Neutral Citation Number: [2022] EWHC 1133 (Admin)
Case No: CO/3463/2021, CO/3749/2021 and CO/3806/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2022

Before:

MR JUSTICE JAY

- -

Between:

E3, N3 and ZA	**Claimants**
- and –	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Hugh Southey QC and Alasdair MacKenzie (instructed by **Duncan Lewis**) for the **Claimants**
Neil Sheldon QC and James Stansfeld (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 4th May 2022

- -

MR JUSTICE JAY:

Introduction

1. E3 and N3 were deprived of their British citizenship by the Secretary of State for the Home Department ("the Defendant"). There was complex litigation in their cases which culminated in the Court of Appeal and an application for permission to appeal to the Supreme Court. Following the determination of the Special Immigration Appeals Commission ("SIAC") in three similar cases, the Defendant concluded that her deprivation decisions in the cases of E3 and N3 could no longer be supported, and these were withdrawn. The Defendant also informed E3 and N3 that their citizenship had been reinstated. SIAC then filed and served a notice recording that fact in accordance with its procedure rules.

2. This claim for judicial review raises an important question of principle. Was the legal effect of the Defendant's withdrawal decision prospective only (the Defendant's analysis) or was it retroactive in the sense that it should be treated as never having been made (E3's and N3's analysis)? This question is by no means academic, not least because ZA, E3's daughter, was born in Bangladesh during the period of deprivation. If the Claimants' analysis were correct, ZA would be automatically entitled to British citizenship and would not now be required to apply for it at considerable expense.

3. I am grateful to Counsel for their impressive written and oral arguments. What appeared to me to be quite a straightforward case at the outset became more complex as the hearing proceeded.

Essential Factual Background

4. E3 was born in the United Kingdom on 27th May 1981. He was therefore a British citizen at birth. Both his parents were Bangladeshi citizens at the time of his birth. There is no dispute that E3 was also a Bangladeshi citizen at the time of his birth but until the issue was resolved by SIAC it was far less clear whether he remained as such after his 21st birthday.

5. N3 was born in Sylhet, Bangladesh on 12th December 1983. He was a British citizen at birth by virtue of s. 2(1)(a) of the British Nationality Act 1981 ("the BNA 1981") because at the time his parents were British citizens otherwise than by descent. In terms of his Bangladeshi citizenship, his status was indistinguishable from that of E3.

6. On 5th June and 31st October 2017 the Defendant made orders depriving E3 and N3 respectively of their British citizenship under s. 40 of the BNA 1981. The Defendant maintained that her orders would not render the Claimants stateless because they were still Bangladeshi citizens.

7. Both E3 and N3 appealed and a preliminary issue in their conjoined appeals was heard by SIAC in October 2018. On 15th November 2018 SIAC allowed their appeals, holding that E3 and N3 had lost their Bangladeshi citizenship at the age of 21.

8. On 10th June 2019 ZA was born in Bangladesh. If her father were a British citizen at the time, ZA would be a British citizen by descent.

9. On 5th November 2019 N3 sought to return to the UK. He was refused entry because the immigration officer was not satisfied that he was a British citizen

or had leave to remain. The following reason was given to N3's representatives on 6th November:

> "The Secretary of State's position is that, as SIAC's statelessness determination does not render the deprivation decision void, revoking the decision is a matter for the Secretary of State. In circumstances where the Secretary of State is appealing against SIAC's determination to the Court of Appeal – with a decision on that appeal now pending – the Secretary of State has not revoked the deprivation decision in relation to your client. Indeed, revoking the deprivation decision would be to pre-empt the outcome of that appeal. Further, it is relevant to the matter of revoking the Secretary of State's decision ahead of the outcome of that appeal that your client is assessed to pose a threat to UK national security."

10. On 21st November 2019 the Court of Appeal allowed the Defendant's appeal against SIAC's judgment, and the matter was remitted to the latter for reconsideration. E3 and N3 then applied for permission to appeal to the Supreme Court.

11. Meanwhile, the same preliminary issue was being litigated before SIAC in three similar cases. On 18th March 2021 SIAC handed down its judgment in the cases of *C3, C4 and C7 v SSHD* (SC/167/2020), allowing the appeals on the ground that the deprivation orders rendered these Appellants stateless. Within a reasonable time thereafter, the Defendant decided not to seek to take the matter further.

12. On 20th April 2021 the Defendant wrote to E3 and N3 in the following identical terms:

> "As you are aware, on 18th March 2021 SIAC handed down judgment determining the preliminary issue of statelessness in the appeals of *C3, C4 and C7 v SSHD*.

> 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."

13. By email dated 28th April 2021, the Government Legal Department clarified its client's position as follows:

> "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 s. 40(4) of the BNA 1981. Thus, the orders were lawful. Following SIAC's judgment in C3, C4 and C7, and the decision not to appeal SIAC's determination, the Secretary of State has reconsidered the matter, in light of SIAC's analysis of the statelessness issue and the evidence before SIAC, which was not available at the time 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 clients' 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 your citizenship throughout.
>
> In relation to the specific matter you raise, the Secretary of State notes that E3 could seek to apply to register his child as a British citizen under the BNA 1981, if your client was so minded and with reliance on the exceptional circumstances of your client and his family."

14. On 10th June 2021 the Defendant informed E3 and N3 that she intended to write to SIAC informing it that the relevant deprivation decisions had been withdrawn and that it was her view that, in consequence, "pursuant to para 11A(2) of the SIAC Rules, the appeals are to be treated as having been withdrawn". E3 and N3 did not accept that analysis.

15. SIAC listed this issue for determination at a hearing on 19th July 2021. At that stage, the applications for permission to appeal to the Supreme Court were still technically extant. At the conclusion of the hearing I stated that it was not open

to SIAC to go beyond the provisions of para 11A of the SIAC Procedure Rules, and in particular I could not determine the legal effect of withdrawal: that could only be determined within judicial review proceedings. Once SIAC had been notified that the applications for permission to appeal were no longer alive in the Supreme Court, I promulgated a short judgment setting out my reasons. I understand that E3 and N3 did not seek to appeal it.

16. Mr Clive Sheldon QC sitting as a Deputy High Court Judge granted permission in the case of N3, and later I granted permission in the cases of E3 and ZA, reserving the substantive hearing to myself, if possible.

Relevant Legal Framework

17. Section 1 of the BNA 1981 provides in material part:

> "**1 Acquisition by birth or adoption.**
>
> (1) A person born in the United Kingdom after commencement [1st January 1983] shall be a British citizen if at the time of the birth of his father or mother is –
>
> (a) a British citizen; …"

18. Strictly speaking, and contrary to the submissions I have received, E3 cannot avail himself of this provision because he was born in the UK before commencement. However, E3 is in an even better position because under s. 4 of the British Nationality Act 1948 he was a citizen of the United Kingdom and Colonies at the time of his birth because he was born here, and the effect of s. 11 of the BNA 1981 is that he became a British citizen at commencement. His parents' status is irrelevant.

19. Section 2 of the BNA provides in material part:

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

20. N3 falls within s. 2.

21. Section 40 of the BNA 1981 has gone through a number of iterations. I shall summarise the position as follows, drawing attention to the provisions which are directly material.

22. Section 40 as originally enacted did not empower the Defendant to deprive a person of his British citizenship on the grounds that it was not conducive to the public good that he should continue to be a British citizen. Such a provision was first introduced on 26th February 2003 but only as a constraint on separate deprivation powers exercisable in specific circumstances. An examination of the detail is unnecessary.

23. Between 1st April 2003 and 15th June 2006, section 40 provided in material part as follows:

> "…
>
> (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of the … United Kingdom …
>
> (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.
>
> (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."

24. The reference to statelessness in s. 40(4) should be understood in the context of the United Kingdom's international obligations under the Convention on the Reduction of Statelessness ("the Statelessness Convention") adopted in 1961. Article 8 prohibits a state from depriving a person of his nationality if doing so were to cause him or her to be stateless. This is subject to two exceptions: the first, where nationality has been obtained by misrepresentation or fraud; and secondly, on the ground of conduct seriously prejudicial to the state, unless at the time of ratification the state declared its retention of the right to deprive a person of citizenship on that ground. Section 40(4) applies to sub-section (2) and not to sub-section (3), and for reasons which are quite complex but irrelevant to the present claims the United Kingdom has not sought to legislate in the second category of case: see *Home Secretary v Al-Jedda* [2013] UKSC 62; [2014] AC 253, at paras 17-22.

25. Between April 2003 and 2004 (the precise date does not matter for present purposes), s. 40A(6) of the BNA 1981 provided that an order may not be made under s. 40 during the currency of an appeal under s. 40A. The effect of this provision, mirroring as it did the original provisions of s. 3(5) of the

Immigration Act 1971 in the context of deportation, was that a person could not actually be deprived of his citizenship until the appellate process had concluded. Thus, the problem which is currently confronting the court did not exist, although following the repeal of s. 40A(6) by s. 47 of and Schedule 4 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 there was nothing in the statutory scheme to prevent a deprivation order being made pending the determination of the appeal and/or to preclude the Defendant from excluding the relevant person from this country: see *R (G1) v SSHD* [2012] EWCA Civ 867; [2013] QB 1008.

26. Mr Hugh Southey QC submitted before me, repeating the submission that he had made to the Court of Appeal in *G1* almost exactly a decade ago, that the purpose of the repeal of s. 40A(6) was to enable deprivation and deportation appeal proceedings to take place concurrently (see para 10 of the judgment of Laws LJ), from which it should be concluded no damage is done to his case by this repeal. Laws LJ rejected Mr Southey's argument (see para 11) for reasons which are not fully germane to the present issue. On balance, however, I consider that the repeal of s. 40A(6), whatever the reasons for it, is a neutral factor.

27. At the same time as s. 40A(6) was repealed, Parliament introduced a new s. 40A(3) into the BNA 1981 via s. 26(7) of and Schedule 2 to the 2004 Act. This provided, in its form as amended in 2006:

> "The following provisions of the [2002 Act] 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)."

28. This provision, which has long since been repealed, invested SIAC with the power to determine, in effect, that a deprivation order was a nullity. That was a power and not a duty. I am sure that SIAC would not in fact have made a direction in favour of E3 and N3 had such a power still been on the statute book. The absence of a current power to make such a direction – particularly in circumstances where an express power has been repealed – lends some support to the Defendant's argument that the result for which E3 and N3 contend does not arise impliedly or by operation of law.

29. Further changes to ss. 40 and 40A of the BNA 1981 were made in 2006. I need not dwell on these.

30. The current version of these provisions, in place with effect from 28th July 2014, provides in material part as follows:

> "**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.

…

(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).

…

40A Deprivation of citizenship: appeal

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

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

(a) in the interests of national security,

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

(c) otherwise in the public interest.

(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—

(a). . . . . .

(b). . . . . .

(c) section 106 (rules), …

(d) section 107 (practice directions), and

(e) section 108 (forged document: proceedings in private)."

31. The following points may be made on these provisions.

32. First, the wording of sub-sections (2), (3) and (4) of s. 40 is similar: "if [the Defendant] is satisfied that …". This reflects the language of earlier iterations of the section, and is not unfamiliar in circumstances where a discretionary power is conferred on the Executive. There are differences in substance between these sub-sections which I will be examining in due course, but at this stage I note that sub-sections (2) and (3) confer a positive power whereas sub-section (4) is in the negative: it operates as a limitation on the power located in sub-section (2).

33. Secondly, the appeal to the relevant tribunal is formally against the decision to make the deprivation order rather than the order itself (see s. 40A(1) and the terms of s. 2B of the 1997 Act to like effect), although a successful appeal would mean that the order itself could not stand. I express myself in deliberately neutral terms at this stage.

34. Thirdly, sub-section (5) is clearly a condition precedent to the exercise of the power to make a deprivation order inasmuch as something must first be done: that is to say, the sending of a written notice. Nonetheless, SIAC has no jurisdiction to hear an appeal on the ground that valid notice was not sent because that infects the legality of the deprivation order, which cannot be appealed, as opposed to the antecedent decision (see para 116 of SIAC's judgment in *C3, C4 and C7*). On the statutory wording alone, it is less clear that the fulfilment of sub-section (4) may properly be described as a condition precedent, but this issue is covered by authority, which I will be examining later.

35. Fourthly, there is nothing in the BNA 1981 or in the Nationality, Immigration and Asylum Act 2002 which either enables the relevant tribunal to specify what the Defendant is expected to do in the face of a successful appeal or indicates what the legal effect of such an appeal is or may be. In short, the relevant tribunal (being SIAC in a national security case) has no power other than to allow the appeal.

36. Mr Southey placed considerable reliance on rule 11A of the Special Immigration Appeals Commission (Procedure Rules) 2003 (SI 2003 No 1034), as amended, which provides:

> "**Withdrawal of appeal or application for review**
>
> 11A.—(1) An appellant may withdraw an appeal or application for review—
>
> (a) orally, at a hearing; or
>
> (b) at any time, by filing written notice with the Commission.
>
> (2) An appeal or an application for review shall be treated as withdrawn if the Secretary of State notifies the Commission that the decision to which the appeal or application for review relates has been withdrawn.
>
> (3) If an appeal or application for review is withdrawn or treated as withdrawn, the Commission must serve on the parties and on any special advocate a notice that the appeal or application for review has been recorded as having been withdrawn."

37. All that this rule does is set out the procedure for the withdrawal of appeals either by the Appellant (sub-rules 1 and 3) or by the Defendant (sub-rules 2 and 3). In the latter case, a notification by the Defendant constitutes a deemed withdrawal of the appeal because the relevant decision has itself been withdrawn, and SIAC is required to reflect that state of affairs by serving a notice. I am well used to doing this, and the function is performed

administratively. Rule 11A says nothing about the legal effect of withdrawal, and in any event could have no impact on the true construction of the primary legislation at the heart of this claim. With respect to him I consider that Mr Southey's various submissions, including an *ultra vires* argument, were incapable of adding anything to the debate.

38. On the topic of withdrawal I should add only this. I take Mr Neil Sheldon QC's point that the withdrawal of a decision is not tantamount to an acceptance that it is legally flawed: see *R (Akinola) v Upper Tribunal* [2021] EWCA Civ 1308; [2022] 1 WLR 1585, paras 66 and 68. In the particular context of that case, Sir Stephen Richards also stated that "a decision ceases to have effect only from the date when it is withdrawn". That statement is unhelpful to E3 and N3 but it is not conclusive.

Two Key Authorities

39. There is no case law which bears directly on the question I have to decide, but there are two decisions which merit early attention.

40. In *SSHD v E3 and N3* [2019] EWCA Civ 2020; [2020] 1 WLR 1098, the Court of Appeal provided guidance to SIAC on the two legal burdens of proof imposed by s. 40 in a case where statelessness is in issue. The first burden is that imposed by sub-section (4) and resides on the Defendant (see Flaux LJ, para 59). Once discharged, the second burden is that imposed on an Appellant on the substantive issue (see, in particular, paras 55, 68 and 70). E3 and N3 did not argue before SIAC that the Defendant had failed to discharge the first burden.

41. It was common ground in *E3 and N3*, and in any event it had been the well-established practice of SIAC for many years, that statelessness was a factual question to be determined on the available evidence and according no deference to the Defendant.

42. Flaux LJ's analysis is not free from controversy, because he was disagreeing with the approach of Lord Wilson JSC, which strictly speaking was *obiter*, in *Al-Jedda*. Mr Southey submitted in his reply that nothing turns on the wording "if he is satisfied", perhaps genuflecting towards Lord Wilson's analysis (albeit at the same time cutting across the submission he had made to the Court of Appeal in *E3 and N3*). I will therefore have to return to this debate at the appropriate time.

43. Mr Southey also sought to make something of the point that the appeal is against the Defendant's decision (see s. 40A(1)) and consideration must be given to the position that existed at the time it was made. I do not consider that anything turns on this for present purposes. Unless an appellant were to argue that the Defendant could not be satisfied at the first stage (on the assumption that SIAC would have jurisdiction to determine that question), the issue of statelessness will ordinarily be resolved on the basis of expert evidence that was not before the Defendant at the time she made the decision. That the Defendant's decision may have been wrong in SIAC's estimation does not necessarily mean that it should never have been made.

44. In *R (Begum) v SIAC* [2021] UKSC 7; [2021] AC 765, the Supreme Court explained the role of SIAC on an appeal under s. 2B of the 1997 Act. The following statements of principle may be drawn:

(1) SIAC exercises an appellate and not a supervisory function (para 69).

(2) The Secretary of State being satisfied that deprivation is conducive to the public good is a "statutory condition" (para 67).

(3) In relation to the exercise of a discretion by the Secretary of State, the principles to be applied by SIAC "are largely the same as those applicable in administrative law" (para 69), although the position is different when compatibly with human rights is in issue. In relation to national security, some matters may not be justiciable at all and others will be subject to scrutiny applying public law principles.

(4) SIAC can determine whether the Secretary of State has complied with s. 40(4) (para 71); and, by implication, will do so by making factual findings.

45. Point (3) above has given rise to a measure of difficulty in subsequent litigation before SIAC and the Court of Appeal. It is unnecessary to explore this, save to point out that in *Begum* the Supreme Court rejected the approach of the Court of Appeal ([2020] EWCA Civ 918; [2020] 1 WLR 4267) which was to treat the issue under s. 40(2) as one of fact for the appellate tribunal.

46. As I have already pointed out, the formulation "if he is satisfied" appears in all of sub-sections (2), (3) and (4) of s. 40. Sub-sections (3) and (4) give rise to no practical or legal difficulty, inasmuch as the relevant tribunal is determining matters of disputed fact (at Flaux LJ's second stage and Lord Wilson's unitary stage) and the viewpoint of the Defendant when the decision was made is not relevant. During the course of argument I indicated that it would be odd if the

legal effect of a successful appeal varied across these sub-sections. I will be returning to this.

47. I should add by way of postscript on point (4) above that the Upper Tribunal in *Ciceri v SSHD* ([2021] UKUT 00238 (IAC)) held that administrative law principles apply as much to what it characterised as the first issue arising under s. 40(3) (viz. whether the condition precedent exists for the exercise of the discretion to deprive on one or more of the means specified in the sub-section) as they do to the national security question at the centre of s. 40(2). The Court of Appeal refused permission to appeal in that case on 4th May 2022. If the Upper Tribunal's conclusion is capable of being read across to s. 40(4), the proposition that SIAC makes its own factual findings is called into question. This is not the occasion to analyse *Ciceri*, not least because I received no submissions upon it and in any case the appellant effectively conceded his fraud (as Lewis LJ pointed out when refusing permission) and that the condition precedent existed. I content myself by observing that *Ciceri* cannot be interpreted as effectively overruling *E3 and N3* in the Court of Appeal and *Al-Jedda* in the Supreme Court: in both those cases, albeit by a different route, it was held that the issue of statelessness is a factual one for determination by SIAC.

The Submissions on Behalf of E3 and N3

48. In his written argument Mr Southey advanced six submissions.

49. First, he submitted that on ordinary principles a decision that has been withdrawn ceases to have effect and is deemed never to have had effect: the

status quo ante is restored. In oral argument Mr Southey emphasised that the rights and entitlements under the relevant provisions of the BNA 1981 are automatic, and that if the deprivation order is no longer in existence those rights spring back. Mr Southey further submitted that this is not a situation where the rights and obligations of third parties are in play.

50. Secondly, Mr Southey submitted that a successful appeal causes a condition precedent to the making of a deprivation order (viz. the decision under s. 40(5)) to be set aside because there is no legal basis for it.

51. Thirdly, Mr Southey advanced a number of submissions on the effect of rule 11A. I have already said that I think that nothing can turn on this provision: it is silent as to legal effects, and the tail cannot wag the dog.

52. Fourthly, there is no power in the Defendant to "reinstate" British citizenship: it flows as a matter of entitlement.

53. Fifthly, Mr Southey relied on the prohibition in article 8(1) of the Statelessness Convention in further support of his overarching contention that the Defendant's decisions were unlawful at the time they were taken.

54. Sixthly, Mr Southey submitted that if the Defendant were right E3 and N3 would be left without a complete and effective remedy.

55. Mr Southey developed these submissions orally in a manner which Mr Sheldon suggested differed from his skeleton argument. I do not think that was entirely fair, although Mr Southey placed greater emphasis on certain aspects. First, and as I have already pointed out, he linked his clients' cases more explicitly with

the "automatic" entitlements in ss. 1 and 2 of the BNA 1981. Secondly, he elaborated the submission that the effect of a successful appeal, despite the absence of a power in SIAC to issue a direction, is, in essence, to declare a legal state of affairs. He stressed that his client's status did not depend on any further decision or recognition of a state of affairs by the Defendant; it was entirely free-standing. Thirdly, as I have said, Mr Southey emphasised in his reply that nothing turns on the wording "if he is satisfied that".

56. It may be observed that E3 and N3 have one overarching submission with a number of different elements. A successful appeal before SIAC, or a withdrawal of a decision or order by the Defendant in recognition of the forensic reality that an appeal would succeed, means that the Defendant's decision was unlawful. It follows, so the submission runs, that the decision must be treated as never having been made.

57. Mr Southey, as did Mr Sheldon, relied, variously, on a number of decisions located within an authorities' bundle containing nearly 1,000 pages. I have diligently studied all the cases in the bundle, but in the concluding section of this judgment it will be possible to be selective.

The Submissions on Behalf of the Defendant

58. It is unnecessary for me to summarise Mr Sheldon's careful and thoughtful skeleton argument for which I am grateful. For present purposes, and in the light of the outcome of this claim for judicial review, I may focus on his oral submissions.

59. Mr Sheldon advanced two overarching arguments.

60. First, he submitted that an appeal before SIAC is not concerned with the lawfulness of the original decision. It is necessary to be clear as to the two stages implicit in the statutory framework. The first stage is the Defendant being satisfied that to make a deprivation order would not render the person stateless. That is a state of mind rather than a state of affairs (the statutory wording is not, for example, "the Secretary of State may not make an order under subsection (2) if the effect of the order would be to make a person stateless"), and E3 and N3 have mounted no challenge to this. The second stage is the determination of the relevant tribunal as to whether that person would or would not be stateless. There is no indication in the statutory scheme that a determination at the second stage in an appellant's favour has any impact on the legality of the Defendant's conclusion at the first stage. Furthermore, the appeal under s. 2B of the SIAC Act 1997 (or analogously before the First-tier Tribunal) is precisely that: it is in the nature of an appellate process; it is not akin to a judicial review; and there is no power to make a quashing order.

61. I should add in parenthesis that I do not interpret Mr Sheldon's submission as asserting that the Defendant being in possession of a state of mind at the first stage meant that she was above legal challenge, in the absence of bad faith. That submission was not in misplaced homage to the decision of the House of Lords in *Liversidge v Anderson* [1942] AC 206.

62. Secondly, Mr Sheldon submitted that in any event, and even if the deprivation decision should be treated as unlawful, it does not follow that it should be treated as having had no legal effect.

63. Dealing specifically with the interaction between s. 40 and ss. 1 and 2 of the BNA 1981, Mr Sheldon submitted that there *was* a difference between a withdrawal of a decision by the Defendant and a successful appeal, at least to this extent. In the event of a successful appeal (in the circumstances of this case), SIAC does no more than find that the deprivation order would render the appellant stateless and allow the appeal. Unless the Defendant decides to appeal that decision, the rule of law requires her to recognise that state of affairs and to take whatever administrative steps are required to ensure that the deprivation order ceases to be operative. In the light of the ruling, the Defendant could no longer be satisfied for the purposes of s. 40(4) that the order would not render the appellant stateless. If the Defendant were to do and say nothing, she would be compellable in judicial review proceedings to take those steps. In a withdrawal case, on the other hand, the Defendant is explicitly accepting that the deprivation order cannot stand, and the act of withdrawing it carries the inevitable corollary that the appellant's underlying entitlement to citizenship is restored. Mr Sheldon was not invoking a separate power to restore in either case: his submission was that the automatic entitlements were revived once the deprivation order was withdrawn.

64. In oral argument Mr Sheldon submitted that article 8 of the Statelessness Convention does not contain any "absolute" prohibition. It says nothing about the administrative and legal procedures a contracting state may enact to comply with its international obligations.

The Post-Hearing Point

65. After the hearing it occurred to me that ZA might have an alternative argument. I was not intending to ignore N3 who was detained in France between SIAC's favourable decision and the Court of Appeal's ruling to the contrary effect, but it seemed to me that ZA's case was more straightforward. My point was simply this: given that SIAC had ruled in E3's favour, did it not follow from that that he was a British citizen until the Court of Appeal determined otherwise?

66. In putting this possible alternative case to the parties I was not intending to throw Mr Southey any form of lifeline. Naturally, he ran with the point, although in so doing I consider that he misinterpreted one of Mr Sheldon's submissions in oral argument (which, in any event, fell to be understood in the context of paras 48-50 of his skeleton argument). In the post-hearing written exchanges Mr Sheldon repeated the submission that I have already summarised.

Analysis and Conclusions

67. The correct point of departure must be what actually happened in these cases. The Defendant withdrew the deprivation orders and/or the decisions to make such orders (there is some difference in wording between the letters of 20th April and the email of 28th April, but nothing turns on this) in consequence of SIAC's determination in the cases of *C3, C4 and C7* and her decision not to appeal that determination. The final sentence of the letters – "your citizenship has been reinstated" – reflects a practical rather than any legal reality. As I have said, certain administrative steps may have had to be taken, but the legal consequence of the withdrawal of the deprivation order was that certainly from that moment and without more E3 and N3 could assert their underlying entitlements conferred elsewhere in the BNA 1981.

68. It is clear that the Defendant's intention was to "reinstate" the citizenship of E3 and N3 with prospective effect only. Her intention, however, could not be dispositive of the issue. The question first arises as to whether there is anything in *C3, C4 and C7* which should compel the Defendant, through the court, to accept that withdrawal must have retrospective effect. In my judgment, there is not.

69. Neither party drew my attention to SIAC's conclusion in *C3, C4 and C7*. It was:

> "117. C3, C4 and C7 have persuaded us that, on the dates when the decisions and orders in their cases were made, they were not nationals of Bangladesh or any other State apart from the UK. This means that orders depriving them of their British citizenship would make them stateless. ***Because of s. 40(4) of the 1981 Act, the Secretary of State had no power to make orders with that effect.*** For that reason (and that reason alone), the appeals against the decisions to make those orders succeed." [emphasis supplied]

As in *E3 and N3*, SIAC made no further order, impliedly taking the view that it had no power to do so.

70. Mr Southey did not seek to draw support from the highlighted sentence, and had I thought that anything turned on it I would have invited further submissions. In *C3, C4 and C7*, SIAC was not addressing any temporal question, and nothing therefore turns on the use of the past tense.

71. The issue in these three appeals to SIAC was whether, as a matter of fact, the deprivation orders would make the appellants stateless. At para 17 of its determination, SIAC characterised the issue in the following way:

> "Second, in s. 2B appeals of the SIAC Act, Parliament has provided a right of appeal to the Commission against decisions to make deprivation orders taken on national security grounds.

> In such appeals, it is for the Commission to decide for itself whether the order would make the person stateless*: B2 v SSHD* [2013] EWCA Civ 616, [96] (Jackson LJ) and *Al-Jedda v SSHD* [2014] AC 253, [30] (Lord Wilson). We have also considered the decision of the Supreme Court in *Shamima Begum v SSHD*. Nothing in that decision affects the Commission's duties in relation to the question of statelessness: see esp. [71] (Lord Reed)."

72. Putting to one side for the time being the reference to para 30 of Lord Wilson's judgment in *Al-Jedda*, para 17 of SIAC's judgment lends support to Mr Sheldon's submission that the exercise is in the nature of an appeal against a factual determination, and that erroneousness is not synonymous with unlawfulness. If para 30 of Lord Wilson's judgment should be modified in deference to *E3 and N3*, para 17 of SIAC's judgment would have to be understood as being directed to Flaux LJ's second stage rather than the first.

73. Para 116 of SIAC's judgment provides further support to Mr Sheldon's argument. The appeal is against the Defendant's decision to make the deprivation order and not the order itself. Although SIAC did not make this explicit, because it was not required to, in the event that the appeal is successful the order is not rendered unlawful nor is it deprived *ipso facto* or at all of legal effect. In my judgment, the highlighted sentence in para 117 should be understood in this context.

74. At para 67 of his judgment in *Begum*, Lord Reed PSC said this:

> "The statutory condition which must be satisfied before the discretion can be exercised is that "the Secretary of State is satisfied that deprivation is conducive to the public good". The condition is not that "SIAC is satisfied that deprivation is conducive to the public good". The existence of a right of appeal against the Secretary of State's decision enables his conclusion that he was satisfied to be challenged. It does not, however, convert the statutory requirement that the Secretary of State must

> be satisfied into a requirement that SIAC must be satisfied. That is a further reason why SIAC cannot exercise the discretion conferred upon the Secretary of State."

In my view, although Lord Reed was not of course focusing on the issue currently under scrutiny, this paragraph provides some support to the propositions that (1) the Defendant *being satisfied* is a statutory precondition, and (2) an appeal is a challenge to the correctness of the Defendant's conclusion rather than against the existence of the precondition itself.

75. At para 59 of his judgment in *E3 and N3*, Flaux LJ set out the matter very clearly:

> "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 SSHD* [2013] UKSC 62; [2014] AC 253 at [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 QC put it, being satisfied at the first stage is a condition precedent to the exercise of the power."

76. So, on this analysis, it is only the Defendant being (reasonably) satisfied at the first stage that is the condition precedent to the exercise of the power. On the premise that the condition precedent was not put in issue on appeal, in the event that an appeal before SIAC is successful that condition precedent is not displaced; rather, a conclusion has been reached at the second stage that the Defendant came to the wrong factual conclusion. I therefore agree with Mr

Sheldon that Flaux LJ's two-stage analysis strongly undermines Mr Southey's argument.

77. It is possible to imagine a hypothetical case in which SIAC concluded that the Defendant's decision in relation to the s. 40(4) question was so unreasonable that it should never have been made. I express myself in those terms because the issue arising at the first stage engages administrative law principles: there is a light burden of proof on the Defendant, and, as already pointed out, "if he is satisfied" means "if he is reasonably satisfied". The present cases do not fall into that category, and – on my reading of SIAC's determination in *C3, C4 and C7* – neither did those cases. Although I need not decide the point, it is strongly arguable that SIAC would have jurisdiction to hear an appeal against the Defendant's decision at the first stage – Flaux LJ's measure of protection would be illusory without it, and judicial review would not appear to be an option - but in most situations there would be little point in an appellant proceeding on that basis. It is also arguable (I put it no higher than that) that a successful appeal at the first stage would mean that the condition precedent *was* displaced and Mr Sheldon would be left with his second line of defence rather than the first, but here again I need not make a finding to that effect.

78. Flaux LJ disagreed with para 30 of Lord Wilson JSC's judgment in *Al-Jedda*, which was subject to close analysis by Mr Southey. My reading of that paragraph is that there is only one stage in a SIAC appeal and not two, and the sole issue in a case such as this is the factual question of whether the deprivation order would make the individual stateless. Para 30 of *Al-Jedda* was not directly

concerned with the issue of legal effects, but in my view, if correct, it removes one important plank of Mr Sheldon's case.

79. Mr Southey did not seek to draw any benefit from the overall conclusion of the Court of Appeal in *Al-Jedda* ([2012] EWCA Civ 358), at para 124:

> "For the reasons I have given I would allow the appeal and quash the Secretary of State's order depriving the appellant of his British nationality."

It could be argued, of course, that the making of a quashing order presupposes legal as opposed to factual error.

80. The Supreme Court did not comment on this aspect of the Court of Appeal's decision: the appeal before them was on a narrower issue. I have examined the judgment of Stephen Richards LJ and do not understand him to have concluded that the Defendant erred in law. In any case, my review of the statutory scheme over the years demonstrates that neither SIAC nor the Court of Appeal had power to make a quashing order. I suspect that this point was overlooked, as it had been in *B2* (SC/114/2012) where SIAC made a direction that the Defendant restore B2's citizenship as from the date of its decision.

81. A further complicating factor is that there are compelling reasons for treating sub-sections (2), (3) and (4) in the same way. I have already pointed out that in my opinion sub-sections (3) and (4) of section 40 raise purely factual questions (albeit not at Flaux LJ's first stage) whereas the Supreme Court in *Begum* held that SIAC should apply administrative law principles to the issue under sub-section (2) (Lord Reed's reasoning appears to predicate one stage rather than two). Thus, it might be argued that SIAC would only be allowing an appeal in

a case where sub-section (2) was squarely in issue if, in substance, it was concluding that the Defendant had acted unlawfully in public law terms. This might appear to create a tension between the different sub-sections (albeit one that is removed if *Ciceri* applies to s. 40(4)), but for present purposes no expression of a concluded view is required. My firm provisional view, however, is that the tension is removed by an acknowledgement that these are always appeals and not reviews, and that SIAC does and can do no more than either dismiss or allow the appeal.

82. The moment has come to draw these strands together. First of all, para 59 of *E3 and N3* in the Court of Appeal is an integral part of the overall reasoning of the decision, and I am therefore required to adopt the approach of Flaux LJ in preference to that of Lord Wilson JSC in *Al-Jedda*. The consequence must be that a successful appeal at stage two leaves unscathed the Defendant's determination at stage one. No condition precedent has been removed and the Defendant's power to make the deprivation decision has not been undermined. But even on the basis of Lord Wilson's analysis in para 30 of *Al-Jedda* the outcome is the same. This is for two reasons that are interconnected. First, the litigation before SIAC and the Court of Appeal in *E3 and N3* was directed to the merits of the Defendant's decision, not whether it possessed legal flaws. It was in the nature of an appeal on traditional, not attenuated, principles. The position may well be different if the statutory wording were "the Secretary of State may not make an order under subsection (2) if the effect of the order would be to make a person stateless" because, on that premise, Parliament would have explicitly deployed the language of precedent fact: see, for example, *Khawaja*

v SSHD [1984] AC 74. Secondly, the statutory scheme is such that the appeal is against the decision rather than the order, leaving (as far the process before SIAC is concerned) the latter unaffected in terms of its legal propriety. Whether the rule of law requires the Defendant to respond to SIAC's ruling by withdrawing the deprivation order generates a separate question.

83. It is opportune at this stage to address Mr Southey's argument that s. 40(4) of the BNA 1981, reflecting as it does article 8 of the Statelessness Convention, is in the nature of an absolute prohibition. In my view, that overstates the effect of the international obligation. The Treaty requires contracting states to make executive decisions which reflect these obligations. Section 40(4) is entirely loyal to this. If the executive makes an erroneous decision which is corrected on appeal, there is nothing in the Treaty which requires the notional backdating of the revocation of the decision to the moment it was made. Nor is there anything in the Treaty which prevents a contracting state from excluding a person from its territory whilst the issue is being litigated.

84. For all these reasons, the effect of the withdrawal decisions in the instant cases was prospective only. The Defendant was not conceding that the decisions were unlawful at the time they were made; she was accepting that, in view of SIAC's very clear conclusions in parallel litigation, these deprivation orders could not stand. The Defendant cannot be interpreted as impliedly stating that the deprivation orders never had legal effect and she was not required to do so.

85. Had the cases of E3 and N3 been determined in their favour following an appeal to SIAC, the outcome in my judgment would have been the same. On this hypothetical scenario, SIAC would have concluded as a matter of fact that the

deprivation orders would render E3 and N3 stateless, and that the Defendant's contrary view was erroneous.

86. This brings me to Mr Southey's submission that a successful appeal before SIAC has immediate effect and does not require any action or acknowledgement by the Defendant.

87. It is necessary to be clear as to how and where this submission fits into Mr Southey's overall argument. In my view, it has no bearing on any of the matters I have thus far addressed; its sole relevance is to ZA's alternative submission that once SIAC, albeit erroneously, determined the appeal in her father's favour in November 2018, E3 was a British citizen at the time of her birth and so is she.

88. A successful appeal before SIAC does not result in any form of relief, nor does it directly impugn the deprivation order which is not its subject; but it leaves the Defendant with no reasonable options in the event that she decides not to appeal. She could no longer be satisfied that the appellant would not be rendered stateless. I agree with Mr Sheldon's analysis that the Defendant must respond appropriately, which in practical terms means that she must withdraw the deprivation order. There is nothing in s. 40 of the BNA 1981 which prevents the Defendant from exercising such a power, and in my judgment the Defendant is entitled to revisit any decision made under that section.

89. Possibly putting to one side the hypothetical case where SIAC has found perversity, the rule of law does not require that the deprivation order be

withdrawn with retrospective effect. That would be an uncovenanted gain for an appellant, who would be achieving more than SIAC has in fact determined.

90. Mr Southey relied on the decision of the Court of Appeal in *R (Boafo) v SSHD* [2002] EWCA Civ 44; [2002] 1 WLR 292, but that is against him. That case is authority for the proposition that, even where the adjudicator (as s/he then was) failed to give directions to the Defendant under s. 19(3) of the Immigration Act 1971, the rule of law required the Defendant to respect the decision on appeal by granting, on the facts of that case, indefinite leave to remain. Thus there, as here, some action by the Defendant was required. Auld LJ said in terms that the position would be different if the Defendant appealed (see paras 26 and 28), which is exactly what happened on our facts.

91. Mr Southey also relied on para 4 of the judgment of Lord Phillips of Worth Matravers PSC in *A v HM Treasury* [2010] UKSC 2; [2010] 2 AC 534. This deals with *ultra vires* executive action and makes clear that a quashing order may not be necessary. However, that has no bearing on the present case.

92. I appreciate that the upshot for ZA is somewhat harsh and that she is an entirely blameless party. It must be for the Defendant to decide how she wishes to deal with any application by her to be registered as a British citizen and, in particular, the payment of the fee.

93. Finally, I must address Mr Sheldon's alternative submission that, even if the original deprivation decisions were unlawful, they should not be treated as never having had legal effect. Given my conclusions on his first submission, I may be

quite brief, not least because Mr Sheldon acknowledged in oral argument that his two submissions overlap.

94. It is necessary to be clear as to what is meant by "unlawful" in this context. Mr Southey has never suggested that the Defendant had no (reasonable) grounds for concluding that the deprivation orders would not render E3 and N3 stateless, and that was not the conclusion of SIAC in the three related cases. If, however, the correct analysis were that an adverse factual finding by SIAC on the statelessness question removes the condition precedent or precedent fact for the deprivation orders in the light of s. 40(4), and for that reason there never was any power to make them, what then?

95. On this topic I was referred to a large number of cases, most of these extremely familiar, dealing with the consequences of unlawfulness in a public law or quasi-public law context. Virtually all the relevant jurisprudence has been reviewed by Holroyde LJ in *R (Guled) v SSHD* [2019] EWCA Civ 92, and a similar exercise by me is not required. Ultimately, these consequences turn on an accurate analysis of the invalidity in question within the particular statutory scheme. That, I think, is a distillation of the approach of the House of Lords in *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340, in particular in the leading speech of Lord Steyn. Mr Sheldon suggested that the approach should be "nuanced", and from that I would not demur.

96. Typically, where the liberty of the subject is involved, the courts take a strict view. That was the position in *R (DN (Rwanda)) v SSHD* [2020] UKSC 7; [2020] AC 698 where the Supreme Court made it clear that a decision to detain based on an unlawful deportation decision was unlawful.

97. Mr Sheldon relied on the decision of the Supreme Court in *R (George) v SSHD* [2014] UKSC 28; [2014] 1 WLR 1831, in particular para 29 of the judgment of Lord Hughes JSC:

> "The terms of section 5 of the 1971 Act are, as words, capable either of importing revival of leave or of not doing so. Revival is not their natural meaning, because the natural meaning is that revocation takes effect when it happens and does not undo events occurring during the lifetime of the deportation order. Revival is a significant and far reaching legal concept, and it is much more likely that it would have been specifically provided for if it had been intended."

98. I can see the force of the linguistic argument that "withdrawal" ordinarily connotes something that is prospective and not backward-looking, but ultimately I do not think that *George* advances the argument any distance. The case turned on a particular corner of the Immigration Act 1971 and the exact statutory wording under consideration.

99. Reference was also made to the decision of the Supreme Court in *R (Majera (formerly SM (Rwanda)) v SSHD* [2021] UKSC 46; [2022] AC 461. In my view, however, the context of Lord Reed PSC's remarks about the effects of invalidity (see para 27 in particular) needs to be understood: this was a case of an order by a tribunal which, albeit defective, had to be obeyed until set aside. I add, for completeness, that Mr Southey did not recruit this authority as support for his alternative submission, and in my view he was right not to do so.

100. Mr Sheldon's contention was that it is sufficient in the circumstances of this case for the court to mark the illegality by requiring the Defendant to withdraw the deprivation orders with prospective effect, which is what she has done. Mr

Southey contends that the Defendant must be required to go further and declare that the withdrawal has retrospective effect.

101. My preferred analysis would be to hold that the statutory scheme does not compel this particular result. Although the Defendant acted reasonably at the time the decision was made, events have proved her wrong, but only in the sense that factual findings were made against her. It would not be a satisfactory outcome that the Defendant could find herself liable for damages for false imprisonment in these circumstances (I am referring now to hypothetical facts, and not necessarily to the facts of N3's case raising as they do questions of French law which have not been explored). Mr Southey submitted that the Defendant takes the risk, but in my judgment she acts in the public interest and the issues of foreign law in play were complex and not free from doubt. Overall, both textual and consequentialist considerations militate against the hard-edged result for which Mr Southey argues.

102. In the alternative, and if pressed, I would hold that retrospective withdrawal (whether at the Defendant's instance or following an adverse decision by SIAC in the particular case) should be reserved for situations where perversity, unfairness or bad faith has been found. In such situations, the overall public interest militates in favour of this sort of exceptional response. These were the situations no doubt contemplated by Parliament during that brief period in which SIAC was empowered to direct the Defendant to treat the decision at issue as never having had effect.

Conclusion

103. These claims for judicial review must be dismissed.