STATELESSNESS
Case Law Database

United Kingdom - E3, N3 and ZA v Secretary of State for the Home Department

Two of the applicants, E3 and N3, were deprived of their British citizenship by the defendant, the Secretary of State for the Home Department. Following the determination of the Special Immigration Appeals Commission ("SIAC") in similar cases, the defendant withdrew her deprivation decisions against the applicants, whose citizenship was reinstated.

During the period of deprivation, the third applicant, ZA, who is the daughter of one of the applicants, was born. The applicants claimed that ZA should be automatically entitled to British citizenship. The court held that the child of a British citizen born during a period in which her father had been deprived of his citizenship (which was later reinstated), was not automatically British at birth, as the decision to reinstate the father's citizenship did not have retroactive effect.

Case name (in original language) : United Kingdom - E3, N3 and ZA v Secretary of State for the Home Department
Case status: Decided
Case number: [2022] EWHC 1133
Citation: E3, N3 and ZA v SSHD [2022] EWHC 1133 (QB)
Date of decision: 13/05/2022
State: United Kingdom
Court / UN Treaty Body: The High Court of Justice Queen's Bench Division Administrative Court
Language(s) the decision is available in: English
Applicant's country of birth: Bangladesh
Applicant's country of residence: United Kingdom
Legal instruments: 1961 Statelessness Convention
Key aspects: Acquisition of nationality, Childhood statelessness, Deprivation of nationality
Relevant Legislative Provisions:

Convention on the Reduction of Statelessness 1961

British Nationality Act (BNA) 1981:

- Section 1(1)(a) of the BNA 1981 provides that a person born in the United Kingdom after 1 January 1983 shall be a British citizen if at the time of birth, one of their parents is a British citizen.
- Section 2(1)(a) of the BNA 1981 provides that a person born outside the United Kingdom after 1983 shall be a British citizen if at the time of birth, one of their parents is a British citizen otherwise than by descent.
- Section 11 provides that if that an individual became a British citizen after 1983 their parents' status is irrelevant.
- The BNA 1981 provides that the Secretary of State may by order deprive a person of their British citizenship if the Secretary of State is satisfied that deprivation is conducive to the public good (Section 40(2)) or where registration or naturalisation was obtained by means of fraud, false representation, or concealment of a material fact (Section 40(3)). Section 40(4) provides that the Secretary of State may not make an order depriving a person of their British citizenship if the order would make a person stateless.
- Section 40A provides that a person who is given notice of a decision to make an order of citizenship deprivation may appeal against the decision to the First-tier Tribunal.

Special Immigration Appeals Commission (Procedure Rules) 2003 (SI 2003 No 1034)

- Section 11A provides that an appellant may withdraw an appeal or application for review.

Facts

Two of the applicants, E3 and N3, were both British citizens when, on 5 June and 31 October 2017, the defendant issued an order depriving them of their citizenship under section 40 of the British Nationality Act (BNA) 1981. At the time, the defendant believed they would not be made stateless because she had assessed them to also be Bangladeshi nationals.

Appeals to the Special Immigration Appeals Commission (SIAC) by both applicants were upheld in November 2018, as it was found that their Bangladeshi nationality

had automatically lapsed at the age of 21 by operation of Bangladeshi law, and, as such, they only had British citizenship at the date of their deprivation. This meant that the defendant's decision had left them stateless, contrary to what is mandated by the BNA 1981. The defendant appealed to the Court of Appeal and the applicants applied for permission to appeal to the Supreme Court.

Meanwhile, the same preliminary issue was being litigated before SIAC in three similar cases and on 18 March 2021, SIAC allowed the appeals on the ground that the deprivation orders rendered the applicants in those other cases stateless (C3, C4 and C7 v SSHD (SC/167/2020)). The defendant decided not to appeal that decision.

Following the SIAC's judgment, the defendant withdrew the deprivation order and stated that the applicants' (E3 and N3) British citizenship had been reinstated. She explained that, at the time of making the deprivation orders, the defendant was not satisfied that the orders would make the applicants stateless and therefore the orders were lawful. The Secretary of State has reconsidered the matter, in light of SIAC's analysis of the statelessness issue and the evidence before SIAC, which was not available at the time the orders were made. Thus, the Secretary of State was satisfied that the deprivation orders did make N3 and E3 stateless, and accordingly the decisions were withdrawn and the applicants' citizenship was reinstated.

On 10 June 2019, the third applicant, ZA, was born to her father E3 in Bangladesh in 2019. If her father were a British citizen at the time, ZA would be a British citizen by descent.

Legal arguments by the applicant

The applicants argued that the status quo ante is restored: on ordinary principles a decision that has been withdrawn ceases to have effect and is deemed never to have had effect. The applicants emphasised that the rights and entitlements under the relevant provisions of the BNA 1981 are automatic, and that, if the deprivation order is no longer in existence, those rights spring back. There is no power in the defendant to "reinstate" British citizenship: it flows as a matter of entitlement.

Further, the applicants argued that a successful appeal causes a condition precedent to the making of a deprivation order (the decision under section 40(5)) to be set aside because there is no legal basis for it. The applicants also relied on the prohibition in Article 8(1) of the 1961 Convention in further support of his overarching contention that the defendant's decisions were unlawful. Finally, the

applicants argued that if the defendant were right, E3 and N3 would be left without a complete and effective remedy.

Legal arguments by the opposing party

The Secretary of State claimed that the SIAC's statelessness determination did not render the deprivation decisions null and void, and revoking the decisions was a matter for her, after which citizenship would be reinstated.

The Government’s legal team reasoning was that when the orders were made, the defendant believed N3 and E3 would not be made stateless but that following extensive litigation over the past few years, involving voluminous expert evidence, her view had now changed and she was no longer satisfied that depriving N3 and E3 from their British citizenship would not leave them stateless. She argued that the statutory test was not one of fact (that the decisions had left them stateless) but one of state of mind (that she was satisfied that the decisions had not left them stateless) at the time of deprivation. In addition, the Secretary of State noted that E3 could seek to apply to register ZA as a British citizen under the discretionary provisions of the BNA 1981, relying on the exceptional circumstances of the case.

Moreover, the Secretary of State argued that Article 8 of the 1961 Convention does not contain any absolute prohibition against nationality deprivation. It does not address the administrative and legal procedures a contracting state may enact to comply with its international obligations.

Decision & Reasoning

The court notes that this claim for judicial review raised an important question of principle: Was the legal effect of the defendant's withdrawal decision prospective only (the defendant's analysis) or was it retroactive in the sense that it should be treated as never having been made (E3's and N3's analysis)?

The court discussed how the defendant withdrew the deprivation orders and/or the decisions to make such orders in consequence of SIAC’s determination in the cases of C3, C4 and C7 and her decision not to appeal that determination. The final sentence of the letters – "your citizenship has been reinstated” – reflects a practical rather than any legal reality. Certain administrative steps may have had to be taken, but the legal consequence of the withdrawal of the deprivation order was that certainly from the moment E3 and N3 could assert their underlying entitlements

conferred elsewhere in the BNA 1981. It is clear that the defendant's intention was to "reinstate" the citizenship of E3 and N3 with prospective effect only.

The court did not find anything in the SIAC's judgment on the case C3, C4 and C7 which should compel the defendant, to accept that withdrawal must have retroactive effect. In this case, the SIAC was not addressing any temporal question, and nothing therefore turns on the use of the past tense.

The fact that before making a deprivation order the Secretary of State must be satisfied that the order will not render the appellant stateless requires a degree of investigation by the Home Office and thus provides a safeguard in respect of citizenship rights. The only condition precedent to the exercise of power is that the defendant is (reasonably) satisfied at the first stage. On the premise that the condition precedent was not put in issue on appeal, in the event that an appeal before SIAC is successful that condition precedent is not displaced; rather, a conclusion has been reached at the second stage that the defendant came to the wrong factual conclusion. Therefore, this undermines the applicants' argument.

The applicants argued that section 40(4) of the BNA 1981 (which prohibits citizenship deprivation if it results in statelessness), which reflects Article 8 of the 1961 Convention, is an absolute prohibition. The court found this to overstate the effect of the international obligation. The 1961 Convention requires contracting states to make executive decisions which reflect these obligations and section 40(4) is entirely loyal to this. If the executive makes an erroneous decision which is corrected on appeal, there is nothing in the 1961 Convention which requires the retroactive effect of the revocation of the decision to the moment it was made. Nor is there anything in the Convention which prevents a contracting state from excluding a person from its territory whilst the issue is being litigated.

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

The court noted that retroactive withdrawal (whether at the defendant's instance or following an adverse decision by SIAC in the particular case) should be reserved for

situations where perversity, unfairness or bad faith has been found. In such situations, the overall public interest militates in favour of this sort of exceptional response. These were the situations no doubt contemplated by Parliament during that brief period in which SIAC was empowered to direct the Defendant to treat the decision at issue as never having had effect.

Notably, the court commented that the impact of the decision on ZA was ‘somewhat harsh’, describing her as ‘entirely blameless’ but that the defendant may decide how she wishes to deal with any application by the child to be registered as a British citizen and, in particular, the payment of the fee.

Decision documents

E3, N3 and ZA v SSHD [2022] EWHC 1133 (QB)

Outcome

The claims for judicial review were dismissed.

Caselaw cited

C3, C4 and C7 v SSHD (SC/167/2020)

Home Secretary v Al-Jedda [2012] EWCA Civ 358, [2013] UKSC 62; [2014] AC 253

R (G1) v SSHD [2012] EWCA Civ 867; [2013] QB 1008.

R (Akinola) v Upper Tribunal [2021] EWCA Civ 1308; [2022] 1 WLR 1585

SSHD v E3 and N3 [2019] EWCA Civ 2020; [2020] 1 WLR 1098

R (Begum) v SIAC [2021] UKSC 7; [2021] AC 765

Ciceri v SSHD ([2021] UKUT 00238 (IAC)

Liversidge v Anderson [1942] AC 206.

B2 v SSHD [2013] EWCA Civ 616, [96]

Khawaja v SSHD [1984] AC 74

A v HM Treasury [2010] UKSC 2; [2010] 2 AC 534

R (Guled) v SSHD [2019] EWCA Civ 92

R (DN (Rwanda)) v SSHD [2020] UKSC 7; [2020] AC 698

R (George) v SSHD [2014] UKSC 28; [2014] 1 WLR 1831

R (Majera (formerly SM (Rwanda)) v SSHD [2021] UKSC 46; [2022] AC 461