Case Ref: SC/CIV/05/20 & SC/CIV/06/20

IN THE SUPREME COURT

OF THE FALKLAND ISLANDS

Courts and Tribunal Service
Stanley
Falkland Islands

Date: 26 May 2021

Before:

THE HONOURABLE JAMES LEWIS QC
(CHIEF JUSTICE OF THE FALKLAND ISLANDS)

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BETWEEN:

THE QUEEN (on the Application of) KRISTEN FOWLER

Applicant

-v-

THE PRINCIPAL IMMIGRATION OFFICER

-and-

HIS EXCELLENCY THE GOVERNOR OF THE FALKLAND ISLANDS

Respondents

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THE QUEEN (on the Application of) JAMIE COLEMAN

Applicant

-v-

THE PRINCIPAL IMMIGRATION OFFICER

-and-

HIS EXCELLENCY THE GOVERNOR OF THE FALKLAND ISLANDS

Respondents

Ms Rebecca Chapman for the Applicants instructed by Falklands Legal.

Mr Dermot Woolgar and Mr Stuart Walker for the Respondents instructed by the Attorney General.

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THE CHIEF JUSTICE:

I. INTRODUCTION

1. These are the conjoined applications for judicial review of the Principal Immigration Officer's ("PIO") decision to revoke the Applicants' work permits and the subsequent rejection of their appeals against revocation by His Excellency the Governor ("the Governor"). The work permits were revoked on the ground that they had each been convicted of sexual offences in the Falkland Islands. The two cases have been heard together because they raise similar factual and legal issues.

2. The applications raise important issues of procedure under the Immigration Ordinance 1999 ("IO99"); the Constitution of the Falkland Islands ("the Constitution") and the role of the Governor in executive decision-making. Indeed over 30% of the population of the

Falkland Islands reside under work permits and the correct procedures for revocation are of clear public interest.

II. SUMMARY OF THE UNDERLYING FACTS

3. Mr Fowler came to the Falkland Islands in October 2018 from St Helena. He was issued with a work permit for Stanley Nurseries and Garden Centre as a nurseryman. He has no dependents in the Islands, but his sister, niece and nephew reside here.

4. Mr Fowler, of previous good character aged 19, on 12 February 2020, was convicted on his plea of guilty before the Summary Court of two offences contrary to section 211 of the Crimes Ordinance 2014, namely sexual activity with a child. The facts of the offences are that Mr Fowler, described as immature and naïve by the court, was going out with a girl aged 15. They consensually kissed on two occasions some months apart.

5. The girl, being under the age of 16, could not give lawful consent to the kissing. He was charged with the offences. In mitigation he said at first the girl had said she was 19 on Facebook but accepted at the time of the offences he knew she was underage. The Summary Court held there were no aggravating features and passed a Community Order with an unpaid work requirement as his sentence. In many jurisdictions kissing between teenagers without aggravating features is not dealt with by criminal proceedings but by way of warning or caution.[1]

6. Mr Coleman came to the Falkland Islands in 2016 from St Helena. He was issued with a work permit for Interserve Defence Limited and subsequently the Falklands Islands Company. He is in a committed relationship living with his partner and two-year-old child who was born in the Falkland Islands. He has a brother and cousin living here and his partner has resided in the Falklands since childhood and her close family all live in the Islands.

7. Mr Coleman, of previous good character aged 24, also on 12 February 2020, was convicted on his plea of guilty before the Summary Court of one offence contrary to section 212 of the Crimes Ordinance 2014, namely encouraging a child to engage in

[1] CPS Prosecutorial Guidance: "Consensual sexual activity between, for example, a 14 or 15 year-old and a teenage partner would not normally require criminal proceedings in the absence of aggravating features"

sexual activity. The facts of the offence are that Mr Coleman asked by text a 15 year old girl to send him "sexy" pictures of herself. When she asked what did he mean he texted "Xrated lol". They did not meet nor engage in any sexual activity in person; and although they discussed sex, he said he did not want to have sex with her as she was underage. In mitigation he said that his motivation for asking for the pictures was not sexual but to expose the girl in relation to allegations made against his brother.

8. The offence was made out because he encouraged a 15 year old girl to take and provide indecent images of a child (herself) to him. The girl did not send the indecent pictures asked for but did send a picture of herself in a blue bra showing her cleavage. He was not charged with possession of an indecent photograph. The Court sentenced Mr Coleman to a Community Order with an unpaid work requirement.

III. PROCEEDINGS UNDER THE IO99

9. On 6 August 2020 an Immigration Officer wrote individually, and without prior notice, to both Applicants informing them that the Principal Immigration Officer had decided to revoke their work permit[2]. This is the first decision under challenge in these proceedings.

    (1) On 25 August 2020 both Applicants separately appealed to the Governor against this decision.

    (2) On 28 August 2020 the PIO responded to the appeals.

    (3) On 9 September 2020 both Applicants filed their right of reply.

    (4) On 23 September 2020, the Governor in Council dismissed the Applicants' appeal against the revocation of the work permit. This is the second decision under challenge.

    (5) On 6 October 2020 the Applicants were informed by decision letter of the dismissal of their appeal to the Governor.

[2] The actual language used was that the PIO 'intended' to revoke at the start of the letter, but the rest of the letter made it clear a decision had already been taken. Mr Woolgar for the Respondents agrees that notwithstanding the clumsy language the letter was informing the Applicants of a decision that the work permit had been revoked.

(6) On 2 November 2020 these proceedings were issued and leave to apply for judicial review was granted on 9 November 2020.

(7) On 14 December 2020, in respect of Mr Fowler there was an interim relief application to allow him to continue working pending the determination of his application.[3] Despite his employer's willingness to employ him during that period the Immigration Officer had taken the view he could not work. He was unable to leave the Islands owing to the Covid 19 pandemic preventing any flights and was effectively left destitute if he could not work. He was without funds and surviving on food handouts and to that date one food parcel from the food bank organised by his probation officer. He had no money or resources. The Falkland Island authorities had taken the position that Mr Fowler had no entitlement to public funds for support. In those circumstances I granted the interim relief sought allowing him to work until the determination of this judicial review.

IV. THE GROUNDS OF CHALLENGE

10. It is convenient to take some of the grounds together. This is a summary of the submissions of the parties.

Grounds 1 and 3 – procedural unfairness

11. The Applicants contend that there has been procedural unfairness in their case. Prior to the making of the decision of 6 August 2020, the Applicants were not put on notice that the Principal Immigration Officer was considering whether to revoke their work permits nor given the opportunity to make representations as to why she should not do so. The first the Applicants knew that their work permits had been revoked was when they received the 6 August 2020 letter. The Applicants submit that a 'minded to revoke' letter should have been sent to them so they could have made representations to the PIO before she made her decision. In short it was a breach of natural justice which requires a person be given an opportunity to be heard before an adverse decision is taken against him (the

[3] The full judgment can be found at https://courts.gov.fk/component/jdownloads/download/10-supreme-court/332-r-on-the-application-of-fowler-v-1-d-e-s-i-s-f-i-2-the-governor-in-council?Itemid=1016

audi alteram partem rule). Moreover, the Applicants say the PIO had a closed mind and misdirected herself on the proper approach to revocation of a work permit.

12. The Applicants further contend that in respect of both the decision of the PIO and the decision on appeal, there was a failure to give adequate reasons for the decisions. Finally the Applicants submit the delay in decision-making in this case was unreasonable. There is a common law duty to take immigration decisions within a reasonable time.

13. The Respondents contend that a 'minded to revoke' letter was not necessary to meet the standards of fairness, but that in any event any procedural unfairness was cured by a fair appeal process which was, they argue, a complete re-hearing. The Respondents submit that within the statutory scheme only permanent residence permits require a 'minded to revoke' letter. They reject the submission that the PIO had a closed mind and say, properly understood, the contemporaneous correspondence does not show a closed mind or misdirection.

14. The Respondents further argue that there were adequate reasons given by the PIO, albeit brief, but in oral submissions Mr Woolgar conceded that the reasons given for dismissing the appeal were inadequate or incorrect. However, not withstanding this admitted flaw the Respondents still argue that substantial fairness has been done.

15. Finally the Respondents acknowledge the delay is not justifiable but say it has caused no real prejudice.

Grounds 2 and 5 – Wednesbury unreasonableness

16. The Applicants submit that the decision to revoke a work permit is an exercise of unfettered discretion once the pre-condition in Section 22(2)(e) of the IO99 is made out. Despite this, they argue, the PIO and the Governor in Council on appeal appear to have treated the fact of the Applicants' convictions as dispositive and have failed to carry out an appropriate balancing exercise, evaluating the relevant factors weighing for and against revocation. They thereby acted irrationally and/or failed to have regard to relevant considerations. In particular, the Applicants submit, the reliance on the 'Good Character Policy' applicable to applications for entry into the Falkland Islands should not have been relied upon when considering revocation of a work permit, and to the extent it was relevant it was misapplied.

17. Further the Applicants submit that the relevant information enabling the Governor in Council to properly evaluate the appeal was absent and that the Executive Council were not adequately or properly directed as to how to approach the appeal.

18. The Respondents submit that once the pre-condition in Section 22(e) of the IO99 is satisfied the discretion is very narrow. Indeed, they submit, there is a statutory presumption in favour of revocation once the pre-condition is satisfied and only in exceptional circumstances would any discretion be exercised not to revoke the work permit.

19. The Respondents accept there is no policy in relation to the revocation of work permits; and that both the PIO and the Governor in Council would have been wrong to apply the 'Good Character Policy' applicable to applications for entry into the Falkland Islands. They say the Policy should be "neither regarded or disregarded" and that the PIO did not in fact apply the Policy in respect of applications for entry. In so far as the Governor in Council applied the Policy Mr Woolgar accepts that would be an error but says in substance the decision to revoke the work permits was inevitable as the discretion once the pre-condition is satisfied is so narrow.

Ground 4

20. The Applicants contend that the decision to revoke the work permits in both cases was disproportionate; and in particular Section 9 of the Constitution was engaged. They submit in respect of Mr Coleman, a man with a partner (who has lived here since the age of 9) and a child born in the Falkland Islands, the revocation of his work permit with the consequential obligation to leave the Islands voluntarily or by deportation, is an undue interference with his constitutional right to a family and private life. In respect of Mr Fowler, who has no immediate family here, it is submitted his deportation is an undue interference with his right to a private life. Moreover, at the appeal the Members of the Executive Council were told there were no fundamental rights engaged in relation to either Applicant, when in fact they obviously were so engaged.

21. The Respondents now accept in relation to Mr Coleman Section 9 of the Constitution was engaged and it was wrong for the appeal committee to be instructed otherwise. They do not accept that Mr Fowler's fundamental rights were engaged as there is no undue interference with his Section 9 rights.

Ground 6

22. The Applicants point out that the right of appeal given by Section 27(3)(d) of the IO99 is to "the Governor". The appeal was heard by the Governor in Council i.e the Governor acting upon the advice of the Executive Council. As the Governor must accept (except in limited circumstances which do not apply) the advice of the Executive Council, the submission runs that the plain words of the statute should be applied, and the appeal should have been heard by the Governor alone in his discretion or judgment and not upon the binding advice of the Executive Council.

23. The Respondents submit that in accordance with the Interpretation and General Clauses Ordinance ("IGCO") the words "the Governor" in section 27(3)(d) of the IO99 should be taken to mean the Governor in Council notwithstanding this means in substance the decision is not taken by the Governor himself but the Executive Committee whose advice he must accept.

V. DISCUSSION AND FINDINGS

A. The statutory and constitutional framework

24. The following provisions are material to this case.

The Constitution Order

> 5.—(1) The existing laws shall, as from the appointed day, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.
>
> (2) Where any matter that falls to be prescribed or otherwise provided for under the Constitution is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section), that prescription or provision shall, as from the appointed day, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution) as if it had been made under the Constitution.

The Constitution

> Protection for private and family life and for privacy of home and other property
>
> **9**.(1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence and, except with his or her own consent, no person shall be subjected to the search of his or her person or property or the entry by others on his or her premises.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
>
> (a) that is reasonably required—

(i) in the interests of defence, internal security, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit..

…

The Governor to consult the Executive Council

66.(1) Subject to subsection (2), in the formulation of policy and in the exercise of the functions conferred on the Governor by this Constitution or any other law the Governor shall consult with the Executive Council and, subject to section 67, shall accept its advice.

(2) The Governor shall not be obliged to consult with the Executive Council—

(c) when exercising any function conferred on the Governor by this Constitution or any other law where it is provided, either expressly or by necessary implication, that the Governor exercise such function in his or her discretion or in his or her judgement or in accordance with the advice of, or after consultation with, any person or authority other than the Executive Council;

The Immigration Ordinance 1999

22 Revocation of work permits
…
(2) A work permit may be revoked by notice in writing under this subsection served upon or delivered to the holder on any of the following grounds stated in the notice:
…
(e) that the holder has been convicted in the Falkland Islands, during the course of his present stay, of an offence punishable on conviction by imprisonment;
…
(3) A person whose work permit is revoked under subsection (2) may appeal against such revocation in accordance with this Ordinance.
(4) When a person's work permit is revoked under subsection (2), unless he is granted leave to remain under some other provision of this Ordinance or is otherwise entitled to remain in the Falkland Islands his continued presence in the Falkland Islands becomes unlawful-

27 Appeals in relation to work permits
…
..A person who is aggrieved by-
…
(d) by the revocation of a work permit,
may appeal by representations in writing to the Governor against that ..revocation.

Interpretation and General Clauses Ordinance 1977

4. “"Governor", "Governor in Council", "Governor in Executive Council" and "Governor with the advice of Executive Council" mean the Governor or other officer for the time being administering the Government of the Falkland Islands acting after consultation with the Executive Council, except in any case where the Constitution authorizes or requires him to act otherwise than after such consultation, where it shall mean the Governor acting in his discretion;”

27(2) “Where an Ordinance repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears, in so far as any subsidiary legislation made…under the enactment so repealed…could have been made…under the provision re-enacted, it shall haveeffect as if made…under that provision”.

Immigration (General) Regulations Order 1987

33(2) "Whenever the Principal Immigration Officer revokes a residence permit he shall notify the holder thereof in writing and that notification shall include the Principal Immigration Office's reasons for such revocation and be accompanied by Forms 11 and 12 in the Schedule to these Regulations".

40 " Every appeal shall be determined in accordance with what the Governor in Council considers to be the best interest of the Falkland Islands which may decide to allow the appeal even if the Principal Immigration Officer appears to have beenfully justified in the decision appealed against or to dismiss it for reasons not advanced by the Principal Immigration Officer".

41 "The decision on appeal under these regulations shall be notified in writing to the appellant and to the Principal Immigration Officer but no reasons for the decision need be disclosed to any person, court or authority whatsoever".

B. The hearing of the appeal by the Governor in Council

25. It is convenient to deal with this ground first as it sets the framework under which the IO99 is interpreted and the constitutional role of the Governor.

26. The issue is whether the words "appeal by representations in writing to the Governor against that revocation" mean simply that; or do they by virtue of section 4 of the IGCO mean "appeal by representations in writing to the Governor *acting after consultation with the Executive Council* against that revocation". It is conceded by the Respondents that if the true construction is the former then the appeal proceedings were fatally flawed.

27. As the First Affidavit of Rosalind Cheek points out there are many provisions in the IO99 which refer to "the Governor" simpliciter. There is also a provision in Section 23A(3) of the IO99 dealing with revocation of a Residence Permit which refers expressly to "the Governor acting on the advice of Executive Council".

28. Moreover, it is clear that some of the provisions in the IO99 which give duties and powers to the Governor by use of the words "the Governor" simpliciter are exercised without reference to the Executive Council. Of importance are sections 16(2) and 17(2) which deal with the grant of residence and work permits respectively. The evidence of Jennifer Smith makes it clear that since 1 January 2009 there have been 78 referrals under these provisions where the Governor has made a decision *without* reference to the Executive

Council[4]. Moreover, since the same date the Governor has made 16 deportation orders *without* consulting the Executive Council.

29. The Applicants point out it is very strange that within the same Ordinance references to "the Governor" can either mean the Governor acting himself or the Governor acting on the advice of the Executive Council which he is effectively bound to accept.

30. Some, but not complete, assistance is given to this conundrum by section 66(2) which reads:

> 66(2)(c) "when exercising any function conferred on the Governor by this Constitution or any other law where it is provided, either expressly or by necessary implication, that the Governor exercise such function in his or her discretion or in his or her judgement or in accordance with the advice of, or after consultation with, any person or authority other than the Executive Council;"

31. This means that if by necessary implication, on a true construction of the statutory provision, the jurisdiction is given to the Governor alone, he must act without the advice of the Executive Council. It follows in this case the heart of the issue is whether this is a case to which section 66(2)(c) applies and whether the IO99 requires by necessary implication that the Governor must decide the appeal in his discretion, rather than after consultation with the Executive Council.

32. As to the meaning of "necessary implication", in *R (Morgan Grenfell & Co) v Special Commissioners of Income Tax* [2002] UKHL 21 at [45] it was said:

> "A necessary implication is not the same as a reasonable implication... A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation."

33. The constitutional position of the Governor is also informative, helpfully set out in the affidavit of Ms Cheek. The Falkland Islands Letters Patent l 948, dated 13 December 1948 (published in Extraordinary Gazette No 4 on 25 February 1949, pages 81-84) set out the basis for the Governor's authority in the Falkland Islands (Article 5), and established an Executive Council (Article 9). The Letters Patent provided that the Governor's authority would be further regulated by Royal Instructions.

[4] The evidence of Jennifer Smith in relation to these 78 referrals is that they were likely done in circumstances of urgency potentially coming within Section 66(2)(f) of the Constitution.

34. Clause 10 of the Royal Instructions was in the following terms:

> In the exercise of his power and the performance of his duties, the Governor shall consult with the Executive Council except in cases: -
>
> (a) which are of such nature that, in his judgment, our service would sustain material prejudice by consulting the Executive Council thereon; or
>
> (b) in which the matters to be decided are, in his judgment, too unimportant to require that advice; or
>
> (c) in which the maters to be decided are, in his judgment, too urgent to admit of their advice being given by the time within which it may be necessary for him to act.
>
> In every case falling within paragraph (c) of this clause, the Governor shall as soon as practicable communicate to the Executive Council the measures which he shall have adopted, with the reasons therefor.″

35. It is of note there was no imperative to accept the advice of the Executive Council. The 1985 Constitution read:

> 61. The Governor to consult the Executive Council
>
> (1) Subject to the provisions of this section, in the formulation of policy and in the exercise of the functions conferred upon him by this Constitution or any other law the Governor shall consult Executive Council.

36. However, there became an express provision that the Governor must accept the advice of the Executive Council in the 2009 Constitution. That reads:

> 66.(1) Subject to subsection (2), in the formulation of policy and in the exercise of the functions conferred on the Governor by this Constitution or any other law the Governor shall consult with the Executive Council and, subject to section 67, shall accept its advice.

37. The language of "appeal" used in section 27 of the IO99 must therefore be evaluated to ascertain whether it carries a necessary implication that the Governor will act in his discretion or judgment or whether on the advice of the Executive Council.

38. Importantly, part of the legislative history was the Immigration Ordinance 1987. The Explanatory Memorandum to the Immigration Bill 1999 (published on 12 November 1999 in Gazette Supplement No 21) stated:

> "The Long Title of the Bill is "A Bill for an Ordinance to repeal and replace the Immigration Ordinance". Whilst many features of the present law are reflected in the Bill, it has been considered more satisfactory to replace it than to engage in piecemeal amendments."

39. The Immigration Ordinance 1987 does not contain a part dealing exclusively with appeals, unlike Part III of the IO99, but Part 6 of the Ordinance contains supplementary provisions which include provisions in relation to appeals. Section 23 appears to contain the entire provisions of the Ordinance which deal with appeals:

"23 Appeals

(1) Any person aggrieved by a decision of the Principal Immigration Officer under this Ordinance may appeal against such decision to the Governor in Council .."

40. It is therefore clear that under the Immigration Ordinance 1987 any appeal was to the Governor in Council. The Regulations made under the Immigration Ordinance 1987 similarly make it clear any appeal was to be to the Governor in Council:

> 40 " Every appeal shall be determined in accordance with what the Governor in Council .."

41. The Executive Council Standing Orders identify circumstances, under the Constitution, when the Governor may act in his discretion. The Respondents submit this is a complete list. I do not agree, in each case it will be a matter of law whether section 66(2)(c) of the Constitution is engaged, but I accept as part of the legislative environment the Executive Council have set out their views on what might be provisions too unimportant, or otherwise where the Governor may act in his discretion or judgment without consulting the Executive Council.

42. It is not necessary in this judgment to determine whether other provisions in the IO99 which refer to "the Governor" can be decided without the advice of the Executive Council. Suffice it to say in this instance, with particular regard to the previous immigration enactments and regulations, I am satisfied that an appeal made pursuant to section 27(3) of the IO99 is properly made to the Governor acting on the advice of the Executive Council. Accordingly, this ground of challenge by the Applicants fails.

C. Were the decisions of the PIO and the Governor in Council procedurally fair?

1. *The decision of the PIO*

43. No opportunity was given to either Applicant to say anything to the PIO before she made her decision to revoke their work permits. What procedural fairness requires in practice is dependent on the context. In the seminal case of *Council of Civil Service Union v Minister for theCivil Service* [1985] AC 374, 411H it was said:

> "what procedure will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decision, the executive functions of the decision-maker…and the particular circumstances in which the decision came to be made"

44. However, the fundamental principle of natural justice is based on twin pillars so well known as not to require recitation of authority: (1) the right to be heard; and (2) an independent and impartial adjudicator.

45. The relevant principles were recently summarised in *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673 at [45]:

> 45. This court recently had occasion to summarise the relevant principles by reference to the leading authorities in R (Citizens UK) v Secretary of State for the Home Department [2018] 4 WLR 123 . The main judgment was given by Singh LJ, with whom Hickinbottom and Asplin LJJ agreed. At paras 68–71 he said:
>
> "68. That the common law will 'supply the omission of the legislature' has not been in doubt since Cooper v Wandsworth Board of Works (1863) 4 CB (NS) 180 (Byles J); see also the more recent decision of the House of Lords in Lloyd v McMahon[1987] AC 625 . Accordingly, the duty to act fairly or the requirements of procedural fairness (what in the past were called the rules of natural justice) will readily be implied into a statutory *4665 framework even when the legislation is silent and does not expressly require any particular procedure to be followed.
>
> "69. The requirements of procedural fairness were summarised in the following well-known passage in the opinion of Lord Mustill in *R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531* , 560 in which he summarised the effect of earlier authorities: 'From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.
>
> …
>
> 71. The origins of the duty to act fairly in the context of an immigration decision can be traced back to the decision of the Divisional Court in *In re HK (An Infant) [1967] 2 QB 617* , 630 (Lord Parker CJ)"

46. In that case the Court of Appeal in England said where the Secretary of State refused a person further leave to remain under paragraph 322(5) of the Immigration Rules on the basis of their allegedly dishonest conduct fairness demanded that a "*minded to revoke*" letter should have been sent to allow the recipient an opportunity to make meaningful representations.

47. The Respondents point out that the scheme within IO99 creates a right to be in the Falklands only if you have Falkland Island status or have been issued with a permit. That permits come in the forms of visitors, residents, work and permanent residence. They point out that only in the case of permanent residence permits ("PRPs") does the statutory scheme require a 'minded to revoke' letter. The inference, the Respondents say, is the legislature did not require a 'minded to revoke' letter in respect of any of the other permits.

48. On analysis I do not think there is much in this submission. PRPs were introduced separately and retrospectively into the IO87 by the Immigration (Amendment) Ordinance 1994 and the power to revoke by inserting a new section 11 B into that Ordinance. Further there was no appeal against the decision to revoke a PRP. The IO99 carried forward the principle of PRPs and included a 'minded to revoke' notice in respect of these permits. The IO99 was subsequently amended in relation to PRPs which fell to persons within section 22(5)(a) and (7) of the Constitution. The fact that an additional procedural safeguard was included by the legislature in relation to PRPs, although it adds to the context, cannot be read to exclude procedural fairness safeguards in relation to residence or work permits if the revocation of those permits requires a 'minded to revoke' letter giving the recipient a fair opportunity of meeting the position.

49. What happened in this case was as follows.

50. On 2 March 2020 Superintendent McMahon wrote to the PIO recommending that the PIO consider deporting the Applicants. It appears, albeit not mentioned by the PIO as part of her consideration, a form MG3 in each case was enclosed which is a prosecution document seeking advice on a charging decision which sets out material facts. Importantly neither MG3 was ever put before the Executive Council on appeal.

51. On 3 March 2020 the PIO emailed an Immigration Officer ("the IO") saying:

> " On first read I don't believe its conducive to the public good for them to remain here…can we look at their status".

52. The IO replied the same day saying:

> 1. Do we want to ask the Governor to agree to a deportation order on conducive grounds and therefore have the permits revoked under section 22(1)(c); or
> 2. Do we revoke the permits under section 22(2)(e) ..
> …Option 1 is the quickest but is it justifiable given the court has given them community service ..

53. On 6 March 2020 the PIO replied saying:

> "I have given this some thought and believe that the deportation route is the most appropriate. We do not want convicted sex offenders to remain in our community."

54. There is no evidence, at that time, the PIO considered the two cases separately as she should have done.

55. Nothing then appears to happen and there is, accepted by Mr Woolgar, an unjustifiable delay. On the 24 July 2020 the PIO emailed:

> ".. I have considered the question raised by .. in respect of sentencing and it is not the sentence that is important in my consideration, but the offence of which he was convicted, that being a sexual offence targeting a young female."

56. The decision letter is then sent on the 6 August 2020 without setting out any adequate reasons or asking for any representations. There are no contemporaneous supporting notes or documentation that shows the PIO carried out any reasoning or balancing exercise before coming to her decision. After leave for these proceedings was granted a detailed and careful affidavit was served by the PIO. Ms Chapman urges me to consider the contents of this affidavit with caution, because evidence to explain a decision after the event may be subject to *ex post facto* rationalisation. It is true the court must be cautious in accepting late reasons particularly so when there was a statutory duty to give reasons at the time.

57. In *Nash v Chelsea College of Art & Design* [2001] EWHC Admin 538 at [34]:

> ".. the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:
> (a) Whether the new reasons are consistent with the original reasons.
> (b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.
> (c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).
> (d) The delay before the later reasons were put forward.
> (e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.
> 35. To these I add two further considerations. The first is based on general principles of administrative law. The degree of scrutiny and caution to be applied by the Court to subsequent reasons should depend on the subject matter of the administrative decision in question. Where important human rights are concerned, as in asylum cases, anxious scrutiny is required; where the subject matter is less important, the Court may be less demanding, and readier to accept subsequent reasons.

58. Further it is clear and conceded by the Respondents that the PIO had a duty to give reasons. This duty arises not only from procedural fairness but specifically from the IO99 and Regulation 33(2) of IO87. The Respondents accept in their written argument that there

is a statutory obligation on the PIO and all immigration officers to give reasons. Section 3(5) of IO99 provides that they must "*inform the applicant, and where required by this Ordinance, in writing, of the reasons for any decision*".Section 24(2) is an instance of an obligation to give reasons in writing. It provides "*On exercising any power of revocation to which subsection (1) relates, the officer shall in writing notify the person affected by the revocation of the reason for it.*"

59. Where there is a statutory duty to give reasons and none or inadequate reasons are given in the decision letter the court will be very slow indeed to accept undocumented detailed reasoning in an affidavit filed after the commencement of proceedings. If the detailed reasoning was contemporaneous with the decision it should have been in the decision letter at the time.

60. Mr Woolgar attempted to justify the comment by the PIO in the 6 March 2020 email as a correct legal explanation of section 22(2)(e) of the IO99, which makes the fact of a conviction for an imprisonable offence the legal gateway, irrespective of sentence. That is of course legally correct. However, it appears to me given this is not the explanation she gave in her affidavit, and it is not consistent with her consideration of it being 'a sexual offence targeting a young female'; the context indicates she was considering the facts of the offence not simply its legal classification carrying a potential sentence of imprisonment.

61. In her affidavit the PIO maintains that she took a balanced approach including considering the personal circumstances of the Applicants. In particular she stated she considered the "Guidance on Criminal Records Checks Declarations and Good Character Policy" ("The Policy") as approved by ExCo in February 2020.

The Policy

62. The Policy has loomed large in these applications. The PIO says she considered it and the only sensible construction of her affidavit is that she applied it. It was also put before the Executive Council and it appears they were invited to apply it.

63. The problem is that this Policy is not applicable to the revocation of work permits. It is a policy for the grant of applications for those wishing to enter the Falkland Islands to visit, work or reside. As Mr Woolgar for the Respondents concedes there is no FIG policy on

revocation of work permits. He admits it was in error for it to be relied upon for revocation. The way he puts it is somewhat difficult to grasp. He says for the Respondents: " The policy was neither applied nor disapplied" in an attempt to circumvent the obvious procedural flaw if this policy was in fact applied by the PIO or the Executive Council.

64. In her affidavit at [25] the PIO says she considered:

> "25.The Policy provides that the following factors should be taken into account:
> - The nature of the offence(s);
> - The seriousness of the offence(s);
> - The age of the applicant when the offence(s) were committed;
> - The number of offences;
> - The length of time since the offences were committed;
> - The sentence or punishment imposed for the offence(s);
> - Whether there is a pattern of offending behaviour, which is recurrent;
> - The type of permit applied for, including with regard to a work permit the requirements of the post; and
> - The employment history of the applicant and any references
>
> 26. Applying the above factors,…"

65. It is difficult to reconcile her comment in the emails of 6 March and 24 July where she has already decided upon deportation and says what is important is that they were convicted of sex offences against a young female, with this list of factors to be considered. Importantly it does not appear at that time she had all the relevant information to carry out the balancing exercise she maintains she has done. Indeed, she expressly said in the 24 July 2020 email that the sentence imposed was not important but in the list of factors she says she considered it as she included it as a relevant factor.

66. The most likely explanation is that she had made up her mind that the Applicants should be deported and was looking for a way to do it as she considered the conduct underlying the offence to be so serious as not to be conducive to the public good.

67. Of course sexual offences are serious and there has been an unfortunate history of historic and contemporary sex abuse in the Falkland Islands. This court has regrettably had to try a number of sexual abuse cases so is well aware of the sentiments and abhorrent feelings that are felt, and rightly felt, towards sex offences in the Islands. However fair procedures must not be influenced or curtailed by this.

Adequacy of reasons

68. The PIO's decision letter simply states as the ground on which the Applicants' work permits have been revoked is that they have been convicted of an offence carrying imprisonment. There is no indication that a balancing exercise has been carried out or details of what considerations have been taken into account.

69. As the Court of Appeal said in *R (Oakley) v South Cambridgeshire DC* [2017] EWCA Civ 71 at [30]:

> 30. In view of this, it may be more accurate to say that the common law is moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so.
>
> 31. There are certain categories of case where the courts have required reasons to be given at common law, although the jurisprudence is relatively underdeveloped, perhaps because statutory requirements are so common. Apart from cases where fairness requires it, or a particular decision is aberrant, the duty has also been imposed where the failure to give reasons may frustrate a right of appeal, because without reasons a party will not know whether there is an appealable ground or not

70. In the instant case the PIO was under a statutory duty to give reasons in any event, see paragraph [58] above.

71. In *R v Brent LBC ex parte Baruwa* (1997) 29 HLR 915 at 929 Schiemann LJ said:

> "..Where as here, an authority is required to give reasons for its decision, it is required to give reasons which are proper, adequate, and intelligible and enable the person affected to know …"

72. What is required, at a bare minimum, is a recital of the relevant findings the PIO took into account, reference to the evidence or information on which those findings were made, and the reasons why the PIO was satisfied she should exercise her discretion to revoke the work permit.

73. Mr Woolgar's final repost on the procedural fairness concerning the PIO's decision is that it was unnecessary for her to take into account the factors she said she took into account because the discretion given by section 22 of the IO99 is so very narrow. In addition on this narrow construction no further reasons than the bare recital of section 22(e) was necessary. This narrow construction is his key submission set out at paragraph [18] above, namely that there is statutory presumption in favour of revocation that informs discretion once the pre-condition is satisfied; and only in exceptional circumstances would any discretion be exercised not to revoke the work permit.

74. I cannot accept that construction. There is no support whatsoever in the words of the statute or indeed, if applicable, the Regulations. It would mean that there is an automatic

presumption to deport or revoke a work permit of anyone convicted of any offence carrying imprisonment. Such a result would also logically apply to residence permits as the revocation section contains identical gateways.

75. The illogicality of such a submission on behalf of the Respondents can be illustrated. The offence of Camping without permission contrary to section 565 of the Crimes Ordinance 2014 carries a sentence of imprisonment. As does drunk and disorderly contrary to section 525 of the 2014 Ordinance. Likewise a host of other offences such as minor assaults, drink driving and some second minor road traffic offences all carry imprisonment. Given that over 30% of the population's presence in the Falkland Islands is only lawful owing to their possession of work permits, the Respondents would say once they have been convicted of such an offence there is a presumption that their work permits are revoked (and therefore their presence in the Islands is unlawful so they must leave immediately or be deported). Such presumption they submit can only be rebutted in exceptional circumstances. Such a construction leads to absurdity and I reject it.

76. On a true construction of section 22 of the IO99 an unfettered discretion to revoke arises once the preconditions set out in subsections (a) to (i) are satisfied. The discretion will be informed by such factors as the Policy identifies at section 6. I am fortified in this conclusion by the general approach to revocation of work permits and deportation in English and Human Rights jurisprudence.

77. The kind of exercise that is required is illustrated by *R (Ngouh) v Secretary of State for the Home Department* at [120] where Foskett J. said:

> "Where reliance is placed, at least in part, on one previous conviction then a number of factors will be relevant including the intrinsic seriousness of the offence, the circumstances generally and the risk of its repetition. Those matters will assist in informing the question of whether it is "desirable" to permit the applicant for ILR to remain in the UK indefinitely. As I have observed previously (see paragraph 107 above), in some instances the offence may be so serious that little by way of explanatory justification for relying on this paragraph may be required: the answer may be obvious. Where, however, the offence is in a different part of the criminal spectrum, certainly if very much at the lower end, then far greater justification would be required, particularly if it is the only occasion where the person concerned has broken the law. That does not mean that it would not be open to the Secretary of State, in some circumstances, to treat a relatively minor first offence as justifying recourse to this paragraph. However, it does mean that the reasoning would need to be focused and compelling. It would need to demonstrate that both the positive and negative aspects were weighed up fully and fairly, not merely the positive and negative aspects of the offence, but also other (potentially positive) factors that would make it "desirable" that the applicant should be permitted to remain in the UK. The same seems to me to apply also when a breach or attempted breach of immigration requirements is deployed as a reason for invoking the paragraph. The underlying

> reasoning must, in my judgment, demonstrate clearly why the provision has been invoked and be capable of withstanding rational analysis." [emphasis added]

78. None of those considerations appear to have been properly considered in the Applicants' cases.

79. The last long stop for Mr Woolgar on behalf of the Respondents was that if the PIO took her decision in a procedurally unfair manner, then such unfairness is cured by a fair appeal. I do not accept that in this case. The Applicants are entitled to a fair decision and a fair appeal. But in any event for the reasons developed below I do not find the appeal process was procedurally fair so this point must fall away.

Delay

80. Complaint is made of the delay in the PIO making the decision. The Respondents accept this delay was not justifiable. It appears to be some 5 months after the initial decision to deport was made for the decision to revoke their work permits to be communicated to the Applicants. However, this was during the Covid 19 pandemic and in all the circumstances I would not find delay alone as being procedurally unfair in the circumstances of these cases.

81. In summary I find that the decision of the PIO was taken in a procedurally unfair manner. First, there was no 'minded to' letter sent so that the Applicants could make representations before she made her decision, and one should have been sent. A decision such as this sent out of the blue is procedurally unfair. Secondly, despite there being a statutory duty to give reasons no adequate reasons were given.

2. ***The decision of the Governor in Council***

82. There is a statutory right to appeal against the decision of the PIO pursuant to section 27 of the IO99. It is also necessary to consider the status of the Immigration (General) Regulations Order 1987 ("the IO87 Regulations").

83. The IO87 Regulations do not appear on the Statute Law Database because the Statute Law Commissioner took the view that these regulations were no longer in force.

84. Section 11 of the Law Revision and Publication Ordinance 2017 states:

> 11. Content of the database
> (1) The Statute Law Database must contain —

(a) the complete and up to date text of all Ordinances of the Falkland Islands in force;
(b) the complete and up to date text of all subsidiary legislation, made under Ordinances of the Falkland Islands, in force;

85. It follows the public could assume the IO87 Regulations are not in force. Moreover, the Executive Council were told at 7.5 of the Appeal agenda that "It is unclear to what extent the 1987 [Regulations] Order continues to apply; it is clearly in need of urgent replacement."

86. This is obviously wholly unsatisfactory advice to give to the Governor and Executive Council who would not know whether the application of the Regulations was lawful or not.

87. Mr Woolgar draws attention to section 27(2) of the IGCO which says:

> 27(2) "Where an Ordinance repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears, in so far as any subsidiary legislation made…under the enactment so repealed…could have been made…under the provision re-enacted, it shall have effect as if made…under that provision".

88. It follows as a matter of law some provisions of the IO87 Regulations would remain in force. Of course, the IO87 did not deal with work permits and the IO87 Regulations do not deal with work permits or appeals against work permits. It follows this is clearly an unsatisfactory state of affairs and the making of new Regulations under the IO99 should be considered.

89. The forms of appeal No.11 and 12 scheduled to the IO87 Regulations are not concerned with the revocation of a work permit but appear to have been treated as such by both the PIO and the Governor in Council. It also follows that Regulation 41 does not strictly apply.

90. Mr Woolgar seeks to maintain that the appeal was a complete rehearing. In support of this he points to Regulation 40 of IO87. While that does allow the Governor in Council to allow an appeal on grounds other than were before the PIO it was not treated in form or substance as a completely fresh re-hearing. It was unquestionably treated as an appeal. Form 11 ("*Notes as to appeals*"),Form 12 ("*Notice of appeal against principal immigration officer's decision*"), Form 14 ("*Principal Immigration officer's response to appeal*"), Form 15 ("*Advice on right of reply*") and Form 16 ("*Reply by appellant*"). The Forms served on the Applicants and used by them to initiate the appeal ask the appellant to set out why the PIO's decision was wrong and ask the grounds of appeal to be set out. The

Executive Council certainly treated it as an appeal and said they upheld the PIO's decision.

91. If it was a true re-hearing, given no oral representations are allowed and no legal representation at the hearing is allowed, there would be an enhanced duty on those advising the Governor in Council to ensure all relevant material was before him and the Executive Council. This was not done.

92. Mr Woolgar points to Regulation 41 of the IO87 which states that The Governor in Council must notify the appellant of the decision on appeal in writing, "*but no reasons for the decision need be disclosed to any person, court or authority whatsoever".* Of course as the Court of Appeal said in *R v Secretary of State for the Home Department, ex parte Al-Fayed* (No 1) [1998] 1 WLR 763 of a similar provision, 44(2) of the British Nationality Act 1981, this does not prevent reasons being given - it just means there is no statutory duty to do so. On the contrary he has a clear discretion to give reasons. However, it is also clear that reasons should be given if fairness requires them to be given.

93. What happened in this appeal is as follows.

94. The members of the Executive Council were asked at paragraph 1(a) of the Committee Agenda to "Determine the appeal against the decision to revoke the work permit having regard to the information contained in the attached annexes".

95. In the annexes were: (1) the Decision letter of 6 August 2020; (2) A letter from Falklands Legal on behalf of the Applicant; (3) a Notice of Appeal including a probation progress report; (3) the PIO's response to the appeal; and (4) a reply to the PIO's response.

96. At paragraph 5.2 of the Committee Agenda papers prepared by the Immigration Officer there was reference to the Policy. It was not appended but these headings were set out:

> The nature of the offence;
> The seriousness of the offence;
> The age of the applicant when the offence were committed;
> The sentence imposed;
> Any pattern of offending;
> The type of permit requested; and
> Employment history and any references received

97. There was obviously a measure of inaccuracy in these headings as they say "type of permit requested" when this was an appeal against revocation.

98. At paragraph 7.4, Regulation 40 of IO87 was set out but with the caveat it was desirable to give reasons. In the event Mr Woolgar accepts no, or incorrect reasons, were given despite this recommendation by the author of the paper.

99. At paragraph 7.6, it said " There are no infringements of the fundamental freedoms in the constitution engaged in this decision in respect of this appellant". Mr Woolgar conceded this was in error, at least so far as Mr Coleman was concerned as it is clear his section 9 rights were engaged. It follows there was a clear misdirection at least in Mr Coleman's appeal.

100. What is astonishing is the fact that no proper details of the underlying offences were shown to the Governor or the Executive Council. The facts I have set out at paragraphs [4] and [7] above are gleaned from the Pre-Sentence Reports ("PSR") that were before the Summary Court. These PSRs were not before the PIO or the Governor in Council. It is clear that even if they complied with the recommendation to consider the nature and seriousness of the offences they could not properly do so on the information before them.

101. Indeed, in the minutes of the meeting one member of the Executive Committee said:

> " … he struggled with in respect of appeals of this nature is where would this sit on a sliding scale rating the crime and the evidence. He noted that there was no court statement on the crime included to balance a decision against what occurred".

102. The Honourable Member was entirely correct. The members should have been supplied with the PSR or court statement to carry out that exact exercise. It is clear the members were not given the help, factually or legally, in determining this appeal they could have properly expected.

103. The minutes record that helpfully the Governor stated:

> "HE The Governor highlighted that this is a serious issue and that his position on the absolute need to combat child sex abuse was well known. He had no personal interest in the case, other than the need to ensure a robust review of the appeal, not least because if lost, it would in effect result in the deportation of the individual; Executive Council therefore needed to consider the breadth of the case and make a dispassionate judgement based on its merits. In this regard, in addition to the impact on the individual's family, the relative leniency of the sentence and the positive references by his employer, further examination of the Probation Officer's report suggests a contradictory position with the statement that Mr Coleman was medium risk; specifically, it was noted that Mr Coleman has engaged well with the system and that his risk had moved from Medium to Low. HE The Governor asked Members if they felt this merited further discussion or investigation."

104. The sentiments of the Governor were not acted upon; and the Executive Council stated they were not minded to change their view on the revocation of the work permit and

rendered advice to the Governor to "uphold the decision of the Principal Immigration Officer". Advice, which I have held he was obliged to accept.

105. In the case of Mr Fowler it is of note that the minutes of the discussion are so brief as not to enable any meaningful examination of the reasoning.

106. The First affidavit of the Governor says that the reasons given by the elected members for their advice in rejecting the appeal of Mr Coleman were:

> "The reasons given by the elected Members for their advice were:
> (a) The nature and seriousness of the criminal offences committed by Mr Coleman.
> (b) The risk assessment of the Probation Officer, suggesting a medium risk of re-offending and serious harm (accepting that the risk had lowered).

107. In respect of Mr Fowler the Governor said the reasons were:

> "The reasons given by the elected Members for their advice were:
> (a) The nature and seriousness of the criminal offences committed by Mr Fowler.
> (b) The fact that the offences were committed soon after Mr Fowler arrived in the Falkland islands.
> (b) The risk assessment of the Probation Officer, suggesting a medium risk of re-offending and the concerns raised in the Probation Officer's report.

108. None of these reasons are recorded in the minutes and most importantly they are not the reasons given in the decision letters sent to the Applicants on 6 October 2020. That fact in itself is procedurally improper and unfair to the Applicants. Mr Woolgar fairly and properly concedes the decision letters of 6 October 2020 are wrong in that respect.

109. In summary I am satisfied the appeal suffered from procedural impropriety. There were misdirections given to the Executive Council, they were not provided with sufficient information or evidence to carry out the determination they were obliged to carry out; and the wrong reasons were given in the decision letters.

D. Were the decisions of the PIO and the Governor in Council rational and proportionate

110. Although it is convenient to deal with these challenges together the legal tests this court must apply in respect of rationality, and proportionality when considering fundamental rights, are different.

111. This court will only interfere with a public law decision on the grounds of rationality if it was a decision no reasonable decision maker directing themselves correctly could have come to. A generous margin of appreciation is to be allowed and it is not enough that the court would have come to a different decision or thinks the decision is wrong. This test

obviously involves proportionality in the sense described by Lord Lowry in *R v Secretary of State for the Home department ex parte* Brind [1991] 1 AC 696 at 762D: " *Clearly a decision by a minister which suffers from a total lack of proportionality will qualify for the Wednesbury unreasonable epithet*". This is a supervisory jurisdiction of this court.

112. The proportionality test when considering fundamental constitutional rights is different. In considering these rights the court carries out its own proportionality consideration balancing relevant considerations. *In R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532 at [27] Lord Steyn:

> "First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith [1996] QB 517* , 554 is not necessarily appropriate to the protection of human rights."

113. In exercising a decision to deport or revoke a work permit based on a conviction the obvious starting point is the nature, seriousness and context of the conduct constituting the offence in question.

114. There appears to have been a fundamental error by the PIO in not properly assessing the offending conduct. As Professor Ormerod says in *Smith & Hogan* in relation to the offence of sexual assault, it includes:

> ".. the merest touching in an indecent manner. The label on conviction did not differentiate between the vastly different forms of conduct and their disparate gravity".

115. Indeed, a sexual assault can range from a touching on the knee to penetrative sex. Not all sexual offences are the same and the presence of a person convicted of a sexual offence will not automatically be unconducive to the public good. Facts and context are everything.

116. I have already indicated at paragraph [77] above factors that should inform the discretion. For the constitutional challenge the approach is somewhat different. Section 9 of the Constitution is in *pari materiae* with Article 8 of the ECHR and therefore the jurisprudence concerning that article from the United Kingdom and from the ECtHR is informative and persuasive.

117. Section 9 is a qualified right, not an absolute right. It may be interfered with, *inter alia*, on the grounds of "public safety", "public order" or "public morality" (section 9(2)(a)(i)).

However, such interference is unconstitutional to the extent that it is "*shown not to be reasonably justifiable in a democratic society*" (provision to section 9(2)). This wording imparts a test of proportionality: See *de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing* [1998] UKPC 30.

118. It is for this Court to conduct the proportionality analysis for itself. The focus is on whether the applicant's rights have been violated, not on whether the decision-making process was defective: *Begum v Governors of Denbigh High School* [2006] UKHL 15 at [27]-[29]. Hence it is not determinative whether the Governor in Council considered the Applicant's private and family life, the question is whether the interference with his private and family life is proportionate, not whether the decision maker concerned reasonably considered that it was.

119. In assessing the proportionality of a decision to expel a foreign national offender with a spouse/partner and children in the host state, an approach laid down by the European Court of Human Rights in *Boultif v Switzerland* (2001) 33 EHRR 50:

> "… the court will consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion." [Emphasis added]

120. The Court added in *Uner v The Netherlands* (2007) 45 EHRR 14 at [58] that the court must also consider:

> "… the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and the solidity of the social, cultural and family ties with the host country and with the country of destination."

121. The best interests of the Applicant's child must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it: *Jeunesse v The Netherlands* (2015) 60 EHRR 17 at [109].

122. Mr Woolgar reminds me that of particular importance are the United Kingdom decisions in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, *Huang v Secretary of State for the Home Department* [2005] EWCA Civ 105,[2007] UKHL 11, *AG (Eritrea) v Secretary of State for the Home Department*[2007] EWCA Civ 801, and *Caroopen v Secretary of State for the Home Department* [2016] EWCA Civ 1307.

123. It is clear a disciplined structure should be adopted. He points out that Lord Bingham's five steps in *Razgar* provide a useful, disciplined, structure. Adapted to these circumstances of these cases and to the particular wording of section 9 of the Constitution, they are:

    (1) Is the revocation of the Applicants' work permits an interference by a public authority with the exercise of the Applicants' right to respect for their private or (as the case may be) family life?

    (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Section 9?

    (3) If so, is such interference in accordance with the law?

    (4) If so, is such interference necessary in a democratic society in the interests of defence, internal security, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, the development or utilisation of any other property in such a manner as to promote public benefit, or for the protection of the rights and freedoms of others?

    (5) If so, is such interference proportionate to the public end sought to be achieved?

124. Question 2 requires there to be a threshold of severity of the interference before the rights are engaged. In the present case the removal of a work permit and the inevitable consequential removal from the Falkland Islands will interfere and have consequences to the family rights of Mr Coleman. It is arguable, but only just, that it might interfere with the private rights of Mr Fowler.

125. It is clear that immigration policy and the right to revoke a work permit with consequential removal from the Islands is a lawful interference with those rights. It follows the only real

question is whether such interference is proportionate given the legitimate aims of the IO99: the question of proportionality therefore amounts to the question whether the interference with the appellant's private life is necessary in a democratic society for this purpose. I have to ask myself whether allowing the Applicants to stay in the Falkland Islands would give a message to others that they could behave in the same way and circumvent the immigration system.

126. In *Mukarkar v Home Secretary [2006] EWCA Civ 1045* Buxton LJ went on to adopt the following passage from the judgment of Carnwath LJ :

> 23. … "In normal circumstances interference with family life would be justified by the requirements of immigration control. However, it is recognised that a different approach may be justified in "a small minority of exceptional cases identifiable only on a case by case basis" (per Lord Bingham, Razgar). The House of Lords has declined to lay down a more precise legal test. Accordingly, whether a particular case falls within that limited category is a question of judgment for the tribunal of fact, and normally raises no issue of law."

127. I shall follow the guidance set out by Sedley LJ in the *AG Eritrea* case as being applicable in the Falkland Islands with the necessary modifications to take account of our constitution.

1. ***Mr Coleman***

128. The starting point are the facts and seriousness of the offence. The conduct was sending a text to a 15 year old girl asking for "Xrated" pictures of herself. None were sent. He did ask the girl to delete the message from her phone.

129. The Summary Court accepted that he had no sexual motivation in asking for the "Xrated" pictures of the girl. No recommendation for deportation was made by the court, indeed it does not seem such a course was even considered. The Summary Court held:

> " ..it is clear contact was motivated by revenge for what happened to your brother. Once you realised what you had become involved in, you desisted. The Court note that you did not meet the complainant, nor did you engage in any sexual activity..

130. The Governor in his second affidavit (filed after the decisions had been made) said this:

> (a) The Applicant's offending was motivated by his brother's suicide attempt which related to his brother's contact with the victim and a police investigation into whether his brother had committed sexual offences against the victim. The Applicant viewed his offending as a method by which to expose what he perceived to be wrongdoing on the part of the victim. This may indicate that the offending is unlikely to be repeated, however, this explanation is possibly to be doubted given that the Applicant made no attempt to contact the police with his concerns and the Probation Service concluded that there was a level of sexual pre-occupation involved in the offending.

(b) The Applicant's offending took place over a short period of time, from 7th July 2019 to 20th July 2019, a period of approximately 2 weeks.

(c) The Applicant had no previous convictions.

131. He had been of good character and this was his first offence. The probation progress report said no future concerns as to his behaviour had emerged. This was an offence at the bottom end of the scale with no real risk of further offending.

132. In relation to his personal circumstances Mr Coleman is in a committed relationship, lives together with his partner and they have a young child born in the Falkland Islands. He also has a brother and cousin living in the Falkland Islands. If he is deported as the inevitable consequence of losing his work permit he would be separated from his family or they would have to leave the Falklands where his partner has her own family and support network.

133. He said in his affidavit:

> "10. When I received the letter from Immigration, it was completely out of the blue. I had heard nothing from Immigration to indicate that they were even considering revoking my work permit. I felt completely devastated. It came at just a time when I thought my life was getting back on track, I had the support of my partner and the support of my employers who were encouraging me to apply for the supervisor's role and confirming that they wanted me to undergo further training and gain further qualifications providing a long term future for myself and most importantly, for my family and young son. I felt that the company offering me the opportunity of being a supervisor was a really positive step forward as they were aware of the conviction but felt sufficiently that they wanted, not only to promote me, but to potentially develop me into a manager. Suddenly this high with this potential for the future was taken away from me when I was told that my work permit was being revoked. This has led to months of uncertainty and anxiety and a period when I was not allowed to work at all and thus earn no income. This has placed considerable strain on my partner who has been the only person earning an income but with our outgoings exceeding what she could earn.
>
> 11. My employers have been supportive throughout this process, including continuing to allow us to remain in our current accommodation which is owned by my employers despite the fact that I was not able to work..
>
> 13. When 1 am not at work, I enjoy spending time with my family, particularly with my young son. We also spend time seeing family on the Falkland Islands and other friends. If I had to leave the Falkland Islands it would be the intention that my family would come with me. I would not want to be separated from my son. However, I believe that it would be very hard upon my partner as her parents are in the Falkland Islands and it would be hard on her parents who are used to seeing Blake who is their first grandchild. I do not have any accommodation in Saint Helena but my partner would not be able to keep her current accommodation on her wages and thus it is probable that we would have to stay with family and friends in Saint Helena initially until I was able to find employment.

134. His partner said:

> "2. I have spent most of my life in the Falkland Islands. My parents moved to the Falkland Islands when I was 9 years old. My parents have permanent residence and I have a younger brother who

still attends school in the Falkland Islands. The Falkland Islands is my parents' home and it is their intention to retire here."

5. When Jamie was arrested, I was shocked. It seemed out of character for Jamie. However, I was aware how emotionally upset he was regarding his brother's attempted suicide. I do not believe that anything like this would happen again. As a result of the stress of going through the criminal proceedings, I believe that our relationship came out stronger with the need to support each other. If the Applicant was forced to leave the Falkland Islands then I and my son would go with him as I think that it is important to keep the family together. The Applicant is a good father who spends time with his son and I would not want their relationship to be destroyed. I know that it would be very hard on my parents who dote on Blake as their only grandson if we had to move back to Saint Helena as although they could see him via video link, it is never quite the same.

6. I have always considered the Falkland Islands to be my home and although I still have some relatives in Saint Helena, my close family are in the Falkland Islands. Normally Christmas is a time when we all get together and I have to face the fact that this could potentially be our last Christmas together.

7. Although I found the period during the court case generally stressful, it was nothing comparted to the stress and anxiety that we have suffered since Immigration revoked the Applicant's work permit. Just as I thought our lives were getting back on track with Jamie being offered promotion and we could look forward and start planning our lives, suddenly Immigration stated that Jamie's work permit is revoked and he has to leave the Falkland Islands. I was completely devastated as was all of my family. I generally suffer from anxiety and the uncertainty of matters and the unfairness of it all has only made me feel more anxious, not knowing what will happen to Jamie and thus what will happen to us as a family and what the future will hold for us, where we will live, what will happen to Blake, how we will stay in touch with my family etc.

8. I feel that our lives are completely on hold and that we have no future. Life has been a complete rollercoaster from ups and downs, to thinking that thinks [sic] were moving forward to now being completely frozen and uncertain. I cannot imagine not living in the Falkland Islands but similarly, I cannot imagine not living with the Applicant and having the Applicant in my son's life."

135. There is strong support for Mr Coleman from his employer and he has been promoted and offered more demanding work.

136. The public interest factors indicated by the Governor are:

(a) Child Sexual Exploitation (CSE) has historically been a prevalent offence in the Falkland Islands. As a result of a Child Safety Review by the Lucy Faithful Foundation in 2013, the Government commenced a historic case review under the overall name of Operation Cinnamon. This was a lengthy and complex review that resulted in a number of criminal proceedings. Since 2013 the Government has made improvements to the manner in which the Government responds to allegations of child sexual exploitation. The Government recognises the serious nature of CSE and has invested significant resources in combating CSE. This has taken the form of the recruitment of a specialist police officer and a clinical psychologist, training for professionals in identifying and investigating CSE, public engagement and public education and training programmes.

(b) The nature of community in the Falkland Islands means that there is much greater interaction between adults and children outside of the family unit, than there might otherwise be in larger jurisdictions. Community social and sporting events often involve both adults and children mixing together freely, with limited supervision. The community is small and parents and guardians are trusting of other adults. There is a sense of shared community and a closeness that is derived from people recognising and knowing about each other. There is not an inherent distrust of strangers. These aspects of community provide significant opportunities for perpetrators of CSE to form

> relationships with children. Vulnerable children are particularly exposed because of these aspects of community. Perpetrators of CSE can easily identify children by name and contact them using social media. Perpetrators who form inappropriate relationships with children over social media are difficult to detect, due to the hidden nature of the contact. The small nature of the community means that victims of CSE are likely to see the perpetrator again, during daily life and at community events. Victims have little opportunity for anonymity. They are re-exposed to the perpetrator and reminded of the trauma which was a consequence of the perpetrator's offending. The perpetrator's continued presence can operate to damage the recovery of the victim and increases the risk that the perpetrator and victim will reconnect. The impact of CSE on a small community is significant. This type of offending undermines community trust and it is in the public interest for the Government to respond to this type of offending robustly."

137. Taking all the factors into consideration I am satisfied no reasonable immigration officer, properly directing themselves, could come to the conclusion his presence in the Falkland Islands was not conducive to the public good, nor that it was a reasonable exercise of discretion to revoke his work permit for the offence to which he pleaded guilty.

138. Further I am satisfied, having carried out the appropriate balancing exercise in accordance with the facts and principles set out above, that revocation of his work permit and consequential effect of deportation is a disproportionate interference with his Section 9 constitutional rights.

2. ***Mr Fowler***

139. The starting point are the facts and seriousness of the offence. It appears while examining the phone of the girl in relation to another matter the police came across 500 pages of Facebook logs and texts between Mr Fowler and the girl over many months.

140. The conversations are clearly between adolescents. There are protestations of love such as "*I love u to bits*" and equally fallings out. However, upon close examination the police found two instances of evidence the teenagers had been kissing as they discuss how good a kisser he is from the night before. The texts relating to the kissing are dated and form the two offences for which he was charged. The kissing is clearly consensual (albeit a fifteen year old cannot in law consent to any sexual contact) . In interview after arrest Mr Fowler admits to kissing and cuddling with her but no further.

141. The police report, form MG3, seeking the AG's decision on whether to charge him says:

> "Mr Fowler admits that he kissed and cuddled with her, but claims nothing else.
>
> There is a lot of sexual innuendo in their chat but nothing that would lead us to prove that anything further, such as sexual intercourse did take place."

142. The Summary Court found there were no aggravating features and that his actions showed naivety. No recommendation for deportation was made by the court, indeed it does not seem such a course was even considered.

143. The Governor in his Second affidavit (filed after the decisions had been made) said this:

> (a) There was some disparity in age between the Applicant and the victim, but not a great disparity. The Applicant was 19 years old and the victim 14/15 years old.
>
> (b) The Applicant did not attempt to engage the victim in more serious sexual activity and at time the Applicant refused to engage with the victim when the possibility of more serious sexual activity was raised.
>
> (c) At the time of the offending the Applicant was immature, sexually inexperienced and both he and the victim considered themselves to be in a relationship.

144. He had been of good character and this was his first offence. The probation report assessed him as a medium risk of reoffending but I fail to see how that is a realistic conclusion. This is unquestionably a sexual offence at the very bottom end of the scale.

145. He said in his affidavit:

> "I was born in St Helena on 17 December 1999. I came to the Falklands to improve myself and to be able to have money to help support my elderly parents in St Helena. My sister and cousin live and work in the Falklands…
>
> As I had not heard anything from Immigration following my sentence in February 2020 I had assumed as did my employers that I would be allowed to continue working. It was therefore a great shock and upset when I received the letter from immigration to say my work permit would be revoked. My employer was outraged at the decision and could see no reason for it. My employer was aware of the matter at court and had been supportive of me throughout."

146. The Governor recited the same public interest reasons as I have set out above.

147. Taking all the factors into consideration I am satisfied no reasonable immigration officer, properly directing themselves, could come to the conclusion his presence in the Falkland Islands was not conducive to the public good, nor that it was a reasonable exercise of discretion to revoke his work permit for the offence to which he pleaded guilty.

148. However, I am not satisfied, having carried out the appropriate balancing exercise in accordance with the facts and principles set out above, that revocation of his work permit and consequential effect of deportation is a disproportionate interference with his Section 9 constitutional rights. His family and private life position is quite different from that of Mr Coleman.

VI. DISPOSITION

149. In the circumstances the decisions of both the PIO and the Governor in Council are quashed on procedural unfairness grounds. Given I have found no reasonable immigration officer, properly directed, could come to the conclusion to revoke the work permits of the Applicants this is not a case for remittal and reconsideration. I also find there was a disproportionate interference with the constitutional family rights of Mr Coleman but not of Mr Fowler.