T2/2014/3560

Neutral Citation Number: [2015] EWCA Civ 1410
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
(MR JUSTICE IRWIN, UPPER TRIBUNAL JUDGE JORDAN, MR CHRISTOPHER GLYN-JONES)

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 3rd December 2015

B E F O R E:

LORD JUSTICE LAWS

LORD JUSTICE LEWISON

LORD JUSTICE BEATSON

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"L1"

Claimant/Appellant

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant/Respondent

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(Official Shorthand Writers to the Court)

Mr M Chamberlain QC (instructed by Birnberg Peirce) appeared on behalf of the **Appellant**
Mr J Glasson QC (instructed by the Treasury Solicitor appeared on behalf of the **Respondent**

J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE LAWS: This is an appeal with permission granted by Richards LJ on 5th February 2015 against a decision of the Special Immigration Appeals Commission ("SIAC"), Irwin J presiding, given on 4th August 2014. There is also by direction of Richards LJ an associated application for permission to seek judicial review, as regards which we shall as necessary constitute ourselves as a Divisional Court of the Queen's Bench Division. I will explain these procedural niceties shortly.

2. SIAC's judgment contains a crisp outline of the bare facts of the case as follows:

> "1. The Appellant entered the United Kingdom in June 1991 at the age of 20. He came from the Sudan and is a Sudanese national. He successfully claimed asylum and was granted exceptional leave to remain ['ELR'] in 1993 and indefinite leave to remain ['ILR'] in 2000. In 2003 he became a naturalised British citizen and acquired the right of abode. He remained in the UK for periods from 2003 to 2009, but with extended periods spent in Sudan. He has a wife and five children, the first four born in the UK and the fifth born in Sudan in May 2011."

I should interpolate to say that Mr Chamberlain QC, for the appellant, showed us material by which the appellant asserts that his permanent home has been in the United Kingdom since 1998. Irwin J continued:

> "2. In May 2010 a submission was put to the Home Secretary asking her to make a decision in principle that the next time the Appellant left the UK he would be deprived of his British citizenship and excluded from the country. On 21 June 2010 the Home Secretary took such a decision in principle. That deprivation and exclusion was to be put into effect if and when the Appellant left. On 3 July 2010, the Appellant and his family did leave the UK to fly to Sudan intending to remain there on his account, for the duration of the school holiday. On Monday 5 July, a second submission was written for the Home Secretary requesting that the decision in principle should be put into immediate effect. On 6 July the Home Secretary signed a notice of decision to make a deprivation of citizenship order and on Monday 12 July a deprivation of citizenship order was signed. On the same day the Home Secretary personally took the decision to exclude the Appellant from the UK, on the grounds that his presence was not conducive to the public good. The order was finalised on the following day."

3. Irwin J stated the central issue in the case thus at paragraph 15:

> "Was it lawful and within the powers of the SSHD, on the facts of this case, to await the departure of the Appellant from the United Kingdom and then to serve notice of deprivation of citizenship and notice of exclusion from the United Kingdom followed by the making of an order depriving him of citizenship and an order excluding him from the United Kingdom, with the intention that the Appellant should remain out of the United Kingdom during the currency of his appeals."

4. There has been in this case what Irwin J was to call a "complex web of litigation". It is summarised at paragraphs 3 to 14 of his judgment. It included a hearing in this court on 4th February 2013 when I expressed concern at material tending to indicate facts which underlie what has now become the central issue in this case. The procedural upshot has been that the SIAC judgment now appealed before us dealt in effect with the single issue identified, as I have shown, at paragraph 15 of the judgment. It did so under two procedural heads: the determination of a preliminary issue in an appeal by the appellant against the deprivation of his British citizenship, and also as an application to SIAC for a statutory review under section 2C of the Special Immigration Appeals Commission Act 1997, as amended by the Justice and Security Act 2013. The review was of the Secretary of State's decision to exclude the appellant from the United Kingdom. Following Richards LJ's ruling, we deal with the former as a Divisional Court determining an application for judicial review permission and we grant permission; we deal with the latter as an appeal to this court in the ordinary way.

5. The preliminary issue raised the question whether it was an abuse of power for the Secretary of State to act as she did because to her knowledge her action deprived the appellant of an in-country right of appeal against deprivation of citizenship to which it is said by statute he was entitled. The application to set aside the Secretary of State's certificate relating to the appellant's exclusion from the United Kingdom in effect raises the same issue.

6. The foundation of the Secretary of State's actions complained of in these proceedings has its origin in a recommendation from the Security Service to the Home Office that the appellant should be deprived of British nationality and excluded from the United Kingdom on the ground that his presence here was not conducive to the public good. The recommendation is referred to in the third witness statement of Mr Philip Larkin, head of an unit within the Office for Security and Counter Terrorism at the Home Office. He gave oral evidence before SIAC, as he had in other cases. Irwin J indicated at paragraph 18 that the Commission found him to be a "scrupulous and honest witness". In his third witness statement he said that the Security Service recommendation informed the Home Office that the appellant was:

> "6. ... a long term subject of interest of the Security Service and was assessed to be a committed Islamist extremist who over a significant period of time, had been involved in a range of terrorist, extremist and other illegal activities, both in the UK and overseas. It was further assessed that he was an associate of a wide range of significant Islamist extremists, both in the UK and worldwide.
>
> 7. The recommendation letter also set out that L1 had largely resided in Sudan since 2005. He had travelled to the UK in 2009 with one of his wives and it was assessed that he intended to remain in the UK permanently. The Security Service were concerned that L1 would seek to increasingly use the UK as a platform from which he would be able to engage in terrorism-related activity and support the activities of other extremists. Accordingly, the Security Service assessed that the deprivation of L1's British nationality and his exclusion from the UK

would be in the interests of national security by disrupting the risk which L1 posed in the UK."

7. Irwin J referred to the first submission that had been made to the Secretary of State on 26th May 2010 by the Deputy Director of Special Cases at the UK Border Agency to the effect that the appellant should be deprived of his citizenship when he left the UK and then excluded from the country. Irwin J continued:

> "23. In further detail, the Home Secretary was informed that L1 was a committed extremist with a significant period of engagement and a broad range of 'terrorist, extremist and other illegal activities both in the UK and overseas'. The submission recorded that the national security case against him was 'strong'. The Security Service assessment was that deprivation and exclusion would be conducive to the public good and 'would further have a disruptive effect upon his activities and ability to engage in terrorism-related activity in future'. The team making the submission had considered a number of factors to assess whether the recommended action was appropriate. Those considerations were set out in an annex but:
>
> '... in summary these include the nature and strength of his connections to the UK – including whether depriving him of British citizenship would render him stateless; whether his family living in the UK, including those who are British citizens; the strength of his continuing links to Sudan; ECHR issues – [L1] has serious (potentially terminal if untreated) health problems and our action will deny him access to NHS medical treatment; the potential community reactions in the UK to [L1's] deprivation and exclusion; and issues relating to the UK's relations with Sudan and foreign relations generally.'"

Irwin J continued at paragraph 24:

> "The conclusion was that the risk L1 posed to the UK national security outweighed any of the contrary issues identified."

8. Much consideration was given to the appellant's personal circumstances and to the means of giving him notice of the intention to deprive him of citizenship. At length, on 21st June 2010 the Secretary of State took the decision to deprive, at least to exclude in principle, intending that those actions be put into effect if and when the appellant left the country, and so they were. Mr Larkin gave evidence as to the implications of the alternative course of action, namely to deprive the appellant of his citizenship whilst still within the United Kingdom and thereafter to deport him. He said:

> "The practical effect of this would likely have been to confine L1 to the UK for a period of years pending any appeal, during which time his presence in the UK would be likely to continue to pose a risk to national security."

9. At paragraphs 4 and 5 of his second witness statement Mr Larkin said this:

> "As set out in PL1, the Security Service assessed that L1 intended to remain in the UK more permanently and it was considered that L1 could seek increasingly to use the UK as a platform from which to engage in terrorism-related activities. The operational objective of serving the deprivation notice while L1 was abroad was to mitigate the risk of L1 establishing himself in the UK in order to use the UK as a platform for terrorist-related activities."

The passage is cited by Irwin J at paragraph 37.

10. The steps taken to notify the appellant of the decision to deprive are described by SIAC as follows:

> **"46. As indicated, the Secretary of State took the decision and signed the notice of intention to make a deprivation order herself on 6 July 2010, authorising an official to sign the actual deprivation order on her behalf, once the Notice of intention had been served on the Appellant. As Mr Larkin outlines in his second witness statement, a UKBA official in Khartoum attempted on several occasions during 7 and 8 July to make telephone contact with the Appellant via a mobile telephone number. These efforts were unsuccessful.**
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> 47. On 9 July, under cover of a letter dated 8 July, the notice of intention to deprive was posted to the Appellant at his last known address in London. The notice and appeal forms were sent by recorded delivery and duplicates sent to the same address in the normal first class post. On 12 July, acting on the belief that at least the duplicate notice of intention sent by first class post would have been left at the Appellant's address in accordance with the regulations, Mr Larkin signed the order to deprive the Appellant of his British citizenship. Later the same day the Home Secretary had made the decision to exclude the Appellant and on the following day, 13 July, a further letter was sent to the Appellant at the London address indicating that he had been excluded.
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> 48. On 13 July also, Mr Larkin contacted the Appellant's brother in the United Kingdom and advised the brother of the action that had been taken, indicating that the Appellant should move promptly to appeal against the decision if he wished to do so. The brother was advised of the 28 day time limit, and was asked to relay the message to the Appellant."

11. In his witness statement of July 2013 Mr Larkin said that the Secretary of State:

> "... does not have a policy of deliberately waiting for individuals to leave the UK before depriving them of their nationality, although she has the discretion to do so where this is in the public interest. In this particular

> case the Secretary of State did make a deliberate decision to wait for L1 to leave the UK before making the final decision, but to date this is the only case in which that has occurred."

12. At paragraphs 53 to 56 (see also paragraphs 60 to 61) Irwin J set out or described the relevant statutory provisions contained in the British Nationality Act 1981 as amended, the Nationality, Immigration and Asylum Act 2002 and the Special Immigration Appeals Commission Act 1997, dealing with deprivation by the Secretary of State of British citizenship and appeals against decisions to that effect.

13. An order excluding a person from the United Kingdom is not made under statute but under the Royal Prerogative. Section 2C of the 1997 Act as amended provides that review of an exclusion order made on "conducive" grounds goes to SIAC.

14. I need not repeat the terms of all the statutory provisions here since it was and is accepted that all technical or procedural requirements have, on the face of it, been complied with. Irwin J said this at paragraph 64:

> "For all those reasons the Secretary of State argues that all technical provisions including the notice provisions, were complied with. In essence, this is not challenged by the Appellant. The challenge in the case is that technical compliance was achieved by manipulation of the process, which was intended to and did deprive the Appellant of the advantages, perceived or real, of an in-country appeal. It is the tactical approach to the technicalities of the legislation and regulations, it is said with that intention, which it is submitted to be an abuse of power."

15. There is no doubt but that a person who is notified of a decision by the Secretary of State to deprive him of British citizenship enjoys an in-country right of appeal if he is in this country when he invokes the appeal right. The decision to deprive is treated as appealable under section 82 of the 2002 Act, section 78 of which prohibits the removal of such an appellant from the United Kingdom while the appeal is pending.

16. The practical advantages of an in-country appeal, about which Mr Chamberlain addressed us this morning, are no doubt obvious but have in any case been recognised in this court, as have the relative disadvantages of an appeal conducted from abroad: see E1 (Russia) [2012] EWCA Civ 357, paragraphs 29, 39 and 43; MK (Tunisia) [2010] EWHC 2363; and BA (Nigeria) [2009] QB 666, per Sedley LJ at paragraph 21. It has been held, however, that an out of country appeal meets necessary standards of fairness: see, for example, Kiarie [2015] EWCA Civ 1020. As Mr Chamberlain was at pains to emphasise, that case was concerned specifically with the procedural requirements of Article 8 and Mr Chamberlain submits that there are features of the case which do not apply here. So far as it goes, that is no doubt right.

17. Before making a deprivation order the Secretary of State must give written notice to the person in question of his decision to do so with reasons and reference to the right of appeal to SIAC (section 40(5) of the 1981 Act, to which I will return shortly). The

duty to notify is regulated by paragraph 10 of the British Nationality (General) Regulations 2003. That provides:

> "10 - (1) Where it is proposed to make an order under section 40 of the Act 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 -
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> (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;
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> (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.
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> (2) If a notice required by section 40(5) of the Act is given to a person appearing to the Secretary of State or, as appropriate, the Governor or Lieutenant-Governor to represent the person to whom notice under section 40(5) is intended to be given, it shall be deemed to have been given to that person.
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> (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 -
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> (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;
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> (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
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> (c) in any other case on the day on which the notice was delivered."

18. It is entirely apparent that, on advice, the Secretary of State deliberately awaited the appellant's departure from the United Kingdom before giving notice of her decision to deprive. When the "in principle" decision was taken on 21st June 2010 it appears that the appellant's whereabouts within the United Kingdom were known to the Home Office.

19. If that course of action was legally objectionable, it was not in my judgment on account of any provision in the statute or the rules creating a limit or restriction on the time that should pass between decision and notice. SIAC's observations at paragraph 88 of Irwin J's judgment are in my view entirely correct. Irwin J said this:

> "We reject the submission that Parliament must have intended a clear time sequence of notice to be followed by decision, giving effective or actual notice to the Appellant or others in his position. The remarkable feature of the sequence of obligations spelled out in the statute and Regulations is precisely that there is no stipulated period between the

> notice and the decision. We accept the analysis of the previous constitution of SIAC that this is a 'simple code'. We do not consider there is a 'right to an in-country appeal', rather provision for an in-country appeal where the individual is, in fact, in the country."

20. In those circumstances in my judgment the Secretary of State's deliberate decision to await the appellant's departure from the United Kingdom before giving notice under the rules cannot be faulted as a failure to follow any express provision in the statutory scheme or code, and as I have made clear the appellant accepts that the requirements of notice have on their face been met.

21. It follows that the appellant's case must inhere in the proposition that the Secretary of State's actions have frustrated the policy or purpose of the measures conferring the right of appeal. Such a case would certainly be made out if it were shown that the Secretary of State had acted so as to deprive the appellant of an in-country appeal for reasons of tactical advantage in the appeal process. That would be an improper motive, and the illegality of such a motive in the context of statutory decision making by a public body needs no authority, though much has been cited. But that is not the factual position here. At paragraph 87 of the judgment, Irwin J states:

> "We accept that the timing of the decision here was determined by reference to national security considerations."

Mr Chamberlain does not demur, indeed he cannot, at that conclusion. We have read SIAC's closed judgment in the case. SIAC reached its conclusions having well in mind all the closed, as well as all the open, material.

22. Though the appellant's case has been put in a number of different ways, in the end there is in my judgment one critical question. Mr Chamberlain was in the course of argument inclined to agree with this formulation: If the Secretary of State proposes to deprive a person of British citizenship, is she obliged to take no steps which would stand in the way of the subject's exercising his right of appeal in country even though in her view, on expert advice, his doing so would or might damage the security of the United Kingdom? In my judgment, statute does not demand an affirmative answer to this question. The procedural provisions relating to appeals do not guarantee an in-country right of appeal.

23. Mr Chamberlain understandably made much of the terms of section 40(5) of the statute. It opens with these words:

> "Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying -
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> (a) that the Secretary of State has decided to make an order ..."

24. These statutes provide, as Irwin J stated at paragraph 88 which I have read, for an in-country appeal where the individual is in fact in this country. That state of affairs is given no different colour or emphasis by the previous provision in section 40(6) which,

as Mr Chamberlain rightly submitted, was altered so that the present statute provides a more convenient process.

25. The relevant provisions do not in my judgment qualify the Secretary of State's powers to deprive an individual of citizenship or exclude him from the United Kingdom where that is proposed to be done for the protection of national security, save only that if the subject launches an appeal while he is in the country he cannot be removed so long as it is pending (section 78 of the 2002 Act). The provisions do not require the Secretary of State to refrain from action whose effect will be that the appeal must be from abroad if the Secretary of State reasonably concludes that such action is required in the interests of national security. The fact that the statutory provisions contemplate -- and Mr Chamberlain again understandably made much of this -- that a person who is suspected or believed to be a danger to national security nevertheless may enjoy an in-country right of appeal does not take the matter any further. No-one suggests that every such person needs to be excluded from the United Kingdom, but it may be that some do.

26. The common law does not demand an affirmative answer to the question which I posed any more than do the statutes. It goes, I hope, without saying that the common law will be very vigilant to ensure that the Secretary of State takes no action whose purpose is to frustrate an in-country appeal for the sake of doing so so as to gain a tactical or procedural advantage; that would be contrary to the ordinarily but vital principle that a public body must not act for an improper purpose. But once it is recognised, as I have held, that the procedural provisions relating to appeals, save only section 78 of the 2002 Act, do not touch the Secretary of State's powers to act for the protection of national security, the Secretary of State's use of those powers for the purpose for which they are given cannot be said to abuse or frustrate the individual's appeal rights.

27. In the course of his tenacious and helpful submissions, Mr Chamberlain submitted that the course taken by the Secretary of State has, or at least may have, prejudiced an Article 3 claim which would have been in the appellant's hands but for the events which have happened. The claim would touch health problems suffered by the appellant. It may be that this dimension of the case will play its part in the substantive appeal in due course, I say nothing about that, but it does not qualify my conclusion that the Secretary of State on the facts here has not frustrated the objects of the appeal legislation. That must be so once it is recognised that the Secretary of State has no duty to secure, far less guarantee, an in-country appeal.

28. Mr Chamberlain also submitted this morning that an especially rigorous approach should be taken to the abuse issue in this case because citizenship is a fundamental status: see Pham [2015] 1 WLR 1591, paragraphs 97 and 98. While that may again colour the substantive appeal, I find it difficult to see how it throws light on the question whether the Secretary of State's actions have frustrated the objects of the relevant legislation.

29. I should add that I do not think that the criminal cases concerning abuse of process assist. This is really a Padfield case (see [1968] AC 997): has the statutory purpose been frustrated? I would hold that it has not, and in those circumstances I agree with the result arrived at by SIAC and would dismiss this appeal.

30. LORD JUSTICE LEWISON: I agree.

31. LORD JUSTICE BEASTON: I also agree.