SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: **N/A**
Hearing Date: **8th & 9th June 2022**
Date of Judgment: **16th September 2022**

Before

THE HONOURABLE MR JUSTICE SAINI
UPPER TRIBUNAL JUDGE LANE
MRS BATTLEY

Between

C12

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

A Vaughan and A Patyna (instructed by **ITN Solicitors**)
appeared on behalf of the Appellant

D Blundell KC and J Stansfeld (instructed by **the Government Legal Department**)
appeared on behalf of the Secretary of State

Z Ahmad QC and D Lemer (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

This OPEN judgment is in 6 main parts as follows:

I. Overview

1. The Appellant, C12, was deprived of his British citizenship on 19 August 2013 by an order ("the Order") of the Secretary of State for the Home Department ("the Respondent"). The Appellant was a British citizen at birth, having been born in the Luton area. His immediate family are his father, mother and a number of siblings, as well as ten British children of his own. At some point in late 2012 or early 2013 the Appellant left the United Kingdom for Pakistan, where he appears to have resided to date. The basis for the deprivation decision was that he had been involved in Islamist extremism and presented a risk to national security of the United Kingdom due to his extremist activities.

2. Some 7 years after the Order depriving him of citizenship, the Appellant issued a Notice of Appeal dated 14 December 2020 challenging the Respondent's notice of intention to make the deprivation order; and as part of that application he sought an extension of time for filing that Notice of Appeal. That application is the matter before us. The Notice of Appeal identified the date of service of notice of the decision challenged as 18 August 2013 and his advisers stated that the deadline for filing an appeal was 15 September 2013. That was no doubt based on the effect of paragraph 8(1)(ii) of the Special Immigration Appeals Commission Rules 2003 ("the SIAC Rules").

3. So, it appeared that the Appellant sought an extension of time of seven years and three months, pursuant to paragraph 8(5) of the SIAC Rules.

4. In normal circumstances, the argument for such an extension would focus on the familiar "special circumstances" test in the SIAC Rules, which permits an extension of time if it would be "unjust" not to do so. Indeed, that is how the hearing before us began. So, Counsel for the Appellant in his first written outline stated in terms that the Appellant sought an extension under the "special circumstances" test from 22 September 2020 to 14 December 2020 or (alternatively) from 16 September 2013 to 14 December 2020. These were dates on which it appeared the Appellant must have been accepting that some form of service of the relevant notice of intention had been effected upon him. His evidence (and that of his Solicitors) sought to explain his inaction from these dates, including his addresses at various times and his level of knowledge of the deprivation order. That evidence was to justify the Commission in granting an extension. In summary, his case is that he only came to be aware of the deprivation in March 2020 when he attended the British High Commission in Pakistan to obtain a new passport.

5. However, the way the application was argued by Counsel for the Appellant underwent a fundamental change overnight following the first day of argument. Prompted by a position adopted by the Special Advocates, Counsel for the Appellant changed his position to arguing (as his primary case) that there had never in fact been service of the notice and (in the words of his second version outline submission) it was said "time did not run and the appeal must be allowed to proceed". We had difficulty with that submission and it remains to us unclear what is meant by it. In any event, Counsel for the Appellant maintained his original arguments (now presented as second and third alternatives to the primary case) that there may have been some form of service (on the earlier dates in his original written outline) and his plea of special circumstances justifying any extension. So, in form at least, we had an application before us which it was within our jurisdiction to determine.

6. A further important development is the coming into force on 28 April 2022 of section 10 of the Nationality and Borders Act 2022 ("the NABA 2022"). The Respondent argues that any claimed problems with invalid service are now irrelevant because, if there has been invalid service of the notice, the Order remains valid; and the effect of section 10(8) of the NABA 2022 is to deem the Appellant as having been given notice of the decision on 19 August 2013 (the date the deprivation order was made) and the 28 day period ran from then. It was argued by the Respondent that the special circumstances test could not be satisfied whether that was the date for lodging an appeal (or indeed whether any of the alternatives were the correct date). Particular reliance was placed on argument that the Appellant was told in terms on 21 August 2013 by a Home Office Official of the notice and his appeal rights yet ignored matters until 2020.

7. Although the Respondent invited the Commission not to determine whether service of the notice in August 2013 was effective or valid because of what Leading Counsel argued is the effect of the NABA 2022, given we have heard full argument and evidence in OPEN and CLOSED, we decided to consider all factual and legal service issues. If this matter goes further and our conclusions on legal issues are overturned, it would be unhelpful in a case of some vintage for the factual issues to be remitted to the Commission. This course has required us to prepare a short CLOSED judgment which is confined to service issues and does not concern the national security case.

8. Despite the range of arguments raised on behalf of the Appellant, in our judgment, stripped to its essentials, this application turns on a single issue: whether by reason of special circumstances it would be unjust not to extend time. That was correctly identified by the Appellant's solicitors in their original application as the only issue. The short answer to that question is that there are no such special circumstances rendering it unjust not to extend time because the Appellant has known about the deprivation decision since 21 August 2013. He has provided no proper explanation for his inaction since then. His position is deeply unmeritorious and our conclusion is that he deliberately did nothing to challenge the decision with full knowledge of it and the process for challenge.

9. We also find that the Appellant was properly served with notice at his last known address in accordance with the then applicable Regulations. That means a decision as to the effect of section 10 of the NABA 2022 is not necessary but we have in any event accepted the Respondent's submission that its effect in the present case is to deem service on the Appellant of the notice as at the date of the Order. So, if we are wrong on the validity of service of the notice in August 2013, such problems have been addressed by the NABA 2022.

10. Finally, by way of introduction, we should record that the delay in the application being heard has been caused in part by a stay granted while the Appellant's representatives obtained legal aid funding. It was not the fault of the Appellant.

11. We have heard the application for an extension of time with the benefit of both OPEN and CLOSED submissions and evidence. We are very grateful for the concise and well-structured submissions of all Counsel and their legal teams.

II. The Legal Framework

12. Section 40 of the British Nationality Act 1981 ("the BNA 1981") as in force at the time and in so far as relevant, provided:

> **(1) ...**
> **(2) The Secretary of State may by order deprive a person of citizenship status if the Secretary of State is satisfied that the deprivation is conducive to the public good.**
> **(3) ...**
> **(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) ...**
> **(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).**
> **(6) ...**

13. So, there are three matters in (a), (b) and (c) in respect of which the Secretary of State is under a duty to give the person notice in advance of the deprivation itself. We note this point here because one will see in the NABA 2022 below a reference to the "duty" under section 40(5) of the BNA 1981 (see our underlining below at [20]).

14. The present Appellant's relevant right of appeal is found in s.2B of the SIAC Act 1997, which provides:

> **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).**

15. Thus, the right of appeal pursuant to s.2B is against the Secretary of State's decision to make an order under s.40 BNA 1981: see E3, N3 & ZA v. Secretary of State for the Home Department [2022] EWHC 1133 (Admin), §§ 33, 82 & 88; C3, C4, C7 v. Secretary of State for the Home Department (SC/167, 168, 171/2020) (referred to further below as "C7"), §116; and S1, T1, U1 & V1 v Secretary of State for the Home Department [2016] EWHC Civ 560, §§12 & 61.

16. As to the mechanics of how the Secretary of State was to comply with her duties to give notice of the three matters in Section 40(5) of the BNA 1981 (before depriving a person of citizenship), Regulation 10 of the British Nationality (General) Regulations 2003/548 ("the 2003 Regulations") provided a bespoke regime:

> **10. Notice of proposed deprivation of citizenship**
> **(1) Where it is proposed to make an order under section 40 of [the BNA 1981] depriving a person of a citizenship status, the notice required by section 40(5) of the Act to be given to that person may be given-**
> **(a) in a case where that person's whereabouts are known, by causing the notice to be delivered to him personally or by sending it to him by post;**
> **(b) in a case where that person's whereabouts are not known, by sending it by post in a letter addressed to him at his last known address.**
> **(2)...**
> **(3) A notice required to be given by section 40(5) of the Act shall, unless the contrary is proved, be deemed to have been given-**
> **(a) where the notice is sent by post from and to a place within the United Kingdom, on the second day after it was sent;**
> **(b) where the notice is sent by post from or to a place outside the United Kingdom, on the twenty-eighth day after it was sent, and**
> **(c) in any other case on the day on which the notice was delivered.**

17. As they apply to the Appellant as a person outside the United Kingdom, Regulation 8(1) of the SIAC Regulations provides that a notice of appeal to the Commission had to be given 28 days after the Appellant was served with notice of the decision against which he wished to appeal.

18. The extension of time provision in Regulation 8(5) of the SIAC Regulations is as follows:

> **The Commission may extend the time limits in this rule if satisfied that by reason of special circumstances it would be unjust not to do so**

19. As to how this "special circumstances" test is to be applied, we were taken to a number of decisions but ultimately, we did not detect any dispute as to the law. The Commission is exercising a fact sensitive and case specific discretion and is to be guided by the following principles:

    (1) The burden is on the Appellant to demonstrate that by reason of special circumstances it would be unjust not to extend time, and that burden is to be discharged on the balance of probabilities by way of evidence as opposed to submission. The reference to "special circumstances" underlines the need to show that there is a reason the normal time limits should be disapplied.
    (2) The starting-point is the explanation for the entire period of the delay. If there is no explanation, or no satisfactory explanation, or an explanation unsupported by evidence from the Appellant that ought to have been readily available, then it would generally not be appropriate to extend time.
    (3) Once the explanation for the delay has been established, other factors relevant to the decision are to be balanced by the Commission. The task is to identify "injustice" and that is a two-way street which includes both injustice to the Appellant and to the Respondent who represents the public interest.

(4) Without being prescriptive, we consider the following factors may be relevant: (i) the merits of the proposed appeal (if a view can be formed at this early stage- which is unlikely in a national security case dependent on CLOSED evidence); (ii) the prejudice to the Respondent; and (iii) the importance of the underlying issue. As to the last point, removal of citizenship engages a person's fundamental rights (Pham v Secretary of State for the Home Department [2015] 1 WLR 1591). However, the courts recognise that proper respect must be paid to domestic time limits, which may preclude consideration of the substantive case, even in cases where very serious matters are in issue such as Article 3 ECHR. The importance of the right in issue is relevant but it cannot be given conclusive weight.

20. The material parts of Section 10 of the NABA 2022, which came into force on 28 April 2022, provide as follows:

> **(6) A failure to comply with the duty under section 40(5) of the [BNA 1981] in respect of a pre-commencement deprivation order does not affect, and is to be treated as never having affected the validity of the order.**
>
> **(7) In subsection (6), *"pre-commencement deprivation order"* means an order made or purportedly made under section 40 of the [BNA 1981] before the coming into force of subsections (2) to (5) (whether before or after the coming into force of subsection (6)).**
>
> **(8) A person may appeal against a decision to make an order to which subsection (6) applies as if notice of the decision had been given to the person under section 40(5) of [the BNA 1981] on the day on which the order was made or purportedly made.**
>
> (Our underlining).

III. Service and Knowledge

21. Before we turn to the facts we should note that there was some debate before us as to whether, as a free-standing ground of appeal in a substantive appeal, an appellant could raise a service complaint. It was however common ground that as part and parcel of adjudicating on a Rule 8(5) procedural extension application (the sole application before us) we could consider issues as to proper service. This was recognised by the Commission in C7 at §116(f). Although we do not have to decide the point, we find it difficult to see how, consistently with the limited jurisdiction on SIAC appeals of the present type, service/notice challenges could be raised on a substantive appeal against a decision to make an order under section 40(5) BNA 1981. Had it been necessary to decide the point, we would have been minded to adopt the reasoning in C7.

22. Originally, the Respondent relied upon two forms of service within Regulation 10 of the 2003 Regulations: posting notice to the Appellant's last known address (Regulation 10(1)(b)), and notice to a representative (Regulation 10(2)). It abandoned reliance on the latter before the hearing (we explain the facts briefly below). The Respondent did not seek to serve the Appellant personally because it says it did not know his "whereabouts" (under Regulation 10(1)(a)).

23. Our factual conclusions below are based on the documentary evidence and witness statements. We have relied upon both OPEN and CLOSED evidence in this regard.

24. On 16 August 2013, the Home Office sent to what it says was the Appellant's last known address, a numbered house at Dovehouse Hill, Luton, Bedfordshire ("the Dovehouse

address") by both regular first-class post and recorded delivery, notice under section 40(5) of the BNA 1981 ("the Notice"), of the Secretary of State for Defence's intention to make an order pursuant to section 40(2) BNA 1981 to deprive the Appellant of his British citizenship. That Notice was served because the Secretary of State for Defence was satisfied that it would be conducive to the public good to do so. The Notice informed the Appellant that it was assessed that he had been involved in Islamist extremism and that he presented a risk to national security of the United Kingdom. There is no dispute that the Notice itself contained all relevant section 40(5) BNA 1981 matters, including reference to rights of appeal. The Notice sent to the Dovehouse address was "returned to sender" in due course.

25. On 19 August 2013, the Home Office served the Notice on Mr. Attiq Malik ("Mr Malik") of Liberty Law Solicitors, who it was originally said appeared to the Secretary of State to be representing the Appellant, having recently represented him in criminal matters. The police hand-delivered the Notice and it was accepted by a Mr. Mohammed Abid at the office of Liberty Law Solicitors. The Respondent now accepts Mr Malik was not a person within Regulation 10(2) of the 2003 Regulations. The Respondent no longer relies upon this form of giving notice. That concession was correct and it is somewhat surprising that it was so late in coming. Mr Malik had no more than some limited involvement with the Appellant when Mr Malik was dealing with an unrelated matter for the Appellant at a different firm. The attempt to serve him (as well as the personal communications with the Appellant that we set out below) do however show good faith attempts by the Respondent to bring the proceedings to the attention of the Appellant. This is not a case where it can be said that the Respondent was seeking to make the Order without giving the Appellant a chance to obtain prior knowledge.

26. On 19 August 2013, the deprivation order was made on behalf of the Secretary of State.

27. On 21 August 2013, Mr. Phillip Larkin ("Mr Larkin"), the Head of Citizenship & War Crimes Casework for the National Security Directorate of the Office for Security and Counter Terrorism at the Home Office telephoned the Appellant on mobile number ending "772". He spoke to the Appellant and identified himself as calling from the Home Office. He explained to the Appellant that the Secretary of State had taken a decision to remove his British citizenship. The Appellant asked for the reasons for the decision. Mr. Larkin explained that the reasons were set out in the Notice that had been sent to his last known address and given to his representative, Mr. Malik. The Appellant was informed of the 28 day period in which he could appeal and he was advised to take legal advice from Mr. Malik or any other representative. Mr. Larkin offered to provide the Appellant with Mr. Malik's contact details but the Appellant indicated that he already had those. The Appellant consented to Mr. Larkin providing his mobile number to Mr. Malik.

28. We have before us a contemporaneous e-mail record of this conversation (timed less than an hour after the conversation). The e-mail makes it clear that Mr. Larkin informed the Appellant of the deprivation decision, the service of the documents on Mr. Malik and his right to appeal. It is wholly consistent with the summary above.

29. On 21 August 2013, Mr. Larkin called Mr. Malik's offices at Liberty Law Solicitors and spoke to Mr. Mohammed Abid who confirmed that he had received the 19 August 2013 letter. Mr. Larkin informed Mr. Abid that he had spoken to the Appellant and he provided Mr Abid with the Appellant's telephone number. Mr. Larkin also wrote to Mr. Malik repeating the above information.

30. The Appellant has said, in a signed statement of 8 April 2022, that the first time he became aware of the deprivation decision was in March 2020, when he attended the British High Commission in Pakistan and tried to renew his British passport. The Appellant's explanation for the 7 year delay preceding March 2020 is that he did not know about his deprivation.

31. However, the Appellant does not challenge the evidence in relation to Mr Larkin's evidence beyond saying that he does "not recall" speaking to any representative of the Home Office. As we observed in oral argument, the words used by the Appellant were rather careful. He did not deny the communication. We note also that it was not argued on his behalf that the Respondent's account was incorrect in any way. His Counsel rightly made no such submission - it would have had no factual foundation.

32. We find on the facts that the Respondent's evidence represents the true events in August 2013. Leading Counsel for the Respondent invited us to find that the Appellant was being dishonest in his evidence as to his lack of recollection in order to excuse his 7 year delay. We do not consider it appropriate to make any such finding. It is not necessary. We are satisfied that from 21 August 2013 he was fully aware of the decision to remove his citizenship and his appeal rights. The Appellant, for whatever reason, appears not to have taken steps to challenge that decision, and he may now not remember the call; but it cannot be said that he did not know of the intended deprivation decision, the reasons for it, or his rights of appeal.

33. We underline that there is no reason for Mr Larkin to have written an e-mail at 12.48 on 21 August 2013 recording his call to the Appellant and informing the Appellant of the deprivation of his citizenship and his right to appeal, if no such telephone call was made. His actions in relation to Mr Malik are also all consistent with a desire to provide notification to the Appellant in advance of the Order being made.

34. The consequence is that we do not have before us any satisfactory explanation from the Appellant for the almost 7 year delay between September 2013 and March 2020. We will return to that matter below when we consider the merits of the extension application.

The Appellant's whereabouts

35. The Appellant argues that the Respondent had actual knowledge of his "whereabouts" in Pakistan for the purposes of Regulation 10(1)(a) of the 2003 Regulations and he should have been served personally or at his address in Pakistan. He argues that based on alleged telephone contacts he received from the UK government, it is likely that they knew of his address in a particular complex in Islamabad. Alternatively, it is said that his whereabouts could have been acquired with reasonable diligence and therefore there was some form of "constructive knowledge" of his whereabouts.

36. This is an issue which is principally addressed in the CLOSED materials.

37. As to the "constructive knowledge" argument, we accept the Secretary of State undertook reasonable searches to identify the Appellant's address, but in our judgment, there was no duty on the Secretary of State to attempt to locate the Appellant or to search for him in order to effect service of the notice upon him. In H2 v Home Secretary (SC/120/2012), the Commission rejected the suggestion that "there existed some

obligation in law on the Secretary of State to search for the Appellant for the purpose of service under Regulation 10(1)(a), rather than effecting service under Regulation 10(1)(b)" [§91]. This was considered and approved of in Laing J's permission decision in W2 & IA v Secretary of State for the Home Department [2017] EWHC 928 (Admin), §20. At the level of principle, we consider it to be plainly a correct approach.

38. The Appellant seeks to rely on an obiter passage in Dyson LJ's decision in Collier v Williams [2006] 1 WLR 1945 in respect of the then CPR Rule 6.5(6). The same argument was advanced and rejected in W2 where it was noted that Collier was "a decision about a version of the CPR which is no longer in force. The structure and language of the relevant provision differed from the structure and language of the notice regulations. SIAC would not be bound by the approach of the Court of Appeal in that case, and, to the extent that it differs from that of SIAC in H2, I consider that SIAC might follow H2", [§33].

39. Whilst the Appellant asserts that this was no more than a preliminary view, we respectfully consider it is the correct view. There is no duty on the Secretary of State to search for the Appellant or to take steps to attempt to obtain his precise address when that is not otherwise known. Deprivation decisions may need to be taken with a degree of urgency in order to protect the security of the United Kingdom. The Secretary of State must be able to operate on the basis of the information known to her and there is no requirement to undertake extensive searches to seek to obtain information on an individual's whereabouts, when Parliament has provided the Secretary of State with the powers to act and make the deprivation order when an individual's whereabouts are not known.

40. On the evidence before the Commission in OPEN and CLOSED, we are satisfied that the Secretary of State was not aware of the Appellant's whereabouts within Regulation 10(1)(a) of the 2003 Regulations. Our detailed reasons are given in our CLOSED judgment.

Last known address: Dovehouse Hill or Wellington Street?

41. As identified above, Regulation 10(1)(b) of the 2003 Regulations permitted a notice to be given by posting the notice to the individual's last known address where his whereabouts were not otherwise known. It is to be noted that the provision refers not to "his last address in the United Kingdom" but to "his last known address". Thus, the question is what was known by the Secretary of State at the time as to the Appellant's last address. This is a matter both for OPEN and CLOSED evidence. The Respondent says that Dovehouse address was his last known address and posted the Notice to that address. The Appellant argues that this was not the right address and so proper notice was not given.

42. The Appellant says that upon his release from prison in August 2011 he moved to a numbered house in Wellington Street ("the Wellington Street address") to live with his family. He refers in this regard to certain Ministry of Justice and Bedfordshire Police documents which show the Wellington Street address as current and the Dovehouse address as a previous address. He also says he stayed at the Wellington Street address until he left the UK for Pakistan.

43. We accept the Respondent's evidence that in order to determine the Appellant's last known address, cross government searches of government-held records were

undertaken. Local Council records revealed that the Appellant had resided at the Dovehouse address; but in February 2013, possession proceedings were instituted due to the Appellant being in rental arrears. That is not in itself inconsistent with this being his last known address.

44. As to the MOJ and Bedfordshire Police documents that identify an address in 2011 for the Appellant at the Wellington Street address, we note that those documents pre-date, by two years, the local Council records indicating repossession action against the Appellant in February 2013 at the Dovehouse address. That indicates that this was his last address. The Respondent was entitled to consider that the Dovehouse address was the "*last known address*". We would go further and we find as a fact that this was his last known address based on the OPEN and CLOSED materials.

Is there valid giving of notice when a notice is returned to sender?

45. It follows from what we have concluded above that there was valid giving of notice at a place within Regulation 10(1)(b): the notice was posted to the Appellant's last known address. The notice was sent by first class post and recorded delivery. However, it is common ground that it was not received and was returned marked *return to sender*. It is said on behalf of the Appellant that this effectively unwinds service. In essence, it was persuasively submitted by his Counsel that, relying upon the principles applied in relation to section 7 of Interpretation Act 1978 ("the IA 1978"), that the "deeming" provisions as to Regulation 10(3) do not apply and so no notice was "given".

46. In our judgment, authority that interprets section 7 of the IA 1978 does not assist in relation to Regulation 10 of the 2003 Regulations. We consider that the 2003 Regulations are a bespoke and self-contained code (or reflect a contrary intention for the purposes of section 7 as we set out below).

47. Section 7 of the IA 1978 provides:
Where an Act authorises or requires any document to be served by post (whether the expression serve or the expression give or send or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the normal course of post.

48. As held by Lewis J in R (Broomfield) v Revenue and Customs Commissioners [2019] 1 WLR 1353, there are two parts to section 7. The first part deems service "to be effected by properly addressing, pre-paying and posting a letter". The second part concerns the actual date of delivery of the notice, which is deemed the date in the normal course of post, unless the contrary is proved (§§124-5). Thus, Lewis J concluded that if an individual "can prove it was not **delivered** on the date it would usually be delivered in the normal course of posting, or if it **was not delivered at all** (because it was returned to the sender), the individual would have proved that service was not effected on that date" (§128) (our emphasis added).

49. In our judgment, the critical difference between Regulation 10(3) and section 7 of the IA 1978 is that Regulation 10(3) makes no reference to the date of delivery. Pursuant to Regulation 10(1) a notice can be *"given"* by posting it to the last known address. The date the notice is given by posting the letter, which must come to pass before the deprivation order can be made, is calculated by Regulation 10(3). This regulation is a

deeming provision that generates the date on which a section 40(5) notice was *"given"* for the purpose the statutory criteria under section 40(5) BNA 1981. That date can be proven not to be correct but that is different to proving that the notice was not delivered at all, for there is no deeming provision under Regulation 10 for *"delivery"* of the notice.

50. The rebuttable presumption in Regulation 10(3) is not the *"giving"* of the notice by posting it to the last known address in accordance with Regulation 10(1)(b); it is to the *date* on which the notice is deemed to have been given for the purposes of section 40(5) BNA 1981. If a presumption is rebutted it does not affect the fact that notice was still "*given*" by posting it in one of the methods permitted under Regulation 10(1).

51. It is significant that, as recognised in R (D4) v Secretary of State for the Home Department [2022] 2 WLR 785 (CA), the possibility of service of a deprivation notice on someone's last known address "imports the possibility of non-receipt", but Parliament intended that a deprivation order could be made for the public good even where an individual's whereabouts were not known (§54). The Court of Appeal, citing Alam [2021] Imm AR 516 noted that "receipt does not mean full knowledge. At most, receipt means that the person receiving the notice should have an opportunity to inform him or herself about the contents" (§47). Further, at first instance in D4, Chamberlain J, noted the argument, without deciding it, that the "concept of 'giving notice' does not always require the notice to be received... . For example [the Regulations] could conclusively deem notice to have been given when sent to the affected person's last known address. This might be regarded as a 'reasonable step' ..." (§47) (emphasis in the original). We respectfully agree.

52. These observations are consistent with established authority that legislation may make provision whereby posting a document to a particular address is to be treated, in law, as giving notice of that document. In Sun Alliance and London Assurance Co Ltd. V Hayman [1975] 1 WLR 177 at 185D-E, Lord Salmon explained:

> "Statutes and contracts often contain a provision that notice may be served upon a person by leaving it at his last known place of abode or by sending it to him there through the post. The effect of such a provision is that if notice is served by any of the prescribed methods of service, it is, in law, treated has having been given and received".

53. In our judgment, the Respondent is correct to submit that the structure of Regulation 10 is such that notice is "given" by posting in accordance with Regulation 10(1)(a) or (b) and no more. This enabled a notice to be "given" following which a deprivation order would be made. Regulation 10(3) provides a rebuttable presumption of the timing of that notice.

54. The consequences of the Appellant's argument to the effect that the letter being returned to sender invalidated service, is that he could not have been given notice of the deprivation decision once the letter was returned to sender (the Regulations did not provide for any other alternative) and therefore the procedural requirements under section 40(5) BNA 1981 could not have been met. Legal consequences seem on this argument to depend on the diligence, or otherwise, of the residents of the last known address. If the letter is ignored or thrown in the bin, notice has been given. But if it is returned to sender, it has not. These unattractive consequences show the unsound nature of the argument.

55. It would be odd (to say the least) if Parliament enabled the Secretary of State to serve notice on someone's last known address only for that notice, and therefore the deprivation order (prior to the NABA 2022), to be arguably invalidated because the letter was returned to sender because the individual no longer lived at the address. In our judgment, the Appellant's contention, by reference to the IA 1978, runs contrary to Parliament's intention. The focus in Regulation 10(3) is on the date the notice was, or was deemed, to be *"given"*, but it is the giving of the notice under Regulation 10(1) that is the procedural requirement under s.40(5) BNA 1981.

IV. The Extension Application

56. Thus far we have concluded that the Respondent did give the Appellant written notice in accordance with Section 40(5) BNA 1981. He had 28 days from 18 August 2013 (that is, to 16 September 2013) to appeal that decision but did not do so until 14 December 2020.

57. On that basis he is some 7 years 3 months out of time. In his alternative argument, he submits that he was not in fact served with the notice until 25 August 2020 when his solicitors received the notice as an attachment to the GLD's response to his PAP letter. We say nothing further about this alternative. It is common ground that this cannot have been lawful service of a notice given that it occurred after the making of the deprivation order contrary to s.40(5) BNA 1981. In any event, it is hard to see how notice is formally effected by merely attaching a document to a pre-action response.

58. Has the Appellant established "special circumstances" justifying a 7 years 3 month extension under Regulation 8(5) of the SIAC Regulations? In our judgment he has not. As we have said above, we find that the Appellant's knowledge of the deprivation decision since 21 August 2013 and his apparent decision not to take any action in respect of it, demonstrates the Appellant had, until recently, very little concern for the matter. He does not get past "first base" by explaining the delay.

59. Further, any explanation for delay must cover the whole period. The Appellant is said to have first contacted ITN Solicitors on 13 March 2020 whereupon efforts were made to start a legal aid application. The Appellant was asked to provide bank statements for the purpose of his application on 14 April 2020 but those were not provided to ITN Solicitors until 22 July 2020. Beyond a hearsay statement in his solicitor's Third Witness Statement, that the Appellant was unwell during that period, there is no evidence or explanation for that three month delay, three times as long as the appeal period provided in paragraph 8(1)(b)(ii) of the SIAC Rules. We find that there is another period of unexplained delay from 25 August 2020, when the Home Office responded to Mr. Nawaz's correspondence and the instruction of Ms Bhullar (his solicitor) on 11 November 2020. Whilst the responsibility of that delay may lie at the door of ITN Solicitors, here the delay by representatives occurred only after time had already expired.

60. We would add that beyond the challenge to service (which we have rejected), the Appellant does not plead any other reason for why it would be unjust not to extend time. In essence, the Appellant's case is that he did not know about the deprivation decision until March 2020 and is not responsible for the delays that occurred between March 2020 and December 2020. We have rejected his evidence that he was unaware of the decision prior to March 2020, so the case on special circumstances falls away. In our judgment, there are no other overriding factors that justify extending time for the

Appellant who for nearly seven years chose to take no action in response to the deprivation order. We give weight to the fact that he may be denied an arguable appeal and to the consequences of the deprivation. We also accept his submission that in a case such as the present there may be no identifiable prejudice to the Respondent because the facts justifying the relevant decisions are likely to be documented. But, in short, he comes nowhere near showing a refusal would be unjust in all the circumstances.

61. It follows that we refuse the application for an extension.

V. The Nationality and Borders Act 2022

62. Although we have determined the application against the Appellant for the reasons given above, we also accept the Respondent's submissions that section 10(8) of the NABA 2022 applies to this case. If, contrary to our judgment on the facts, there was not valid service at the Appellant's last known address on 18 August 2013 (and there has accordingly been a failure to comply with the section 40(5) BNA 1981 duties of prior notice) the Order remains valid and pursuant to section 10(8) of the NABA 202 , the 28 day appeal period against the Notice under Rule 8 of the SIAC Rules commenced on 19 August 2013. That has expired but we do not accept any extension is justified for the reasons we have already given (the clear and conscious decision by the Appellant not to appeal following the 21 August 2013 conversation with Mr Larkin).

63. There was detailed argument before us from the Appellant's representatives as to how section 10(8) of the NABA 2022 applied and the purpose of the new legislative provisions. The SAs' written arguments in this regard were adopted by the Appellant. We are aware of the original basis for the legislation - essentially dealing with the *notice to file* issue addressed in the case D4 (cited above). We were also taken to the Explanatory Notes and the well-known case law concerning the presumption against retrospectivity; and the related rule that a statute is not to be construed so as to have greater retrospective operation that its language renders necessary.

64. The common thread in the case law is that the first and foremost guide in construing legislation is the language used by Parliament. If Parliament has made a provision which is expressly retrospective the court must give effect to it. Our function is to determine the meaning of the words in the statute. Context and mischief are relevant but as explained in the case law including, for example Williams v Central Bank of Nigeria [2014] AC 1189 at [72], this does not give us licence in interpretation to take a "free-wheeling view" of the intention of Parliament in which context and purpose override the plain meaning of language.

65. In our judgment, the following propositions flow from the plain language of the material subsections of section 10 of the NABA 2022:

    (1) First, they are expressly intended to have legal consequences for a prior legal instrument ("pre-commencement deprivation order"). They are intended to be retrospective.
    (2) Second, if there have been failures to comply with the service of notice duties under section 40(5) of BNA 1981 in respect of such pre-existing instruments, such failures do not affect the validity of such orders. That is, where notice of the very type in issue in the case before us has not been given (as the Appellant argues with his various service complaints). Both the D4 type case and the present case are covered:

there is no material distinction because they are both situations where there may have been a failure to give notice.

(3) Third, where that has happened, an appellant may appeal against the notice of the decision with a deeming provision that it was given on the date of the deprivation order. He can of course seek an extension of time if he was not aware of the notice. In a case of true lack of knowledge, and as the Respondent accepted, it would be rare that the Commission would refuse an extension. Indeed, Leading Counsel for the Respondent submitted that it would be most likely not to be opposed.

66. Submissions were made on behalf of the Appellant that it could not have been the intention of Parliament to replace a right of appeal with the much weaker mere ability to ask the Commission to exercise a discretion allowing an appeal to be pursued out of time. We do not accept this. Parliament's words are clear and there is nothing surprising in the situation when one considers what the existing regime already provides for. The Appellant's submission ignores the fact that the existing legislation already contemplates that an individual might be deprived of citizenship when he has in fact had no *actual* notice of the decision such as for example where he has not received mail from his last known address. The existing legislation also contemplates, as explained in D4, that a notice may be sent to a person when the Respondent has actual knowledge it will not come to his attention. In each of these cases, time runs against an appellant. If he is out of time, he has no right to mount an appeal but must ask for discretion to be exercised in his favour by way of an extension application. Parliament has accepted that consequence and it also applies to someone in the position of C12 if in fact (contrary to our main finding on the facts) he was not given notice in accordance with the 2003 Regulations.

67. We note that the Appellant's Counsel and the Special Advocates argue that the function of section 10(8) is much more limited and does not apply in the way advanced by the Respondent. They could not however identify anything in the language which explains why it would not apply in this case. In our judgment, if we are wrong as to our conclusions as to valid giving of notice, the language of this sub-section plainly applies.

VI. Conclusion

68. The application for an extension of time for giving Notice of Appeal is refused and the proceedings in the Commission are at an end. The application fails on the facts and, were it necessary, under the law applied following the NABA 2022.