extreme views. Nor were their applications refused because their naturalisation might make his possible deportation more difficult.

Statutory provisions

10. The British Nationality Act 1981 provides for the acquisition of citizenship by birth, descent, registration and naturalisation. The first two categories do not involve the

exercise of a discretion; the requirements are either fulfilled or not. Registration involves the exercise of a discretion by the Secretary of State as does the acquisition of citizenship by naturalisation.

11. Section 6(1) of the Act provides:

> "If, on an application for naturalisation as a British citizen made by a person of full age and capacity, the Secretary of State is satisfied that the applicant fulfils the requirements of Schedule 1 for naturalisation as such a citizen under this subsection, he may, if he thinks fit, grant to him a certificate of naturalisation as such a citizen."

12. This provision therefore creates a discretionary power to refuse naturalisation to those who meet the statutory conditions but it does not create a discretionary power to grant naturalisation to those who do not.

13. The requirements of the applicant in Schedule 1 include 5 years' residence without breach of immigration laws, good character, adequate language knowledge and the intention that his or her principal home will be in the UK or that he or she will enter or remain in Crown service. Paragraph 2 permits some of the strictness of the requirements to be waived. There is no definition of good character in the Schedule. Schedule 5 contains the terms of the oath and pledge which the applicant, if successful, will have to swear and the grant of the naturalisation obviously assumes that the applicant will swear them truthfully. Allegiance is sworn to HM The Queen, and loyalty is sworn to the UK with a promise to "respect its rights and freedoms" and to uphold its democratic values, observe its laws and to fulfil one's duties as a British citizen. The SSHD did not suggest that any of the Claimants could not truthfully take the oath and pledge.

14. The SSHD's published guidance to staff, the "Nationality Policy Guidance Casework Instructions" at chapter 18A annex (d) version 2013, deals with the good character requirement. At [1.3] is a non-exhaustive list of what factors would normally show someone not to be of good character: those who have not respected or who are not prepared to abide by the law, for example where they have criminal convictions, or where there are reasonable grounds to suspect that it is more likely than not that they have been involved in crime; those who have been involved in war crimes, terrorism or other actions considered not to be conducive to the public good; those whose financial affairs were not in appropriate order, for example non payment of taxes due; those whose activities were 'notorious and cast doubt on their standing in the local community'; those who had been deliberately dishonest or deceptive in their dealings with the UK or had assisted in the evasion of immigration control or had previously been deprived of citizenship. The guidance continues: "if the person does not clearly fall into one of the categories outlined above but there are doubts about their character, the decision maker may still refuse the application." The decision of the Secretary of State shows that none of those factors were present so as to cause any of the Claimants to fail the good character requirement.

15. Most of those points are subject to further elaboration. There is elaboration on suspected criminal activity; for example, if information reveals that a person is known or strongly suspected of criminal activity but for various reasons has neither been

charged nor convicted, the decision maker will have to take into account the nature of the information and the reliability of the source. The same applies where there is reliable information that a person is involved with a gang: the more involved a person is, the more likely that refusal would be justified. At [4.6] under the heading "Association With Known Criminals" the guidance says: "when considering a refusal on this basis the decision maker will weigh up the extent of the person's connections with the individual(s) or group concerned and the known impact of their activities." However the application will not be refused simply because the person knows a known criminal.

16. Section 5 deals with terrorism and like activities. Where a person has engaged in activities likely to give rise to a risk to public order, the application will normally be refused. Examples are where the person has made speeches with the aim of exciting religious violence or has caused or could reasonably incite others to commit an offence, for example having extreme views which if expressed could lead to civil unrest, or advocating violent disorder or the violent overthrow of the state. A person excluded from the Refugee Convention under Article 1F would normally have an application for naturalisation refused. None of those circumstances apply to the Claimants.

17. The SSHD's Guide for Applicants states that to be of good character, an applicant "should have shown respect for the rights and freedoms of the United Kingdom, observed its laws and fulfilled your duties and obligations as a resident of the United Kingdom." The SSHD is entitled to apply a high standard in judging whether she is satisfied that someone is of good character; *R* (*Al-Fayed) v SSHD (No 2)* [2000] EWCA Civ 523 , at [41], Nourse LJ.

18. On 25 March 2015, after the decisions in these cases were taken, amended Nationality Instructions came into force. The changes are not directly applicable or challenged, but Mr Fordham QC sought some support from them. The "Introduction" to Chapter 18, [18.4], deals with some circumstances in which the SSHD might exercise her discretion to refuse naturalisation to someone who met the statutory requirements. This could be for reasons relating to their "actions, behaviour, personal circumstances and/or associations (including family relationships)." Examples included where "a refusal could act as a deterrent to others against behaviour which is not conducive to the public good. In particular, the applicant's associations, including family relationships, with those who have been or who are engaged in terrorism or unacceptable extremist behaviour or who have raised security concerns, will normally warrant a refusal of citizenship. Due regard will be given to whether an association is current and/or whether family ties have been severed."

The submissions

19. Mr Fordham submitted that the power of discretionary refusal could only be used where it related to the suitability of the individual for naturalisation. The purpose of s6, and of the Nationality Instructions, is to focus on the attributes of the individual adult applicant, including his individual character, good or otherwise. Grant, with its benefits, and refusal, with its damaging implications, focus on the individual. Parliament should be taken not to have intended the power of discretionary refusal to be exercised so as to refuse naturalisation to someone who satisfied the specific tests and did not have extremist Islamist views, on account of the extremist views of a

member of the applicant's family or of others not connected to the applicant or because the applicant had not severed his or her relationship with the extremist family member.

20. The discretionary power also had to be used in a way which was reasonable, proportionate and fair, in view of what was at stake for the individual. If the severance of the family relationships with an Islamist extremist overcame a discretionary barrier to the naturalisation of an applicant who had already satisfied the good character test, it would make the "destruction of family life the price of British nationality." In *K v SSHD* [2006] UKHL 46 [2007] 1 AC 412, the family bond had been recognised as important, the family being the natural and fundamental group unit of society, entitled to protection by the State. Action against someone simply because of their family would be arbitrary.

21. Citizenship was an important status; refusal could have damaging implications, important benefits were not conferred; *R (Al-Fayed) v SSHD* [1998] 1 WLR 763 at p773 E, Lord Woolf MR. This was particularly so for someone whose roots and home were in the UK. The judicial review of discretionary refusal decisions required a suitably intense standard of review based on necessity, appropriateness, suitability and the balance of advantages and disadvantages, including but going beyond whether the decision was arbitrary or conspicuously unfair; *Pham v SSHD* [2015] UKSC 19, [2015] 1 WLR 1591, a decision which however involved deprivation of citizenship. None of the conduct relied on against them was of the Claimants' doing. They were not participants in it. It was not said that there was more that they should have done to stop it. In so far as relevant, the deterrent effect of severing family connections would be directed at others than HY. The applicants could not have been aware that this issue could affect their applications.

22. If an applicant had been required to sever their family connections to succeed in or to advance their application for naturalisation, their rights under Article 8 or under Articles 8 and 14 ECHR would have been interfered with. The interference would have been both arbitrary and an act of unjustified discrimination against the applicant based on family ties, which is forbidden in naturalisation decisions, and so Article 8 would have been breached: *Genovese v Malta* (2014) 58 EHRR 25. The aim was illegitimate, the means disproportionate and there was no connection between what the applicant had done or could do and the extremism of the family member and still less so that of others who were not family members.

23. Mr Tam QC for the SSHD contended that satisfaction of the statutory tests opened the way for the exercise of a discretion which was not subject to any specified constraints. It was not limited to questions of the individual's suitability for naturalisation. The importance of deterring potential extremists from involvement in extremist activity, including by making it clear that such activity could affect the naturalisation of close family members' was indeed relevant to and legitimately considered in the exercise of the statutory discretion. The decision concerned the relationship of an individual to the State, and the discretion was broad enough to include public policy considerations of that nature. It had parallels in deterrent sentencing for crime and in criminal deportations in which blameless dependants may suffer because of the activities of the criminal family member. The fact that the applicant must be of full age and capacity, and that the focus of the application was on the applicant's character did not make the applicant's associations irrelevant. Naturalisation was a privilege, not a right, and

thus differed significantly from deprivation of citizenship. Naturalisation decisions engaged no heightened standard of review. But in any event the decision was not arbitrary or made in the application of a blanket policy; it was a fact specific decision based on HY's serious activities and justified by the legitimate aim of deterring others from doing the same.

24. The amended Nationality Instructions of March 2015 were irrelevant since the decision had not been made under those Instructions. In any event, the reference to the severing of family connections was no more than a reference to a factor which the SSHD would take into account and would have done so in relation to the applications being considered had it been relevant. She would also have taken into account any attempt at the exercise of a benign influence on HY by the applicants, and they could have explained their disagreement with HY, and what they had done in consequence. Mr Tam confirmed that this was not a case in which the SSHD had an unexpressed but lurking doubt about the character or views of the applicants.

25. There had been no interference with family life: the applicants and HY continued to enjoy the same family relationships that they had enjoyed before the applications were made. Article 8 rights were only engaged by a naturalisation decision in very few cases, where there was an arbitrary denial of citizenship; *Genovese*, above, and *Al-Jedda v SSHD* [2013] UKSC 62, [2014] AC 253. Article 14 was not engaged.

Conclusions

26. I start with the facts concerning the Claimants and the significance of their having met the good character requirement. They are each regarded as being able to take the oath and pledge in good faith, and not untruthfully. Before any question arises of the exercise of the statutory discretion to refuse an applicant who is of good character, the SSHD will already have been satisfied that there are no reasonable grounds to suspect involvement in crime or terrorism or other actions not considered conducive to the public good, or involvement with a gang, by whatever description, and that they have not engaged in activities risking public order by speech or other actions. If the SSHD believed that an applicant shared the extremist Islamist views alleged against HY or encouraged those views in HY or others, naturalisation would have been refused on good character grounds. Mr Tam confirmed that refusal did not reflect some lurking doubt on that score. I judge the comment about "close association" in the decision letters to mean no more than that the decisions assumed the continuance of family ties, changed only by the normal evolutions whereby the adult children have left the parental home and have their own family. Nor was the discretion exercised against naturalisation because the Claimants had failed to take steps to distance themselves from HY's views publicly or in private. No Instruction has required that family members of a criminal or extremist, coming as they do from a background which might warrant anxious scrutiny, positively demonstrate their good character by showing that they do not share those criminal or extremist views, or that they have sought to dissuade the extremist from his ways and views.

27. Next, in the light of all that, the reason for the adverse exercise of the discretion is clear- at least in part: it is simply that refusing naturalisation is seen as useful in deterring "potential extremists" from involvement in extremist activities, because of the adverse impact which the refusal of naturalisation will have on close family members, who, it must be assumed for these purposes, are themselves of good

character. It is not an approach to meet circumstances particular to these Claimants, despite Mr Tam's reference to HY's specific circumstances. It is an approach which, if it is to make sense within its own terms, is to be applied quite generally; it would undermine the deterrent were it applied to but one or a few selected families. The decisions are not qualified by reference to the effect of any mitigating or countervailing factors, such as endeavours to dissuade the family extremist from his views or public disavowal, or lack of strong contact, or severance for whatever reason. That may explain why no such issues were raised with the Claimants: nothing they could say would be relevant, since nothing could alter who they were in relation to HY.

28. The words "potential extremists" bear comment: they show that the target of the deterrence is not HY or the likes of HY. HY is not a potential extremist but an extremist of long-standing and firm convictions. The refusal of naturalisation is not to punish him for his activities or views, or to deter him, or his like, from them. It is to deter those who are contemplating extremist activities, through the potential impact of those activities on family members' future applications for naturalisation. If, however, I am wrong and the aim of this exercise of the discretion is to deter actual extremists from extremist activity, that would not still include HY, since the SSHD accepts that he no longer engages in extremist activities, albeit still holding to his views. The expressed aim is not to dissuade them from holding Islamist extremist views but to deter them from acting on them, including by persuading others to adopt them. No connection between the applicant for naturalisation and such a potential extremist is necessary. It is merely necessary, for the intended deterrent effect to arise, that the potential extremist should know that the SSHD will exercise the discretion against the grant of naturalisation to his or her own family members albeit of good character.

29. The scope and purpose of the existence of this statutory discretionary power which the SSHD seeks thus to deploy is however unclear. Both Mr Fordham and Mr Tam found difficulty in suggesting what it was intended to cover. Mr Tam suggested that the exercise of the discretion could be used to support a general moratorium on the grant of naturalisation or general refusals of a particular nationality. I do not think that Mr Fordham was right to suggest that a person who is outwardly acceptable but whose associations lead to doubts about loyalty or security risk falls to be dealt with as a matter of discretion; I regard those points as going to good character, and the Nationality Instructions' guidance on associations bears that out. The statutory discretion is not to be exercised on what are essentially good character grounds simply because the evidence on good character does not support refusal on that ground. The good character test is broadly expressed, and the SSHD has ample scope for a broad judgment under it as to whether the evidence satisfies her or not. And doubts about character can be resolved adversely to the applicant.

30. It is clear however that the focus of the tests in the BNA and in the Nationality Instructions is on the individual's merits for naturalisation. But, given the nature of the individual tests, it is difficult to see what of an individual nature is not already provided for within the specific requirements. The parties could not readily identify some aspect of an individual's personal qualities or attributes which might be relevant, but which was not specifically provided for but which could sensibly come within the scope of the discretion. There was a debate about whether there could be

certain aspects of Crown service in respect of which a lacuna might be covered by the discretion.

31. Although the focus of naturalisation on the individual does not mean of itself that the discretion cannot be used for some more general purpose connected to the Act, the very difficulty of discovering some general or individual purpose for the discretionary power demonstrates to my mind that it was not intended to provide a very large and wide ranging discretion to refuse naturalisation in the public interest, and rather was there as a backstop to cover the unforeseen eventuality. It is not so much a residual discretion, as one provided against the possibility of the unforeseen. In view of the statutory focus on the individual applicant, and the very broad express power which the SSHD has to formulate the requirements for measuring the good character of the applicant, and to refuse naturalisation if not satisfied of it, I do not consider that Parliament conferred the discretionary power for the pursuit of broad and general public policy objectives.

32. The factor which has led to the exercise of the discretion in this case is not one related to the personal or individual qualities, attributes or failings of an applicant. The deterrent possibility may arise because the applicants are related to HY, but the deterrent purpose of the decision is directed not at the applicants but at others. The factor applies regardless of any connection between the individual applicant and any person at whom the deterrent is aimed, and regardless of any ability of the applicant to control what those others may do or think. The use of naturalisation decisions in an attempt to affect the behaviour of those to whom the applicant may or may not be connected – and, in this case, no applicant was said to be connected to a person at whose behaviour the deterrent effect of the decision was aimed - would require a very broad discretion to have been conferred, enabling otherwise successful applicants to be refused for a variety of reasons which served some general public interest as judged to exist by the SSHD. There is no reason on the SSHD's argument for the connection between refusals of naturalisation and deterrence to stop there, since it could cover all criminal or undesirable activity. Such a purpose does not come within the scope of a limited backstop discretion.

33. But whether the power was broad or backstop, the purpose of this exercise of the discretionary power is so far removed from the individual, and indeed from the individual's family, that an individual can be refused naturalisation to deter people, whom they need not know or be aware of, from actions over which the applicant has no control. There is real unfairness, on the face of it, in refusing naturalisation to someone who qualifies in all other respects, in order to provide a general deterrent to others, over whom the applicant has no control. Such a use of the discretionary power is so far beyond the range of those which Parliament might have anticipated would be taken into account that Parliament should be taken not to have intended so extensive a discretion. If Parliament had intended such an effect it would have provided for it expressly in view of the essentially individual approach adopted in the Act.

34. Put another way, this exercise of the discretionary power does not advance the purposes of the Act, but instead advances some other more general societal purpose, which is beyond its scope and purpose.

35. I accept that any SSHD is entitled to consider carefully what discretionary measures are available to deter and prevent extremist activity. The fact that its exercise on this

basis is unprecedented does not show it to be unlawful. However, Parliament in 1981 could have considered this issue: the notion that criminals and other undesirable aliens, who would not themselves qualify for naturalisation, should be deterred from their activities by the prospect of their family members being refused naturalisation, cannot be new, albeit that the particular Islamist extremist context may be of more recent origin. Yet Parliament has not provided for this expressly in the Act, as in my judgment it would have done had so unusual a use of a discretionary power related to an individual's circumstances been intended.

36. I do not accept the parallels drawn by Mr Tam between the use of the discretionary power here and the effect on the family of a criminal of passing a deterrent sentence on him, or the effect on a criminal's innocent family of deporting them along with the criminal. In each instance the innocent family suffers because of the need to punish or remove the criminal. That is the opposite of what the SSHD seeks to do. The true parallel would be the punishment of the family of one criminal to deter the criminals in other families. That is a power which would no doubt find its supporters, but is not one which Parliament should be taken to have conferred in relation to naturalisation by the grant of this discretion in this Act.

37. I am satisfied for those reasons that the exercise of the discretionary power in this way by the SSHD was unlawful.

38. Mr Tam submits that I am not concerned in this case to deal with the position which would have arisen if the decision had been made on the basis of the amended Nationality Instructions, and refusal had been on the basis that the applicants had not severed their family relationship with HY. This would have given rise to some awkward issues for the SSHD. Even if defensible in principle, the potential problem of the son and daughter of HY severing the relationship with him, the extremist father, but not with his wife, their non-extremist mother, or severing with both parents, would need to be faced by the SSHD.

39. But the logic of the SSHD's case does not permit that issue to be ignored altogether. True, I am not concerned directly with the prospect that if someone has severed their connection with extremist family members, then naturalisation can be granted. That has not happened. But Mr Tam said that it would be regarded as a relevant factor in cases in which the amended Nationality Instructions did not apply. But the decision letters and reviews add no such words of qualification or means of countering the effect of the relationship with HY, so the approach has not been spelt out for the Claimants to deal with before refusal and review. That was unfair.

40. I also have some difficulty with the logic of his answer: the deterrent effect on other extremists of a refusal of naturalisation to all applicants from HY's family would not obviously or necessarily cease upon those applicants severing their connection with HY, and still less if it were only one or two applicants who did so. If the severance of the relationship as the price of the grant of naturalisation was regarded as a sufficiently beneficial alternative deterrent to its refusal, because that is what other extremists would have to face, the SSHD's deterrent policy would now be served by the severance of the applicants' family relationship with HY. Severance might reflect more situations than the forcing apart of a family, since applicants might genuinely reject the activities and views of the family extremist, as it must be taken is the position here, and then also wish for nothing further to do with the family extremist.

But equally severance need not be confined to cases where the family member no longer wishes for contact with the unrepentant extremist, and Mr Tam did not so suggest. The policy is in those cases a policy of forcing the applicants to choose between family and naturalisation, in order to deter others from extremist activities. That is what Mr Fordham submitted was happening and in effect is exactly the policy which Mr Tam has submitted should not be considered as it does not apply. Yet if it does not apply, I cannot see how the severance of the relationship can be relevant. The SSHD has simply not grappled with the issues which her policy creates. Her position lacks internal logic, and is for that reason irrational.

41. I do not need to grapple with the Article 8 and 14 issues which may arise in a different decision.

42. These three decisions are quashed.