Appeal No: SC/100/2010
Hearing Dates: 18th November 2010
Date of Judgment: 3rd December 2010

IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE LANE
MR M L JAMES

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(L1)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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MS A WESTON (instructed by Birnberg Peirce and Partners) appeared on behalf of the Appellant

MR R WASTELL (instructed by the Treasury Solicitor) appeared for the Secretary of State

MS J FARBEY (instructed by the Special Advocates' Support Office) appeared as Special Advocate

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PRELIMINARY ISSUE

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The Hon. Mr Justice Mitting :

Background and preliminary issues

1. The Appellant is thirty nine year old citizen of Sudan. He is married to a Sudanese woman. There are four children of the marriage, aged eight, six and four years and thirteen months. He arrived in the United Kingdom and claimed asylum on 30 June 1991. His claim was accepted and he was granted indefinite leave to remain. In early 2003 he became a naturalised British citizen. His wife has limited leave to remain in the United Kingdom. Their children are all British citizens.

2. On 3 July 2010 the Appellant and his family left the United Kingdom to spend the summer holiday with his family in Sudan. It was his and their intention that they should all return in time for the new school year.

3. By a notice signed personally by the Secretary of State on 7 July 2010 to be given under s40(5) British Nationality Act 1981 she gave notice to the Appellant that she intended to have an order made to deprive him of his British citizenship under s40(2) on the ground that it was conducive to the public good to do so. The stated reason for that decision was that the Security Service assessed that he had been involved in terrorism and other illegal activities over a prolonged period of time and had links to a number of Islamist extremists including Abdelsalem Tagzira. On 12 July 2010 Philip Larkin, an official of the UK Border Agency, acting on behalf of the Secretary of State, signed an order depriving the Appellant of his British citizenship. On 12 July 2010 the Secretary of State personally decided that the Appellant should be excluded from the United Kingdom because his presence was not considered conducive to the public good. The reason for the decision was the same as that stated in the notice of intention to deprive him of his citizenship. That decision was taken under prerogative powers and does not, as a free standing decision, give rise to a statutory right of appeal.

4. There is a right of appeal against a decision to make an order under s40 to deprive a person of British citizenship. Because this was a case in which the Secretary of State took her decision in part reliance on information which should not be made public in the interests of national security, that appeal lay to SIAC. S41(1)(e) empowered the Secretary of State to make regulations "for the giving of any notice required or authorised to be given to any person under this Act". Regulation 10 of the British Nationality (General) Regulations 2003 SI 2003 No. 548 provides, relevantly,

> "(1) Where it is proposed to make an order under s40 of the Act depriving a person of a citizenship status, the notice required by s40(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.
>
> …
>
> (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".

5. It is the Secretary of State's case – in this respect not disputed by the Appellant – that his whereabouts, while he and his family were in Sudan, were unknown to her and her officials when she signed the notice of intention to make the deprivation order. It is her case that notice of her intent was properly given to the Appellant by sending it under cover of a letter of 8 July 2010 to his last known address, Flat 5 Chessington House, Union Grove, Stockwell, London SW8 2RB. Rule 8(1)(b)(ii) of the Special Immigration Appeals Commission (Procedure) Rules 2003 SI 2003 No. 1034 requires notice of an appeal to SIAC to be given by an Appellant outside the United Kingdom not later than 28 days after the Appellant "is served with notice of the decision against which he wishes to appeal". The Appellant gave notice of appeal on 20 October 2010 – over 10 weeks late if notice of the Secretary of State's intention to make a deprivation order was properly given by the letter dated 8 July 2010. It is the Appellant's case that he was not given notice of that intention until served with a copy of the notice personally at the British Embassy in Khartoum on 22 September 2010. If that is right, his notice of appeal is in time. If not, it is 10 weeks out of time and he can only bring his appeal if SIAC is willing to extend time under Rule 8(5) of the Procedure Rules. It may do so "if satisfied that by reason of special circumstances it would be unjust not to do so".

6. The two preliminary issues which we determine by this judgment are:

   (i) Was the Appellant's notice of appeal served in time?

   (ii) If not, should time be extended?

Was the notice of appeal served in time?

7. In determining this question, we have considered both open and closed material. Our conclusions are based upon both. For obvious reasons, not every conclusion stated in this open judgment is fully supported by the open material.

8. Mr Larkin sets out in two witness statements dated 12 and 17 November 2010 what was done to serve notice of the Secretary of State's intention to make a

deprivation order on the Appellant and to bring its terms to his attention. First, a UK Border Agency official in Khartoum attempted on several occasions on 7 and 8 July to make telephone contact with him on a mobile telephone number to invite him to the British Embassy so as to serve the notice on him there. The attempts were unsuccessful. Accordingly, a letter dated 8 July 2010 was drafted enclosing the notice. It stated that the notice and associated appeal forms were enclosed with the letter and that the same would be sent by first class post and by recorded delivery. The letter was posted on 9 July 2010. No-one was present to accept delivery of the recorded delivery letter, but a note must have been left at the Appellant's flat because the recorded delivery copy of the letter was returned to the UK Border Agency on 4 August 2010 marked "not called for". On 13 July 2010, a further letter was posted to the Appellant's flat which enclosed the order signed on 12 July 2010 depriving him of British citizenship and gave notice of the Secretary of State's decision to exclude him from the United Kingdom. The letter expressly referred to the posting of the notice of deprivation and to his right of appeal against that decision, but did not, unlike the notice, enclose the appeal forms or state the time limit within which an appeal must be brought.

9. Mr Larkin says that on 13 July 2010 at about 16.45pm he also made a telephone call to the Appellant's brother, Osman, who confirmed his identity on receiving the call. Mr Larkin explained to him that a notice had been delivered to the Appellant's flat. He explained that it was a very important notice and that the Appellant should read and understand it as soon as possible. He said that it was a notice from the Home Secretary to inform the Appellant that an order to deprive him of his citizenship was to be made. He further explained that the order had now in fact been made and that the Appellant was no longer a British national and had been excluded from the UK. He told the Appellant's brother that the Appellant had a right of appeal against the deprivation notice and that he had 28 days to lodge an appeal from Monday 12 July 2010. He said that the notice and accompanying appeal forms had been delivered to the Appellant's flat. He asked that the message be relayed and the Appellant's brother confirmed that he would attempt to do so.

10. A good deal of this evidence is disputed by the Appellant and his brother. The Appellant says that his brother telephoned him on about 20 July 2010 mentioning an important document which he needed to send to him. They agreed that his brother's sister-in-law Umama, who was planning a trip to Sudan, should bring the document with her. He says that he received a document – the letter of 13 July 2010 which gave notice of the Secretary of State's decision to exclude him, but that the first time he saw a notice "depriving me of my British citizenship" was when he was handed an envelope containing the same at the British Embassy on 22 September 2010. He says "unequivocally" that the letter of 8 July 2010 was never received by him.

11. His brother states that he received a phone call to his mobile telephone from a man who said he was calling from the UK Border Agency "in July 2010". He said that the Home Office were sending an important letter for the Appellant with very serious news – and that if he came back to the UK he might not be

let in. He said that he should call the Appellant to make sure that he was aware of it and tell him to take legal advice. He says that the conversation was short – about a minute. He refutes Mr Larkin's statement that he was given a detailed explanation of what was in the letter: "the contents of the letter were not explained to me". He says that he called the Appellant straight away to say to him that he should come home to sort things out, but he did not agree that it was necessary. "A day or so after the call" he went to the Appellant's flat to collect the letter form the UK Border Agency, which he opened. It was the letter of 13 July 2010. He telephoneD the Appellant in Sudan to explain to him briefly that he was excluded and could not return to the United Kingdom, but was not confident that he understood the full meaning of the letter and did not talk about its details on the telephone. They agreed that Umama should take the letter to him personally on a trip to Sudan which she was going to make "within a week or so". He gave her the letter to take to the Appellant.

12. We are sure that the evidence of Mr Larkin is true and accurate, for reasons which can be partly stated in this open judgment.

(i) The Secretary of State's decision to deprive the Appellant of his citizenship was one which had clearly been contemplated before it was taken. The natural inference, which we draw, from the events described, is that she waited until he had left the United Kingdom before setting the process in train. For a deprivation order to have effect, notice of her intention to make it had to be given. S40(5) lays down mandatory statutory requirements for the contents of the notice, without which it will be of no effect: it must specify that the Secretary of State has decided to make an order, the reasons for the order and the person's right of appeal under s40(A)(1) of the 1981 Act or s2B of the Special Immigration Appeals Commission Act 1997. Only the second of those requirements was fulfilled in the letter of 13 July 2010. The first could not then be fulfilled because the deprivation order had already been made; and the letter did not specify the provision under which the Appellant had a right of appeal against the notice. Accordingly, it is and was essential to the effectiveness of the deprivation order that a notice containing the information specified in s40(5) was properly served on the Appellant. It is inconceivable that in a planned and carefully choreographed set of steps the elementary mistake of failing to serve the requisite notice would have been made.

(ii) The letter serving the notice states that it was sent by first class post and recorded delivery. We accept Mr Larkin's evidence that it was sent by recorded delivery and returned marked "not called for". There is no reason why he should have taken one of the two steps identified in the letter of 8 July 2010, but omitted the other.

(iii) We are satisfied that on 13 July 2010 he did explain to the Appellant's brother the terms of the notice, including the fact that the Appellant had 28 days in which to appeal against it.

(iv) We do not accept that the Appellant's brother would have left it as late as 20 July 2010 to notify him about a decision as important as this.

13. Ms Weston, for the Appellant, submits that, even if notice was sent by first class post to the Appellant's flat on 9 July 2010, it was nonetheless not effectively given to him. She submits that Regulation 10 of the 2003 Regulations should be construed so as to permit a person to whom notice was given by post to demonstrate that it was not brought to his attention until a date later than that specified in Regulation 10(3)(a): Regulation 10 is a deeming provision only, capable of being rebutted. The foundation for her argument is *Anufrijeva v Secretary of State for the Home Department* (2004) 1 AC 604 and, in particular, the observations of Lords Steyn and Scott at paragraphs 26 and 55:

> "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the Courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system". (per Lord Steyn)

> "It is, indeed, inherent in the concept of a "refusal" that it should be communicated to the person to whom it is directed. The communication of a refusal may be either by words or by conduct from which the requisite inference can be drawn, but without communication there will be no more than a non-acceptance, a quite difference concept from that of a refusal. The Immigration Rules require a refusal and that the refusal is to be communicated by a 'notice of refusal'". (per Lord Scott)

We are, of course, bound by those observations; but neither purport to define the manner by which notice must be given. Where Parliament has prescribed a method by which notice must be given, giving notice in the prescribed manner suffices to give legal effect to the decision notified. *Anufrijeva* does not impose an additional requirement that the decision must be brought to the personal attention of the person affected. Nor does it require Regulation 10 to be construed as a "deeming provision" capable of being rebutted by evidence. It lays down a simple code for giving notice which, once fulfilled, suffices.

14. Ms Weston also relies on *ex parte Saleem* (2001) 1 WLR 443. That, however, was a very different case. The Court of Appeal unanimously held that Regulations made pursuant to s22 of the Immigration Act 1971 which could have the effect of depriving an Appellant of a right of appeal against an immigration decision in circumstances in which she, without fault on her part, was deprived of her right of appeal, were outwith the rule making power. The s22 rule empowered the Lord Chancellor to make rules for regulating the exercise of rights of appeal conferred by the Act. The rule did not regulate that right but was destructive of it and so was invalid. This ruling does not apply to Regulation 10 of the 2003 Regulations, for two reasons: first, ample time is given to an Appellant who is abroad to appeal against the decision; secondly, Rule 8(5) of the SIAC Procedure Rules permits time to be extended when SIAC is satisfied that by reason of special circumstances it would be unjust not to do so.

15. Regulation 10(3)(a) permits the Secretary of State or an Appellant to prove that notice sent by post from and to a place within the United Kingdom was given on a day other than the second day after it was sent. Accordingly, if, due to postal delays, it was proved that the letter was not delivered until the third day after it was sent, the time for appealing would not begin to run until that date. If, exceptionally, it was proved that the letter, although posted, was not delivered at all, the time for appealing would not begin to run until notice was given for a second time. But Regulation 10(3)(a) cannot be read so as to permit a person upon whom a notice was properly given by post, to argue successfully that he was not given proper notice by that means. Unless the Appellant's contention, which we have rejected, that the notice was not posted is accepted, Regulation 10(3)(a) does not assist him.

16. For the reasons given, we are satisfied that notice of the intention to make an order depriving the Appellant of his British citizenship was properly served upon him and that the 28 days for him to appeal to SIAC began to run on 12 July 2010.

Should SIAC exercise its discretion to extend time under Rule 8(5)?

17. Before we could exercise our discretion in favour of the Appellant, we would have to be satisfied that there were special circumstances which justified extending time and that it would be unjust not to do so. Subject to the position of the Appellant's children, which we refer to below, we find it difficult to conceive of circumstances in which an Appellant of sound mind who was not prevented by external circumstances from giving notice of appeal in time who knew that a decision to make a deprivation order had been made and had a time-limited right in which to appeal, could satisfy us that special circumstances existed and/or that it would be unjust not to extend time. We are satisfied, at least on balance of probabilities, that the Appellant did know, in ample time, that a decision had been made against which he had a right of appeal within 28 days. We do not accept his brother's assertion that Mr Larkin did not explain the terms of the notice to him on 13 July 2010 and it is inconceivable that he would not promptly have relayed what he had been told to the Appellant. We are satisfied that when he went to the Appellant's flat soon after being told about the notice by Mr Larkin, he would have seen and opened the letter enclosing the notice, described its contents to his brother and given it to Umama to take with her to Sudan. There is no reason why she would not have given it to the Appellant, when she arrived there, either in July, as the Appellant's brother implies or in early August, as he states. In either event, he would have both known about and read the notice in sufficient time to give notice of appeal in time. Subject to the position of the children, those findings lead us to conclude that there are no special circumstances here which would justify extending time and that it would not be unjust to refuse to do so.

18. S55 of the Border, Citizenship and Immigration Act 2009 requires us to have regard to guidance given by the Secretary of State under s55(3). That guidance requires us to treat the best interests of the children, in relation to any nationality decision, as a primary consideration – ie a consideration of first importance. We accept that it is unlikely to be in the best interests of the

Appellant's children that he should be deprived of his British citizenship and, by his own inaction, of the opportunity of challenging the deprivation decision in these proceedings. They are British citizens, with a right of abode in the United Kingdom. They are of an age when that right cannot, in practice, be enjoyed if both of their parents cannot return to the United Kingdom. At present, only their mother can do so. We know nothing of the family's circumstances in Sudan, beyond the fact that they went there voluntarily in July to stay with the Appellant's family. The position of the children has not been at the forefront of Ms Weston's argument, so that the lack of information about their circumstances is unsurprising.

Although the interests of the children are a primary consideration, they are not the only consideration and can be outweighed by others. In this case, we are satisfied that they are so outweighed. The Secretary of State has, by taking a proper course expressly authorised by Parliament, taken an effective step to protect the national security of the United Kingdom – if her reasons for depriving the Appellant of his British citizenship are well-founded. For present purposes, we can take it that she is unlikely to have made that decision without substantial and plausible grounds for doing so. By depriving the Appellant of British citizenship, she has subjected him to immigration control and enabled herself to decide, in the exercise of prerogative powers, that he should be excluded. *Secretary of State for the Home Department v Rehman* (2002) 1AC 153 establishes that, at a minimum, significant weight should be given to the views of the Secretary of State and her security advisers in the assessment of the requirements of national security. Parliament has provided the means of challenging that assessment, but an Appellant who does so, must comply with the procedural rules under which his challenge is brought. If his children are put at a disadvantage by reason of his own inaction, they, like he, can ordinarily be expected to suffer the procedural consequences of that inaction. There is an important public interest in ensuring that SIAC procedures are properly followed and enforced. Finally, although we do not put this at the forefront of our reasons, there would exist a means for the childrens' best interests to be considered substantively if the Appellant were to apply for entry clearance. It would automatically be refused under paragraph 320 of the Immigration Rules (either because it was sought for a purpose not covered by the rules or because of the Secretary of State's decision to exclude the Appellant), but it would be an immigration decision under s82(2)(b) of the Nationality, Immigration and Asylum Act 2002. If, in consequence, the Appellant contended that his and/or his wife and children's rights under Article 8 ECHR were thereby breached, he would have a right of appeal by virtue of ss84(c) and 86(3). A refusal to extend time under Rule 8(5) of the SIAC Procedure Rules would, accordingly, not deprive them altogether of the opportunity of having his Article 8 rights, and so the best interests of the children, substantively considered.

19. For the reasons given, we decline to extend the Appellant's time for giving notice of appeal.

20. For the reasons given, this challenge to the decision of the Secretary of State is rejected.