Appeal No: SC/106/107/108/109/11
Hearing Date: 25th and 26th June 2012
Date of Judgment: 26th July 2012

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
UPPER TRIBUNAL JUDGE WAUMSLEY
SIR PAUL LEVER

'S1, T1, U1 and V1'

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant:	Ms S Harrison & Ms A Weston
Instructed by:	Birnberg Peirce & Partners Solicitors
For the Respondent:	Mr R Tam QC and Mr R Jones
Instructed by:	The Treasury Solicitor
Special Advocates:	Mr Charles Cory-Wright QC & Mr Z Ahmad
Instructed by:	The Special Advocates' Support Office

OPEN JUDGMENT

MR JUSTICE MITTING :

Introduction

1. This is SIAC's open judgment on issues raised by Miss Harrison and Miss Weston for the appellants which, they submit, should cause SIAC to allow the appeals without further consideration of the underlying merits. There is no closed judgment, but there is a short confidential judgment which deals with a matter raised at their request (without opposition from Mr. Tam QC for the Secretary of State) in a private hearing conducted under rule 43 of the SIAC (Procedure) Rules 2003.

2. On 31st March 2011 the Secretary of State made a decision to deprive each of the appellants of British citizenship. Notice of her decision was served on the same date, by posting it to their last known address under regulation 10(1)(b) of the British Nationality (General) Regulations 2003. Orders depriving each appellant of his British citizenship were signed on behalf of the Secretary of State on 2nd April 2011. When these decisions were taken, the appellants were in Pakistan. The orders depriving them of British citizenship removed their right to return to the United Kingdom and made them subject to immigration control. They have not applied for leave to enter.

3. The sequence of steps taken by the Secretary of State can safely be taken to have been purposefully timed. Section 40(5) of the British Nationality Act 1981 requires the Secretary of State to give to a person whom she intends to deprive of citizenship status a notice specifying the matters set out in section 40(5): that she has decided to make the order, the reasons for the order and his right of appeal. Under regulation 10(1)(b) notice may be given by post in a letter addressed to a person at his last known address, when his whereabouts are not known. Such a notice is deemed to have been served on the second day after it was sent: regulation 10(3)(a). The deprivation order was made on the day on which the decision notice was deemed to have been served – i.e. as soon as it was lawful to do so. At that date, the Secretary of State and her advisers had every reason to believe that the appellants were not in the United Kingdom. Accordingly, she can be taken to have known that any appeal against her decision to deprive the appellants of British citizenship could only be brought from abroad.

The issues

4. In detailed grounds prepared at the direction of SIAC on 27th April 2012, Miss Harrison and Miss Weston identified the issues for determination as follows:

> "(i) Whether the respondent, in depriving the appellants of their British citizenship whilst they were out of the jurisdiction by service of deprivation orders and/or in refusing to facilitate their return and entry to the UK, pending the appeal, has acted unlawfully on the basis that it is:

(a) contrary to the statutory provisions and purpose in particular section 40A(3)(a); and/or

(b) procedurally unfair at common law and/or under Article 8 ECHR because the appellants are deprived of a fair hearing and/or effective remedy under community law; and/or

(c) is an abuse of process

(ii) If contrary to the above the statutory provisions do permit a British citizen to be deprived of their legal status in the UK pending appeal and notwithstanding the right to an in-country appeal, the question arises as to whether this constitutes unlawful discrimination by reason of nationality contrary to the right to equal treatment in community law (Article 12 TFEU) and/or Article 8 and 14 of the ECHR

(iii) Whether the notice of the decision was invalid given that it did not inform the appellants of their in-country right of appeal and/or it was served on an address in the UK despite the known whereabouts of the appellants (any or all of them) in Pakistan

(iv) Whether, for any of the reasons set out above, the respondent should now be directed to withdraw the decision to make the deprivation order and/or the orders depriving the appellants of their British citizenship thereby allowing the appellants to return to the United Kingdom forthwith pending the appeal process and for the purposes of preparing, presenting and being present at their appeals."

Facts and allegations

5. S1 was born a British citizen in 1963. (As SIAC has found in a preliminary judgment on the issue of statelessness, he was a dual Pakistani-British national until deprived of his British citizenship). He married NBS in 1984. (She became a British citizen by naturalisation in 1993). They have four sons and one daughter, all British citizens by birth. T1, U1 and V1 are their eldest sons. (In the same decision SIAC determined that they too were dual Pakistani-British citizens until deprived of British citizenship). The whole family left the United Kingdom voluntarily in October 2009. They have provided as their current address a house, built by them in Medina Colony, Nangal, Sahdan Muridke, Sheikhpura District, Pakistan. We have no reason to doubt that that is now the family home in Pakistan.

6. The Secretary of State alleges that the appellants are active members of Lashkar-e Tayyiba (LeT) and (in the decision notice) that they have links to Al-Qaeda. LeT is a proscribed organisation which seeks the detachment of that part of Kashmir below the line of control from India by violent means. The Security Service allege that the appellants have provided LeT with financial support, are committed Islamist extremists and may have undertaken terrorist training. None of the appellants has yet provided any open answer to

these allegations. The confidential judgment contains a statement by Miss Weston of all that they are prepared to say at this stage about them.

7. It is contended on their behalf that to do so at this stage would place them in grave danger. In an undated statement Ali Dayan Hasan, the Pakistan director of Human Rights Watch, has set out the background to these claimed fears. Mr. Hasan has given evidence in a previous SIAC case (*Abid Naseer & Others v. SSHD* SC/77/80/81/82/83/2009), and was found to be an impressive and knowledgeable witness: see paragraph 32 of the open judgment. We have no reason to revisit that view in respect of the report which he has prepared for these proceedings. He states that the Inter-Services Intelligence Agency (ISI), the Pakistani Security Service, acts with impunity. Al-Qaeda suspects are "still routinely disappeared". There is a long-standing connection between the ISI and the LeT. In the 1990s, the LeT operated a campaign of fear and harassment in Kashmir which included the mutilation of informers. In Mr. Hasan's opinion, the appellants have a legitimate and real fear about giving detailed instructions on the national security case via unsecured electronic communication devices and whilst remaining in Pakistan. Both the ISI and LeT would take an adverse interest in them. Any fear about the LeT would be "well justified" because of the proximity of the family home to the LeT compound in Muridke. When, on the first day of the hearing of the preliminary issue, we expressed the view that that may depend upon the nature of the appellants' answer to the allegations and that it was not clear from Mr. Hasan's report whether they had told him what it was, he produced a short supplemental report. By implication, he accepted that they had not told him what their answer was, but confirmed that his report was predicated on the understanding that they would be "responding substantively to the national security allegations relating to any alleged involvement in the LeT or AQ".

8. All of the appellants, and in particular S1, complain about the difficulty of dealing with the case from Pakistan and of communicating with their solicitors. A number of visits have been made to Pakistan by different members of Birnberg Peirce and Partners and detailed instructions were obtained about the statelessness issue and, for the purpose of this hearing, about the difficulties of conducting their case from Pakistan. Sarah Kellas, the solicitor with the conduct of their cases has set out those difficulties: she cannot reassure them that remote communication is secure and so has endeavoured to take instructions by visiting Pakistan and conducting face to face meetings. Difficulties have been experienced in establishing a relationship of trust between her firm and the appellants. S1, in his fourth statement, said that he suspected one member of the firm of being from the British Security Services. Provisional concerns have been expressed by Miss Harrison about the personal safety of herself and, if he thinks it necessary to take personal instructions from the appellants, that of Mr. Cory-Wright QC, their leading special advocate (who is still free to see them because he has not yet seen any closed material).

9. A, the youngest son of S1 and NBS has been diagnosed with global developmental delay and was, while in the United Kingdom, the subject of a statement of special educational needs. He is now fifteen but, according to

NBS, remains dependent upon her and S1 for emotional and practical support. She says that he has no hope of education in Pakistan. She wishes to return to the United Kingdom – but only with her husband and family. She suffers from diabetes and has mobility problems. She does not feel able to return on her own, with or without A.

A simple answer

10. SIAC's jurisdiction to hear this appeal is conferred and limited by section 2B of the Special Immigration Appeals Act 1997:

> "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)…"

Section 40A of the 1981 Act provides:

> "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) Sub-section (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or in part in reliance on information which in his opinion should not be made public –
>
> (a) in the interests of national security…."

11. The meaning and effect of these provisions is clear: a person given notice of the Secretary of State's decision to make a deprivation order – which must precede the making of the order – has a right of appeal against the decision. In a case, such as this, in which the Secretary of State has certified that the decision was taken wholly or in part in reliance on information which should not be made public in the interests of national security, the appeal is to SIAC. But, like the right of appeal to the First Tier Tribunal which it replaces, the appeal to SIAC is against the decision to make the deprivation order. It is not against the deprivation order.

12. The appellant's complaints under the statutory scheme are twofold: they were not told in the decision notice that they had a right to return to the United Kingdom before the deprivation order was made and to appeal from within the United Kingdom against that decision and/or order; and the timing of the making of the deprivation order made it impossible for them to exercise that right.

13. There are two simple answers to those submissions:

(i) There is no statutory requirement for the information suggested to be included in the decision notice. The only requirements are those set out in section 40(5) of the 1981 Act: it must specify that the Secretary of State has decided to make an order, the reasons for the order and the right of appeal. The notices served on the appellants contained this information. They also contained an additional statement, based on rule 8(1)(b)(ii) of the SIAC Procedure Rules 2003: that "any notice of appeal must be given to the Commission no later than 28 days after you have been served with this notice". Given that the Secretary of State correctly anticipated that the appellants would be abroad when the decision notice was served, this information was both helpful and accurate. *E1 v. SSHD* [2012] EWCA Civ 357, (in which a notice was held by the Court of Appeal to be a nullity because it stated incorrectly, that the appellant could only appeal against the decision to vary, by cancellation, his leave to remain from outside the United Kingdom) is distinguishable. The decision of the Court of Appeal was founded on the premise, established by *SSHD v. MK (Tunisia)* [2011] EWCA Civ 333 that section 3D of the Immigration Act 1971 gave to E1 the right, within 10 days, to return to the United Kingdom and to appeal against the decision from within the United Kingdom. Regulation 4(3)(b) of the Immigration (Notices) Regulations 2003 required the notice to state whether an appeal may be brought while in the United Kingdom. Because the notice contained the erroneous statement that E1 could not appeal from within the United Kingdom, it was a nullity. Except that, if the appellants had returned to the United Kingdom before the deprivation order was made, they would have had a right to appeal against the decision notice from within the United Kingdom, none of that reasoning applies here. Nothing in the statutory scheme, which is entirely contained in sections 40 and 40A of the 1981 and regulation 10 of the British Nationality (General) Regulations 2003 make similar provision to that contained in section 3D of the 1971 Act and regulation 4(3)(b) of the Immigration (Notices) Regulations 2003. An omission to state in a notice something which the statutory provisions do not require cannot make the notice invalid.

(We have dealt with this aspect of the submissions of Miss Harrison and Miss Weston on the assumption that we have jurisdiction to deal with the validity of the notice. If we do not, this challenge could only be made in judicial review proceedings, as in *E1*).

(ii) The appellants' real complaint is about the timing of the making of the deprivation order – before the appellants in fact realised that the decision to deprive them of British citizenship had been made. Unless SIAC has jurisdiction to consider the timing of the making of the deprivation order as part and parcel of the decision to make the order, it cannot have jurisdiction to determine an appeal against the timing and its consequence. The statutory scheme provides for two distinct steps: the making of a decision and the making of an order. The latter can only be made after the former has been made and notice of it served. In principle, taking, or omitting to take, an anticipated but subsequent

step in a statutory process cannot invalidate an earlier decision lawful when made: see paragraphs 51, 66 and 75 of *Patel v. SSHD* [2012] EWCA Civ 741. Our task is to determine an appeal against the decision to make a deprivation order. We do not have jurisdiction to determine a challenge to the timing of the order. Further, even if we did, it is difficult to see how a decision, lawful when made, could be made unlawful by the timing of a subsequent order.

14. No application for leave to enter has been made by the appellants. If they were to do so, it is likely – in our view inevitable – that the Secretary of State would, in the exercise of prerogative powers, exclude them from the United Kingdom on conducive grounds, so that an entry clearance officer would be bound to refuse leave to enter under paragraph 320(6) of the Immigration Rules. In that event, SIAC would have jurisdiction to entertain an appeal against that decision. But unless and until such a decision is made, SIAC has no jurisdiction to entertain a challenge to the "refusal" of the Secretary of State to facilitate the return of the appellants to the United Kingdom pending determination of their appeal.

A more complex answer

15. On the assumption (which, for reasons expressed above we do not believe we are entitled to make) that the decision to deprive the appellants of citizenship and the making of the order doing so are to be treated as a composite decision, permitting us to review every aspect of it, we need to consider the lawfulness of the order under domestic, EU and ECHR law. Miss Harrison and Miss Weston made written submissions (which they did not develop fully in their oral submissions, pending the decision of the Court of Appeal in *G1 v. SSHD* [2012] EWCA Civ 867, which was handed down on 4th July 2012) to the following effect:

    The sequencing and timing of the service of the decision notice and the making of the order were

    (i) contrary to the statutory provisions and purpose, in particular section 40A(3)(a) of the 1981 Act.

    (ii) procedurally unfair at common law.

    (iii) procedurally unfair under Article 8.

    (iv) procedurally unfair under EU law.

    (v) amounted to an abuse of process (subsequently refined to an abuse of power).

    (vi) unlawfully discriminatory under EU law.

    (vii) unlawfully discriminatory under Article 14 ECHR.

16. Each of these submissions was determined – as part of the ratio decidendi – by the Court of Appeal in *G1*. The principal judgment was given by Laws LJ.

Subject to one qualification, which is immaterial for present purposes, Rix LJ agreed with his judgment and Lewison LJ agreed with both judgments. The answers given by the court to the seven propositions set out above were as follows:

(i) The statutory scheme, in particular section 40A(3) did not prohibit the Secretary of State from excluding an appellant from the United Kingdom or require her to facilitate his return (paragraphs 12 – 16).

(ii) The common law does not presume a right to be present at a statutory appeal, even one in which an appellant suffers from perceived procedural disadvantages (paragraphs 22 – 24).

(iii) & (vii)

The case has nothing to do with Article 8 ECHR and Article 14 has no application (paragraph 54)

(iv) EU procedural requirements do not apply to the appeal (paragraph 42). Further, even if they do, they do not entitle the appellant to be present at his appeal (paragraph 27).

(vii) In consequence, EU anti-discrimination provisions do not apply (paragraph 51). We also share the doubts of the court, expressed in paragraph 52, whether any difference in treatment between the appellant and an alien whose leave to remain has been cancelled constitutes discrimination. If compelled to do so, we would have rejected this argument on that ground alone.

17. Miss Harrison and Miss Weston also submitted that, if the Secretary of State had a policy or pursued a practice of waiting until an individual had voluntarily departed from the United Kingdom before taking the steps necessary to deprive him of his British citizenship, that policy or practice would be unlawful. Assuming, without deciding, that SIAC has jurisdiction to determine that issue, we reject their submission. It cannot be unlawful for the Secretary of State to make a decision and to implement the decision by making an order in circumstances expressly authorised by Parliament: as the Court of Appeal explained in *G1*, the Secretary of State is entitled to decide to deprive an individual of British citizenship and then to make a deprivation order even if, by reason of the fact that he is abroad when both steps are taken, he cannot appeal against the decision from within the United Kingdom. Further, on the facts of this case, there is nothing to indicate that the Secretary of State deliberately waited until the appellants had left the United Kingdom before making the decision. They left voluntarily in October 2009. The decision was not made until 31st March 2011. For the argument to succeed, it would have to be the case that the Secretary of State could not lawfully make a decision and/or give effect to it by a deprivation order, unless the individual concerned was within the United Kingdom when the decision was made and notified or, if not, when the order was made. There is no warrant in the statutory scheme for the imposition of such a restriction on the Secretary of State's power, nor any reason to believe that Parliament intended that one

should apply. The Secretary of State may not know where an appellant is, when the decision is made – hence, the provision referred to above for service by post to a person at his last known address, when his whereabouts are unknown. Further, Parliament cannot be taken to have intended that the Secretary of State should be disentitled to deprive of citizenship a dual national convicted of a serious crime in the country of his other nationality and imprisoned there. Parliament cannot have intended that the Secretary of State should be compelled to await the conclusion of his sentence before depriving him of citizenship or – as might happen – risk the country of his other nationality depriving him of citizenship first, so throwing the burden of protecting the public in the United Kingdom from him on the authorities of this country.

A yet more complex answer

18. Miss Harrison and Miss Weston submit that, to uphold the rights of NBS and A as citizens of the European Union, it is necessary, and a requirement of Union law that the appellants, and in particular S1, should have the right to conduct their appeal while personally present in the United Kingdom. Because, if the reasoning set out above is correct, domestic law does not give them that right and because neither SIAC nor the High Court has the power to order the Secretary of State to facilitate the return of the appellants, their appeal must be allowed. The proposition is founded on the trilogy of Luxembourg cases, *Ruiz Zambrano v. Office National de L'Employ* (ONEm) C-34/09, *McCarthy v. Secretary of State for the Home Department* C-434/09 and *Dereci v. Bundesministerium Fur Inneres* C-256/11. The current position of the Luxembourg Court is summarised in paragraph 74 of *Dereci:*

> "…EU law and, in particular, its provisions on citizenship of the Union, must be interpreted as meaning that it does not preclude a member state from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the member state of which he has nationality, who has never exercised his right to freedom of movement, provided that such refusal does not lead for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union…"

Thus, depriving young children of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union by the removal of the only people able to look after them – their non-citizen parents – would infringe that right: see the outcome in *Zambrano.*

19. The Luxembourg Court has not yet, however, considered the position of adults who have been excluded by a member state for reasons of its national security. The Court may give some guidance on that issue in answering the question referred to it by the Court of Appeal in *ZZ v. SSHD* [2011] EWCA Civ 440, though the issue does not arise directly. We do not accept that the requirements of EU procedural law trump the protection of national security by a member

state, for the reasons explained by SIAC in *M1 v. SSHD* SC/101/2010 and by Maurice Kay LJ in *ZZ* at paragraphs 16 – 19. If, which we doubt, they have any part to play, a balance would have to be struck between the two competing requirements. The UK Parliament has decided where the balance is to be struck in section 40 of the 1981 Act and in the SIAC (Procedure) Rules 2003. It would require an unequivocal decision of the Luxembourg Court before a UK Court or this Commission, could hold that they were contrary to EU law. No such decision has been made.

20. The submission is not that S1 must be permitted to return to the United Kingdom to permit NBS to do so and to permit both of them to look after A – an issue which will arise in the substantive appeal and can be determined within it – but that, to avoid the denial of genuine enjoyment of the substance of their rights as Union citizens, either S1 or all of the appellants must be permitted to conduct their appeal from within the United Kingdom: to ensure the substantive rights of NBS and A, procedural rights must be conferred on (or upheld in respect of) others – the appellants. Even if this proposition is in principle sound, which we do not accept, it creates a further problem to which we can see no ready answer. It is not obvious that NBS and A would be denied the genuine enjoyment of the substance of the rights conferred by their status as citizens of the Union by the lack of opportunity for the appellants to conduct their appeal from within the United Kingdom. Before any judgment could be reached upon that issue, the following questions would have to be determined: whether NBS and A could not live in the United Kingdom without S1 and/or the other appellants; whether the appellants are genuinely inhibited by fear or other difficulties in conducting their appeal from Pakistan; and in either event, whether, balancing the national security of the United Kingdom against the interests of the individuals concerned, the appellants should be allowed to return to conduct their appeal. None of these questions can be determined without a hearing at which the various propositions would be tested. How is that hearing to occur? Must the appellants be permitted to return to conduct it and to participate in it in the United Kingdom? The proposition creates an unbreakable circle or procedural maze through which there is no path to an exit.

21. SIAC is under no obligation to resolve this conundrum. Its task is to determine whether or not the Secretary of State's decision to deprive the appellants of British citizenship was justified and proportionate, having regard to the interests of the individuals affected by the decision. It will do so under the statutory regime laid down in Parliament in the 1981 Act and in the 2003 Procedure Rules.

Miss Harrison and Miss Weston's further submissions

22. In further written submissions dated 11th July 2012 Miss Harrison and Miss Weston submit that the decision and reasoning of the Court of Appeal in *G1* is not, on the facts of this case, determinative of the issues identified in paragraph 16 above. The argument rests on the claim that, by reason of the circumstances set out in paragraph 7 and 8 above, it is impossible for the appellants to give instructions about the substance of the case against them. We do not accept that submission. The Court of Appeal decided that an appeal from abroad by a former British citizen against the decision to deprive

him of British citizenship must be conducted under the statutory scheme; and that the statutory scheme was compliant with domestic law and, to the extent that they were engaged at all, with EU and ECHR law.

23. Miss Harrison and Miss Weston also submit that the decision to deprive the appellants of British citizenship exposed them to a risk of ill-treatment or worse such as to put the United Kingdom in breach of its obligations under Article 2 and 3 ECHR. This is a substantive issue, which raises as yet unargued questions about the existence and extent of any duty owed under Articles 2 and 3 to a British citizen resident outside the territory of the United Kingdom and of any area under its control; and, if such a duty exists, whether the decision of the Secretary of State caused the United Kingdom to be in breach of it. These are issues for determination at the substantive hearing, not now.