Neutral Citation Number: [2023] EWCA Civ 26

Case No: CA/2022-001103

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
THE HONOURABLE MR JUSTICE JAY
CO/3463/2021, CO/3649/2021 and CO/3806/2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2023

Before:

SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

E3, N3 AND ZA	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Hugh Southey KC and Alasdair MacKenzie (instructed by **Duncan Lewis**) for the **Appellants**
Neil Sheldon KC and James Stansfeld (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 8 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewis:

INTRODUCTION

1. This appeal concerns the proper interpretation of provisions in the British Nationality Act 1981 ("the 1981 Act") concerning the deprivation of citizenship. Section 40(2) of the 1981 Act provides that the Secretary of State may by order deprive a person of his status as a British citizen if he is satisfied that deprivation is conducive to the public good. Section 40(4) of the 1981 Act provides, however, that the Secretary of State may not make such an order "if he is satisfied that the order would make a person stateless".

2. The issue that arises is this. Where the Secretary of State makes an order depriving a person of his status as a British citizen, and subsequently withdraws the order because it is realised that the order has made the person stateless, does the withdrawal of the order mean that it should be treated as if it had never been made and never had legal effect, so that the person is to be treated as someone who was at all times a British citizen? Or does the withdrawal only take effect from the date that the order was withdrawn? The appellants contend that it is the former. Jay J. ("the judge") held it was the latter. The appellants appeal against that conclusion.

THE FACTS

3. The first claimant, E3, was born in the United Kingdom on 27 May 1981. He had British citizenship at birth and that status was continued by section 11 of the 1981 Act. Both of E3's parents were Bangladeshi citizens at the time of his birth and, accordingly, E3 was also a Bangladeshi citizen by descent at least at the time of his birth.

4. On 2 June 2017, the Secretary of State gave notice that she intended to make an order depriving E3 of his British citizenship under section 40(2) of the 1981 Act as he was assessed as being an Islamist extremist who had previously sought to travel abroad to participate in terrorist activity and posed a threat to national security. The Secretary of State said that she was satisfied that such an order would not make E3 stateless. On 4 June 2017, the Secretary of State made an order stating that E3:

> "Be deprived of his British citizenship on grounds of conduciveness to the public good
>
> The Secretary of State is satisfied that [E3] will not be rendered stateless by such action."

5. The second claimant, N3, was born in Bangladesh on 12 December 1983 and acquired Bangladeshi citizenship at birth. His parents were both naturalised British citizens, so that N3 was also a British citizen at birth by virtue of section 2(1)(a) of the 1981 Act. On 1 November 2017, the Secretary of State gave notice that she intended to make an order depriving N3 of his British citizenship as he was assessed as being a British/Bangladeshi national who had travelled to Syria and aligned himself with Al-Qaeda. The Secretary of State assessed him as a threat to national security. She considered that making an order depriving him of his British citizenship would not

make him stateless. On 3 November 2017 the Secretary of State made an order depriving N3 of his British citizenship.

6. Both E3 and N3 appealed against the decision to make an order on a number of grounds including that, at the date of the decisions, they no longer held Bangladeshi citizenship and the order would render them stateless. Their appeals were joined. On 15 November 2018, the Special Immigration Appeals Commission ("SIAC") allowed their appeal, holding that E3 and N3 had ceased to be Bangladeshi citizens at the age of 21 by virtue of Bangladeshi law. On 28 December 2018, the Secretary of State appealed against the decision of SIAC.

7. On 10 June 2019, E3's daughter, ZA was born in Bangladesh. If E3 had been a British citizen at the time of her birth, ZA would also have had British citizenship by virtue of section 2(1)(a) of the 1981 Act as she would have been a person born outside the United Kingdom whose father was a British citizen at the time of her birth.

8. On 21 November 2019, the Court of Appeal allowed the Secretary of State's appeal in the cases of E3 and N3 and remitted the matter to SIAC. E3 and N3 applied for permission to appeal to the Supreme Court.

9. Meanwhile, the issue of the effect of Bangladeshi law on dual British and Bangladeshi nationals when they attained the age of 21 was litigated in other cases. On 18 March 2021, SIAC handed down judgment in the cases of individuals known as C3, C4 and C7 allowing the appeals on the grounds that the individuals had ceased to be Bangladeshi nationals on attaining the age of 21 and the effect of orders depriving them of their British citizenship was to render them stateless.

10. On 20 April 2021, solicitors for the Secretary of State wrote to E3 and N3 noting the judgment of SIAC in *C3, C4 and C7 v Secretary of State for the Home Department* on the question of statelessness. The letters said that:

> "In light of that SIAC judgment, we are instructed that the Home Secretary has withdrawn the deprivation order in relation to your client. Your client's British citizenship has therefore been reinstated."

11. Solicitors for E3 and N3 replied stating that as the Secretary of State had no power to make the deprivation order as the order rendered E3 and N3 stateless, "the decisions were a nullity and citizenship had always remained intact". On 28 April 2021, the solicitors for the Secretary of State replied stating:

> "In relation to reinstatement of citizenship, it is the Secretary of State's position that, at the time of making the deprivation orders in respect of both your clients, she was not satisfied that either order would make your clients stateless, in accordance with section 40(4) British Nationality Act 1981. Thus, the orders were lawful. Following SIAC's judgment in C3/C4/C7 and the decision not to appeal SIAC's determination, the Secretary of State reconsidered the matter, in light of the analysis of the statelessness issue and the evidence before SIAC, which was not available at the time that the orders were

> made. The Secretary of State is now satisfied that the deprivation orders would make your clients stateless, and accordingly the decisions have been withdrawn and your client's citizenship reinstated. The decision to reinstate your clients' citizenship, following extensive litigation and the consideration of further evidence, does not render the original decisions unlawful. For these reasons, your clients have not retained their citizenship throughout."

12. On 27 July 2021, the Supreme Court issued a sealed consent order resulting in E3 and N3's applications for permission to appeal against the decision of the Court of Appeal being withdrawn, and the matter was remitted to SIAC. As the Secretary of State had notified SIAC that the decisions subject to appeal had been withdrawn, the appeals to SIAC were to be treated as withdrawn (rule 11A of the Special Immigration Appeals Commission (Procedure) Rules 2003). The proceedings in SIAC were, therefore, at an end.

13. On 1 November 2021, E3 and ZA sought judicial review of the refusal by the Secretary of State to accept that E3 was a British citizen between 5 June 2017 and 21 April 2021. They contended that the effect of the withdrawal of the decision depriving E3 of his citizenship was that the decision had never had legal effect. Consequently, they sought a declaration that E3 was a British citizen between the relevant dates and that ZA was a British citizen. N3 had also brought a claim for judicial review challenging the refusal to accept that he was a British citizen between 31 October 2017 and 21 April 2021. The claims were dismissed by the judge who held that the effect of the withdrawal of the decision was prospective only.

THE STATUTORY FRAMEWORK

Acquisition of British Citizenship

14. Section 1 of the 1981 Act provides that:

> "(1) A person born in the United Kingdom after commencement… shall be a British citizen if at the time of his birth his father or mother is –"
>
> (a) a British citizen; or
>
> (b) settled in the United Kingdom…"

15. Section 2 of the 1981 Act deals with persons born outside the United Kingdom and provides, so far as material, as follows:

> "2. – Acquisition by descent
>
> (1)A person born outside the United Kingdom … after commencement shall be a British citizen if at the time of the birth his father or mother –
>
> (a) is a British citizen otherwise than by descent..."

Deprivation of Citizenship Status

16. The 1981 Act as originally enacted provided for a number of grounds upon which a person could be deprived of his British citizenship. Section 40(5) of the 1981 Act as originally enacted provided that the Secretary of State could not deprive a person of his British citizenship unless he was satisfied that it was not conducive to the public good that the person continue to be a British citizen. Further, the Secretary of State could not deprive a person of British citizenship on the ground that he had been sentenced to a period of 12 months' imprisonment within the last five years "if it appears to him that that person would thereupon become stateless". Before making an order, the Secretary of State had to notify the person concerned of the grounds upon which it was proposed to deprive him of citizenship. The person had a right to have his case considered by a committee of inquiry but there was no right of appeal.

17. The provisions governing deprivation have been amended over time. At the material time, section 40 of the 1981 Act, as substituted by section 4(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and section 56(1) of the Immigration, Asylum and Nationality Act 2006, provided, so far as material that:

> "**40 Deprivation of citizenship**
>
> (1) In this section a reference to a person's "citizenship status" is a reference to his status as—
>
> (a) a British citizen …..
>
> (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact.
>
> (4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.
>
> (4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—
>
> (a) the citizenship status results from the person's naturalisation,

> (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
>
> (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.
>
> (5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—
>
> (a) that the Secretary of State has decided to make an order,
>
> (b) the reasons for the order, and
>
> (c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68)….."

18. Section 40A of the Act provided, so far as material, that:

> "40A Deprivation of citizenship: appeal
>
> (1) A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against the decision to the First-tier Tribunal.
>
> (2) Subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public—
>
> (a) in the interests of national security ….
>
> (3) The following provisions of the Nationality, Immigration and Asylum Act 2002 (c.41) shall apply in relation to an appeal under this section as they apply in relation to an appeal under section 82 of that Act–
>
> (c) section 106 (rules),
>
> (d) section 107 (practice directions),
>
> (e) section 108 (forged document: proceedings in private)."

19. As the decisions were certified as being taken on national security grounds, there was no right of appeal to the First-tier Tribunal under section 40A of the 1981 Act.

Instead, there was a right to appeal to SIAC. Section 2B of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act") provides that:

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

20. There are no specific provisions dealing with the powers of SIAC on an appeal against an order depriving a person of his status as a British citizen. There are no specific provisions dealing with the power of the Secretary of State to give effect to a decision on such an appeal. In cases where SIAC finds that a person is rendered stateless by a deprivation order, it was accepted that the Secretary of State may withdraw a decision, and the order depriving a person of his status as a British citizen, in order to give effect to a decision of SIAC allowing an appeal on that ground (at least where there has been no material change of circumstances since the appeal). It is also common ground that the Secretary of State may anticipate the decision of SIAC, as happened in these cases, and withdraw a decision and a deprivation order before the appeal is heard.

Legislative History

21. In view of the arguments on the proper interpretation of sections 40 and 40A of the 1981 Act, and the relevance of the legislative history, it is appropriate to note two further changes that were made to section 40A of the 1981 Act prior to the present case. An appeal under section 40A of the 1981 Act was given suspensive effect by section 40A(6) (as substituted by section 4(1) of the 2002 Act). That subsection provided that:

> "An order under section 40 may not be made in respect of a person while an appeal under this section or section 2B of the Special Immigration Appeals Commission Act 1997 — (a) has been instituted and has not yet been finally determined, withdrawn or abandoned, or (b) could be brought (ignoring any possibility of an appeal out of time with permission)."

22. Section 40A(6) of the 1981 Act was itself repealed by section 47 of, and Schedule 4 to, the Asylum Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act"). Section 26(7) of, and paragraph 4 of Schedule 2 to, the 2004 Act enacted the following provision, so far as material, as part of section 40A(3) of the 1981 Act:

> "(3) The following provisions of the Nationality, Immigration and Asylum Act 2002 (c.41) shall apply in relation to an appeal under this section as they apply in relation to an appeal under section 82, 83 or 83A of that Act—
>
> (a) section 87 (successful appeal: direction) (for which purpose a direction may, in particular, provide for an order

> under section 40 above to be treated as having had no effect);…"

23. Section 40A(3)(a) was itself repealed on 19 October 2014.

THE APPEAL AND SUBMISSIONS

24. There are four grounds of appeal. The first three can be taken together. They are to the effect that the judge was wrong to find that the effect of the withdrawal of the decision to make a deprivation order was not to restore E3 and N3's British citizenship with retrospective effect as:

    (1) The scheme of the 1981 Act meant that a withdrawn deprivation decision no longer has any effect;

    (2) The withdrawal of the deprivation decision involved an acceptance that the decisions were wrong and had had the unlawful consequence of rendering E3 and N3 stateless and, consequently, those decisions should not be treated as having had any effect on E3 and N3's rights to citizenship between the date on which the deprivation orders were made and the date on which the decision to make such orders was withdrawn;

    (3) The 1981 Act prohibited statelessness. Where a person was left stateless by a decision to deprive him of his British citizenship, that was unlawful because it was prohibited by the 1981 Act.

25. The fourth ground of appeal was that the judge should have found that that the effect of SIAC's decision on 15 November 2018 allowing E3's appeal against the decision to deprive him of citizenship meant that his British citizenship was restored at the date of SIAC's judgment so that he was a British citizen when his daughter was born on 10 June 2019.

26. Mr Southey KC, with Mr MacKenzie, on behalf of all three appellants, submitted that the 1981 Act prohibited statelessness, that is, it was unlawful to create a state of affairs where a person was stateless. On an appeal to SIAC, SIAC determined whether a person was left stateless by the making of a deprivation order: see *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 at paragraph 101. If so, the decision to deprive a person of British citizenship would be unlawful and a nullity. The purpose of asking SIAC to make findings of fact as to statelessness was to assess the legality of the decision to deprive a person of British citizenship. The court considered the position as at the time that the Secretary of State made the decision to make a deprivation order. Further there was no express statutory power to restore or re-instate citizenship. That was consistent with the judgment by SIAC having the effect that a decision to make a deprivation order which rendered a person stateless was unlawful with the consequence that a person had always retained his British nationality. Whilst the provisions of sections 40 and 40A of the 1981 Act did not expressly address the consequences of a successful appeal, the default position applied and a decision was a nullity if there was a successful appeal against that decision. Further, arbitrary consequences would result if a withdrawal were prospective only. In this case, ZA was entitled to British citizenship by virtue of section 2 of the 1981 Act as her father, E3 was a British citizen at the time of her birth

and he should not have been deprived of his citizenship. If the deprivation decision was a nullity, E3 would have retained his British citizenship throughout and ZA would be British. If the withdrawal of the deprivation decision had prospective effect only, ZA would not automatically be British, and E3 would have to apply for her to be registered as a British citizen and pay the appropriate fee. Parliament did not intend those consequences to arise. Finally, on this aspect of the case, Mr Southey submitted that the provisions of the 1981 Act ought to be interpreted consistently with Article 8 of the 1961 Convention on the Reduction of Statelessness ("the Convention") which, he submitted, prohibited statelessness.

27. Mr Sheldon KC, with Mr Stansfeld, for the respondent, submitted that, on a proper interpretation of the relevant provisions of the 1981 Act, the order made by the Secretary of State would be lawful if she were satisfied at the time she made the order that it would not render the person concerned stateless. The statutory appeal to SIAC was directed at a factual question, namely whether, on the evidence available at the time of the appeal, the deprivation order rendered the person stateless. The fact that there was a successful appeal did not have the consequence that the decision to make a deprivation order was unlawful. That position was supported by the fact that, at one stage, section 40A(3)(a) of the 1981 Act provided a discretion for SIAC to make a direction that a decision to make a deprivation order be treated as having had no effect. That was inconsistent with an interpretation of sections 40 and 40A of the 1981 Act that meant they had the automatic consequence that the result of a successful appeal was that the decision was a nullity. Mr Sheldon submitted that the relevant provisions of the 1981 Act were not introduced to give effect to Article 8 of the Convention and, in any event, the 1981 Act was not incompatible with the Convention. In relation to the final ground of appeal, Mr Sheldon submitted that the effect of a successful appeal to SIAC did not have the consequence that an individual who was subject to a deprivation order immediately, and without more, resumed British citizenship unless the judgment of SIAC was stayed. The Secretary of State would have to take the necessary steps to give effect to the appeal by withdrawing the deprivation order and, if she refused or failed to do so, she could have been compelled to do so by the courts on a claim for judicial review.

ANALYSIS AND CONCLUSION

28. This appeal concerns the statutory scheme governing the making of deprivation orders and the effect of an appeal under sections 40 and 40A of the 1981 Act. That is a question of statutory interpretation which involves consideration of the language used, read in context, and having regard to the purpose underlying the statute and any legitimate aid to interpretation.

29. The context is sections 1 to 11 of the 1981 Act which set out the circumstances in which a person acquires British citizenship. Section 40 deals with the circumstances in which a person may be deprived of status as a British citizen. Section 40(2) and (3) set out the grounds upon which that status may be removed, i.e. where the Secretary of State is satisfied that deprivation is conducive to the public good (section 40(2) of the 1981 Act) or is satisfied that the person acquired citizenship by fraud, false representation or concealment of a material fact (see section 40(3) of the 1981 Act). There is a process for making such an order. The Secretary of State must first decide to make a deprivation order and give written notice of that decision, and the right of

appeal, to the person concerned. The person may appeal against the decision to make a deprivation order either to the First-tier Tribunal or, as here, SIAC.

30. Section 40(4) of the 1981 Act imposes a restriction, or a limitation, on the power of the Secretary of State to make a deprivation order under section 40(2) of the 1981 Act. Although section 40(4) has been described as creating a condition precedent to the making of an order, it is more accurate to describe it as a limitation on the circumstances in which the power may be exercised. The subsection provides that:

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

31. First, the limitation on the exercise of the power is expressed by reference to the state of mind of the Secretary of State which will be based upon the evidence available to her at the time that she decides to make a deprivation order. The Secretary of State must consider whether a deprivation order would render a person stateless. If the Secretary of State "is satisfied" that the order would render the person stateless, she cannot make the order. If she is not satisfied of that fact, she may exercise the power to make a deprivation order. But the limitation is expressed by reference to whether the Secretary of State *is satisfied* of a certain state of affairs. It is not dependent on whether or not the state of affairs exists. The subsection does not provide that the Secretary of State may not make a deprivation order "if the order would render a person stateless"; it provides that the Secretary of State may not make such an order "if he is satisfied" that the order would render the person stateless.

32. Secondly, the person has a right of appeal against the decision to make the deprivation order (although not against the deprivation order itself). On an appeal relating to section 40(4) of the 1981 Act, SIAC will have to determine whether the making of the deprivation order did render a person stateless. Statelessness will be a question of fact which will depend on the evidence available including expert evidence on the meaning and interpretation of the laws of another state. SIAC will need to determine whether or not the order does on the facts have the consequence of rendering the person stateless. (The position is different in relation to an appeal against a decision that deprivation is conducive to the public good under section 40(2) where SIAC is concerned with reviewing the exercise of a discretion on public law principles: see *R (Begum) v SIAC* [2021] AC 765 at paragraphs 66 to 71).

33. There is no express provision governing the powers of SIAC on an appeal. SIAC will, therefore, simply allow the appeal if it determines that a decision to make a deprivation order does result in the person being rendered stateless. SIAC does not have power to quash the decision to make the order, still less the order itself which is the legal measure bringing about the deprivation of citizenship. Further steps will need to be taken by the Secretary of State to give effect to the finding by SIAC that a person is rendered stateless by the order. In particular, the Secretary of State will have to withdraw the decision, and the order, thereby removing the legal measure that deprives the individual of his status as a British citizen.

34. A judgment by SIAC would not have amounted to a finding that the decision of the Secretary of State was unlawful, that is, it would not have amounted to a finding that the Secretary of State had no power to make the deprivation order in the case of E3 or

N3 so that the orders were nullities. It would not have been a decision that as a matter of law the Secretary of State was not, or could not have been satisfied, on the material before her that the order would not render E3 or N3 stateless. No such challenge was brought by the appellants on that basis. Rather, any finding by SIAC would have been a finding on the evidence before it, including the expert evidence, that as a matter of fact, the order rendered the person stateless. In other words, reading the statutory scheme as a whole, and having regard to the specific wording of section 40 and 40A of the 1981 Act, the lawfulness and validity of a decision to make a deprivation order is separate from the findings of fact made by SIAC on the issue of statelessness. In the event, the Secretary of State in these cases anticipated any likely finding by SIAC by withdrawing the deprivation orders. The position is, however, that the provisions governing the making of a deprivation order, and those governing the right to appeal on that issue to SIAC, do not have the automatic consequence that any finding by SIAC that an order would render the person stateless means that the order was unlawful or a nullity. Nor does any withdrawal have that effect. Rather, the withdrawal has effect from the date when the deprivation order is withdrawn.

35. That conclusion is reinforced by two further considerations. First, the legislative history of section 40 of the 1981 Act is consistent with the view that the decision of SIAC on the question of statelessness does not have the automatic consequence that the decision was unlawful and so incapable of producing legal effects. I note that when section 40A was first introduced by the 2002 Act, section 40A(6) provided that when an appeal was brought against a decision, the Secretary of State could not make the deprivation order itself until the appeal was determined. That provision was repealed in April 2005. I do not regard that provision as significant. The fact that an appeal had suspensive effect meant that an order could not be made until any appeal was determined. It does not deal with the powers of SIAC on allowing an appeal and does not indicate the effect of any judgment of SIAC on the legal status of the decision (or deprivation order).

36. A more significant aspect of the legislative history was section 40A(3)(a) which was introduced into section 40A by the 2004 Act and was in force from 4 April 2005 until 19 October 2014. That provided that certain provisions of the 2002 Act applied to an appeal under section 40A of the 1981 Act including:

> "(a) section 87 (successful: direction) (for which purpose a direction may, in particular, provide for an order under section 40 above to be treated as having had no effect)."

37. That provision conferred a discretion. SIAC *may* give a direction that an order is to be treated as having had no effect. The existence of such a power is inconsistent with a position whereby a successful appeal under section 40A has the automatic consequence that the decision to make a deprivation order has no effect and the deprivation order itself is, therefore, also a nullity. The fact that Parliament introduced such a power indicates that Parliament in 2004 considered that the other provisions of section 40 and 40A of that Act did not have that effect. The view of Parliament in 2004 as to the meaning of provisions first enacted in 2002 is not decisive. But it is at least consistent with the view, and an indication, that Parliament did not intend successful appeals on the issue of statelessness to have the automatic consequence that the decision to make a deprivation order was unlawful and a nullity such that it could never have produced legal effects.

38. Secondly, the interpretation of sections 40 and 40A of the 1981 Act that I consider to be correct is consistent with the existing case law. In particular, in *E3*, Flaux LJ (with whom the other members of the Court agreed) considered the way in which section 40, and the right of appeal, operated and said this:

> "55. I agree with Mr Sheldon [counsel for the Secretary of State] that there is a consistent line of authority which, although not strictly binding on this court, establishes that once the Secretary of State has demonstrated that he is satisfied that the deprivation order will not render the individual stateless, the burden of proving that the individual will be rendered stateless by the deprivation order is on the individual.
>
> …..
>
> 58. However, in *Hashi* [2016] EWCA Civ 1136 , the question of where the burden of proof lay on the issue of statelessness was in issue and the issue was fully argued. Accordingly, although what Longmore LJ said at paras 23 and 24 (quoted at para 32 above) is strictly obiter, it is a statement of principle made after full argument. In my judgment, it is a correct statement of principle. The statutory regime under section 40(4) of the 1981 Act has two stages. As Longmore LJ said at para 23, the first stage is that the Secretary of State demonstrates that he is satisfied that the deprivation order will not render the appellant stateless and on that issue the burden is on the Secretary of State. Once that burden is satisfied, at the second stage, if the appellant wishes to establish that nonetheless the deprivation order will render him stateless, the burden of so proving is on the appellant, given that, as SIAC said at para 5 of its judgment in *Abu Hamza* , the appellant is alleging that there should be an exception to a general power.
>
> 59. This analysis does not detract from the appellant's fundamental rights of citizenship. The fact that, before making a deprivation order the Secretary of State has to be satisfied that the order will not render the appellant stateless requires a degree of investigation by the Home Office and thus provides a safeguard in respect of those rights. I would respectfully disagree with the suggestion of Lord Wilson JSC in *Al-Jedda v Secretary of State for the Home Department (Open Society Justice Initiative intervening) [2014] AC 253* , para 30 that "satisfied" in section 40(4) may not sensibly be afforded any significance at all. Although, as Longmore LJ said in *Hashi* , it will be a comparatively easy burden for the Secretary of State to discharge to demonstrate that he was so satisfied, this first stage provides a protection for the individual against the arbitrary exercise of the power or, as Mr Southey [counsel for the appellant] put it, being satisfied at the first stage is a condition precedent to the exercise of the power."

39. That judgment recognises that there is significance in the use of the words "is satisfied" in section 40(4) of the 1981 Act. The significance is that the order will be lawful if the Secretary of State exercises the power in circumstances where she is satisfied, on the material before her, that the person would not be stateless as a result.

40. I do not consider that that conclusion is affected by the concerns of Lord Wilson in *Al-Jedda* as to whether the phrase "is satisfied" had any meaning. Lord Wilson was dealing with the meaning of "is satisfied" in a different context. The issue in that case was whether the Secretary of State could make a deprivation order if, at the time, it were open to a person to apply for citizenship of another state. It was in that context that Lord Wilson did not consider that the words "is satisfied" could be afforded significance. It was in that context, too, that he observed that whether the requirement was that the fact should exist, or that a person should be satisfied that it exists, the nature of the fact remains. In the present context, the lawfulness of the deprivation order does depend upon the state of mind of the Secretary of State, not the actual fact itself. The limitation imposed on the Secretary of State is that she may not exercise the power to deprive a person of his status as a British national if she is satisfied that would render him stateless. If she is not satisfied of that fact, the limitation on her powers does not apply and her order will be lawful. The phrase "is satisfied" does have a significant role in the operation of section 40 of the 1981 Act.

41. Mr Southey referred to a number of other considerations. First, he submitted that there was no express provision for citizenship to be reinstated. That, he submitted, implied that the effect of the decision of SIAC was that the decision, and deprivation order, were nullities and had no legal effect, thereby enabling the individual to continue exercising his right to citizenship.

42. The proper analysis is as follows. A person is a British citizen if he meets the statutory requirements set out in the relevant section of the 1981 Act. He is deprived of that status by a deprivation order made under section 40 of the 1981 Act. Whilst deprived of that status, he is not entitled to British citizenship for the period whilst that order is in force. When the order is withdrawn, the legal barrier to enjoyment of his right to British citizenship is removed and, from the date of withdrawal of the order, he is a British citizen as he meets the statutory requirements for being a British citizen and there is no barrier in place depriving him of that status.

43. Mr Southey also relied on the provisions of Article 8 of the Convention. That, he submitted, prohibits statelessness and, as the purpose of the 1981 Act was to give effect to the Convention, its provisions should be read in a manner that was consistent with Article 8 of the Convention. Mr Sheldon submitted that the provision in section 40(4) of the 1981 Act was not, in fact, intended to give effect to Article 8. That article permits a state to retain the right to deprive a person of his citizenship on the ground that he has conducted himself in a manner seriously prejudicial to the vital interests of the state. The United Kingdom made the declaration permitted by Article 8(3)(a) of the Convention. Thus, the provisions of section 40(4) of the 1981 Act were not intended to give effect to the Convention. A later treaty, the European Convention on Nationality, did provide that the contracting parties would not deprive a person of citizenship on the grounds that his conduct was seriously prejudicial to the vital interests of the state if that would render a person stateless. But the United Kingdom has not ratified that treaty. In enacting section 40(4) of the 1981 Act, therefore, it is submitted that the United Kingdom went further than was necessary to give effect to

its existing international obligations: see paragraphs 21 and 22 of the judgment of Lord Wilson in *Al-Jedda*. In reply, Mr Southey submitted that the scope of section 40(2) of the 1981 Act ("deprivation is conducive to the public good") is, or may be, wider than the concept of "seriously prejudicial to the vital interests of the state" and so Parliament is to be taken as intending to give effect to Article 8 of the Convention when enacting section 40(4) of the 1981 Act.

44. There is considerable force in the submissions made by Mr Sheldon on this point. It is not, however, necessary to decide the point for the following reasons. Where the legislation is clear and unambiguous, the courts must give effect to the provisions of the legislation whether or not those provisions give effect to the treaty obligation. As Diplock LJ observed at page 143E-F in *Salomon v Commissioners of Customs and Excise* [1967] QB 116:

> "If the terms of the legislation are clear and unambiguous, they must be given effect to, whether or not they carry out Her Majesty's treaty obligations…. But if the terms of the legislation are not clear but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligation and another or others are not, the meaning which is consonant is to be preferred".

45. The provisions of the 1981 Act are clear and unambiguous. There is no need for any resort to the provisions of Article 8(1) of the Convention in deciding the meaning of section 40 and 40A of the 1981 Act. The meaning is clear from the words used read in their context.

46. Furthermore, while we had limited submissions on the meaning of Article 8 of the Convention, my provisional view is that the article does not mean that any successful appeal, or any withdrawal of a deprivation order, must be treated as if the order were a nullity. The article is not concerned with the effect in domestic law of a withdrawal of a deprivation order in anticipation of a successful appeal. Article 8 does not, as Mr Southey submitted, "prohibit statelessness". Rather it provides that a contracting state shall not deprive a person of its nationality if deprivation would render the person stateless. The aim is to ensure that states do not act in a particular way. The United Kingdom seeks to achieve those aims first by limiting the power of the Secretary of State to deprive a person of citizenship and secondly by providing for a right of appeal to determine if a person is being left stateless as a result of a deprivation order. If so, the Secretary of State is expected to correct the position and remove the deprivation order. Article 8 of the Convention is not concerned with addressing the lawfulness as a matter of domestic law of things that have happened. Here, the Secretary of State did deprive E3 and N3 of their status as British citizens. Whilst that order was in force, they were not British citizens. They could not, for example, insist on being provided with a British passport or insist on being allowed into the United Kingdom without leave. My provisional view is that the aim of the Convention was not to seek to undo past events which cannot now be changed. Article 8 does not require a successful appeal, or a withdrawal of an order in anticipation of such an

appeal, to have the effect in domestic law of rendering the order null and void from its inception.

47. I turn next to the final ground of appeal. Mr Southey submitted that the effect of the successful appeal to SIAC by E3 meant that the appeal had been allowed. He submitted that the judgment took effect unless stayed and, as a minimum, the decision to make the order was no longer of effect from the date of the judgment as it had not been stayed. Consequently, he submitted that E3 was as a British national at the time of ZA's birth and so she had British citizenship by reason of section 2 of the 1981 Act.

48. I do not accept that submission. First, a successful appeal against the decision to make the deprivation order does not of itself alter the legal position of the appellant. As explained above, a successful appeal to SIAC does not result in the decision to make the order being quashed or found to be a nullity. It is simply that, on the evidence before SIAC, the appellant is rendered stateless by the deprivation order. The Secretary of State will have to take steps to give effect to the decision of SIAC by withdrawing the deprivation order. It is not a case of the judgment of SIAC taking effect unless stayed. Rather, the deprivation order continues to have legal effect until the Secretary of State withdraws it. At the time of ZA's birth, her father was not "a British citizen otherwise than by descent" within the meaning of section 2(1)(a) of the 1981 Act. Rather he was a person who had been deprived of his status as a British citizen by order on 4 June 2017. That order was not withdrawn until 20 April 2021. At the time of ZA's birth on 10 June 2019, her father was not a British citizen and ZA did not meet the requirements for the acquisition of British citizenship.

49. The judge considered, and counsel for the Secretary of State accepted, that the consequences for ZA were harsh in that E3 would have to apply to register her as a British citizen and pay a fee if he wished her to have British citizenship. If the Secretary of State had realised that depriving E3 of his British citizenship would render him stateless, she would not have done so. E3 would have continued to be a British citizen and ZA would have acquired British citizenship at birth (we understand that it is common ground that ZA was a national of Bangladesh on birth so that ZA is not stateless). The consequences may appear harsh but they are the result of the proper interpretation of the relevant sections of the 1981 Act. The fact that the consequences of that interpretation may be, or appear to be, harsh is not a reason for giving an interpretation to the statutory scheme which is contrary to its proper meaning.

50. In conclusion, the withdrawal of the deprivation orders in the case of E3 and N3 took effect on the date that they were withdrawn, that is, on 20 April 2021. The statutory scheme, with the possibility of appealing to SIAC on the question of whether a decision to make a deprivation order has the result of rendering a person stateless, does not have the effect that any deprivation order which is withdrawn is to be regarded as unlawful or a nullity, that is, as incapable of having produced legal effects in the past. The judge was correct therefore to dismiss the claim for a declaration that E3 and N3 were British citizens between 4 June 2017 and 21 April 2021 and 31 October 2017 and 21 April 2021 respectively. I would dismiss this appeal.

Lady Justice Elisabeth Laing

51. I agree.

Sir Julian Flaux C

52. I also agree.