DEPRIVATION OF CITIZENSHIP AFTER

BEGUM v SSHD [2021] UKSC 7

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NO 8 CHAMBERS, FOUNTAIN COURT, BIRMINGHAM

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Section 40 British Nationality Act 1981

(1)In this section a reference to a person's " citizenship status " is a reference to his status as—

(a)a British citizen,

(b)a British overseas territories citizen,

(c)a British Overseas citizen,

(d)a British National (Overseas),

(e)a British protected person, or

(f)a British subject.

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

(3)The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—

(a)fraud,

(b)false representation, or

(c)concealment of a material fact.

(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)But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—

(a)the citizenship status results from the person's naturalisation,

(b)the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and

(c)the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

(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)Where a person acquired a citizenship status by the operation of a law which applied to him because of his registration or naturalisation under an enactment having effect before commencement, the Secretary of State may by order deprive the person of the citizenship status if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—

(a)fraud,

(b)false representation, or

(c)concealment of a material fact.

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66. In relation to the nature of the decision under appeal, section 40(2) provides: "(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good." The opening words ("The Secretary of State may …") indicate that decisions under section 40(2) are made by the Secretary of State in the exercise of his discretion. The discretion is one which Parliament has confided to the Secretary of State. In the absence of any provision to the contrary, it must therefore be exercised by the Secretary of State and by no one else. There is no indication in either the 1981 Act or the 1997 Act, in its present form, that Parliament

intended the discretion to be exercised by or at the direction of SIAC. SIAC can, however, review the Secretary of State's exercise of his discretion and set it aside in cases where an appeal is allowed, as explained below.

67. The statutory condition which must be satisfied before the discretion can be exercised is that "the Secretary of State is satisfied that deprivation is conducive to the public good". The condition is not that "SIAC is satisfied that deprivation is conducive to the public good". The existence of a right of appeal against the Secretary of State's decision enables his conclusion that he was satisfied to be challenged. It does not, however, convert the statutory requirement that the Secretary of State must be satisfied into a requirement that SIAC must be satisfied. That is a further reason why SIAC cannot exercise the discretion conferred upon the Secretary of State.

68. As explained at paras 46-50, 54 and 66-67 above, appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so (such as existed, in relation to appeals under section 2 of the 1997 Act, under section 4(1) of the 1997 Act as originally enacted, and under sections 84-86 of the 2002 Act prior to their amendment in 2014: see paras 34 and 36 above). They are in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions, as appears, in the context of statutory appeals, from Edwards (Inspector of Taxes) v Bairstow [1956] AC 14. They must also determine for themselves the compatibility of the decision with the obligations of the decision-maker under the Human Rights Act, where such a question arises.

69. For the reasons I have explained, that appears to me to be an apt description of the role of SIAC in an appeal against a decision taken under section 40(2). That is not to say that SIAC's jurisdiction is supervisory rather than appellate. Its jurisdiction is appellate, and references to a supervisory jurisdiction in this context are capable of being a source of confusion. Nevertheless, the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend upon the nature of the decision under appeal and the relevant statutory provisions. Different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable. So, for example, in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, the principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in

administrative law, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment.

70. In considering whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, SIAC must have regard to the nature of the discretionary power in question, and the Secretary of State's statutory responsibility for deciding whether the deprivation of citizenship is conducive to the public good. The exercise of the power conferred by section 40(2) must depend heavily upon a consideration of relevant aspects of the public interest, which may include considerations of national security and public safety, as in the present case. Some aspects of the Secretary of State's assessment may not be justiciable, as Lord Hoffmann explained in Rehman. Others will depend, in many if not most cases, on an evaluative judgment of matters, such as the level and nature of the risk posed by the appellant, the effectiveness of the means available to address it, and the acceptability or otherwise of the consequent danger, which are incapable of objectively verifiable assessment, as Lord Hoffmann pointed out in Rehman and Lord Bingham of Cornhill reiterated in A, para 29. SIAC has to bear in mind, in relation to matters of this kind, that the Secretary of State's assessment should be accorded appropriate respect, for reasons both of institutional capacity (notwithstanding the experience of members of SIAC) and democratic accountability, as Lord Hoffmann explained in Rehman and Lord Bingham reiterated in A, para 29.

71. Nevertheless, SIAC has a number of important functions to perform on an appeal against a decision under section 40(2). First, it can assess whether the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted, or has taken into account some irrelevant matter, or has disregarded something to which he should have given weight, or has been guilty of some procedural impropriety. In doing so, SIAC has to bear in mind the serious nature of a deprivation of citizenship, and the severity of the consequences which can flow from such a decision. Secondly, it can consider whether the Secretary of State has erred in law, including whether he has made findings of fact which are unsupported by any evidence or are based upon a view of the evidence which could not reasonably be held. Thirdly, it can determine whether the Secretary of State has complied with section 40(4), which provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". Fourthly, it can consider whether the Secretary of State has acted in breach of any other legal principles applicable to his decision, such as the obligation arising in appropriate cases under section 6 of the Human Rights Act. In carrying out those functions, SIAC may well have to consider relevant evidence. It has to bear in mind that some decisions may involve considerations which are

not justiciable, and that due weight has to be given to the findings, evaluations and policies of the Secretary of State, as Lord Hoffmann explained in Rehman and Lord Bingham reiterated in A. In reviewing compliance with the Human Rights Act, it has to make its own independent assessment.

Laci v SSHD [2021] EWCA Civ 769

35 When he gave permission to appeal in this case McCombe LJ observed that the six-point guidance given by the UT in BA had not been considered by this Court. That is literally correct because, as noted, BA was not referred to in either Aziz or KV. However, I do not think that it is appropriate for us to embark on a general examination of each of the six points. That is partly because we now have Leggatt LJ's summary of the relevant principles in KV, which covers much of the same ground and should be taken as the starting-point in future cases: I appreciate that that summary was not the result of argument, but I can see nothing in it that seems likely to be contentious. However, another reason why it is inappropriate is that the present appeal only engages the UT's points (4) and (5). It is true that by ground 4 the Appellant contends that point (2) in BA did not correctly state the law in the case of a decision under section 40 (2); but the decision in this case was taken under section 40 (3), and I do not believe that we should make observations on an issue which is not before us.

36 There may, however, be some value in my spelling out how points (4) and (5) in BA now stand in the light of Aziz and KV. I take them in turn.

37 As to point (4) in BA, the broad thrust of what the UT says is that only exceptionally will it be right for a person who has obtained British citizenship by (in short) deception to be allowed to retain it. In my view that is entirely correct: the reason is self-evident. It is in line with what Leggatt LJ says in the first half of para. 19 of his judgment in KV. I note that he uses the term "unusual" rather than "exceptional". That may be because the Courts have been wary of treating "exceptionality" as a test as such, but I do not think that there is a problem here: the reason why such an outcome will be exceptional is that it will be unusual for a migrant to be able to mount a sufficiently compelling case to justify their retaining an advantage that they should never have obtained in the first place. The UT was also right to recognise that the necessary assessment arises both as a matter of common law and (potentially) in relation to Convention rights. The precise formulation, however, may not be quite in line with what is said in KV and Aziz; and now see para. 40 below.

38 As to point (5) in BA, it is now clear from Aziz that the FTT ought not, at least normally, to undertake any "proleptic assessment" of the likelihood of removal. Loss of British citizenship and loss of leave to remain are different things, appealable by different processes. However,

it should be noted that Sales LJ's reasoning does not apply to other adverse consequences of a deprivation decision. One example of such an adverse consequence was statelessness, which was the issue in KV. Another may be a "limbo period": I discuss this further below. Such consequences will in principle be relevant to the exercise of the common law discretion under section 40 (3), and to the extent that they constitute an interference with the appellant's article 8 rights they will need to go into the proportionality balance: see para. 17 of Leggatt LJ's judgment in KV.

39 I should note for completeness that Mr Gill referred us to the decision of the Court of Justice of the European Union in Rottmann v Freistaat Bayern (case C-135/08). This establishes that it is not contrary to EU law for a member state to withdraw the citizenship of one of its nationals where that citizenship was obtained by deception provided that it observes the principle of proportionality. It is not authority for anything else relevant to the present appeal.

40 Postscript. When this judgment was circulated to counsel in draft, Mr Malik drew our attention to the decision of the Supreme Court in R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7, [2021] 2 WLR 556, which was handed down subsequent to the argument before us. Begum concerns a decision taken by the Secretary of State to deprive the appellant of her nationality under section 40 (2) of the 1981 Act. At paras. 32-81 of his judgment, with which the other Justices agreed, Lord Reed discusses the nature of an appeal to SIAC under section 2B of the Special Immigration Appeals Commission Act 1997, which is the equivalent of section 40A; and in that connection he discusses both Deliallisi and BA (though not KV, to which the Court does not appear to have referred). His conclusion is that while section 2B provides for an appeal rather than a review SIAC should approach its task on (to paraphrase) essentially Wednesbury principles, save that it was obliged to determine for itself whether the decision was compatible with the obligations of the decision-maker under the Human Rights Act 1998 (see para. 68). It may be that that reasoning is not confined to section 2B or to cases falling under section 40 (2), in which case some of statements quoted above about the correct approach to appeals under section 40A in the case of decisions under section 40 (3) will require qualification. But I do not think that that is something on which I should express a view here. Begum does not bear directly on the actual grounds of appeal before us, and Mr Malik made it plain that he did not wish to advance any fresh ground based on it. Rather, he was rightly concerned that we should be aware of it in the context of the more general review of the law in the preceding paragraphs. I confine myself to saying that anything said in the authorities reviewed above about the scope of an appeal under section 40A should be read subject to the decision in Begum."

Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 238 (IAC)

Following KV (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 2483, Aziz v Secretary of State for the Home Department [2018] EWCA Civ 1884, Hysaj (deprivation of citizenship: delay) [2020] UKUT 128 (IAC), R (Begum) v Special Immigration Appeals Commission [2021] UKSC 7 and Laci v Secretary of State for the Home Department [2021] EWCA Civ 769 the legal principles regarding appeals under section 40A of the British Nationality Act 1981 against decisions to deprive a person of British citizenship are as follows:

(1) The Tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) of the British Nationality Act 1981 exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the Tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection. In answering the condition precedent question, the Tribunal must adopt the approach set out in paragraph 71 of the judgment in Begum, which is to consider whether the Secretary of State has made findings of fact which are unsupported by any evidence or are based on a view of the evidence that could not reasonably be held.

(2) If the relevant condition precedent is established, the Tribunal must determine whether the rights of the appellant or any other relevant person under the ECHR are engaged (usually ECHR Article 8). If they are, the Tribunal must decide for itself whether depriving the appellant of British citizenship would constitute a violation of those rights, contrary to the obligation under section 6 of the Human Rights Act 1998 not to act in a way that is incompatible with the ECHR.

(3) In so doing:

(a) the Tribunal must determine the reasonably foreseeable consequences of deprivation; but it will not be necessary or appropriate for the Tribunal (at least in the usual case) to conduct a proleptic assessment of the likelihood of the appellant being lawfully removed from the United Kingdom; and

(b) any relevant assessment of proportionality is for the Tribunal to make, on the evidence before it (which may not be the same as the evidence considered by the Secretary of State).

(4) In determining proportionality, the Tribunal must pay due regard to the inherent weight that will normally lie on the Secretary of State's side of the scales in the Article 8 balancing exercise, given the importance of maintaining the integrity of British nationality law in the face of attempts by individuals to subvert it by fraudulent conduct.

(5) Any delay by the Secretary of State in making a decision under section 40(2) or (3) may be relevant to the question of whether that decision constitutes a

disproportionate interference with Article 8, applying the judgment of Lord Bingham in EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159. Any period during which the Secretary of State was adopting the (mistaken) stance that the grant of citizenship to the appellant was a nullity will, however, not normally be relevant in assessing the effects of delay by reference to the second and third of Lord Bingham's points in paragraphs 13 to 16 of EB (Kosovo) [1].

(6) If deprivation would not amount to a breach of section 6 of the 1998 Act, the Tribunal may allow the appeal only if it concludes that the Secretary of State has acted in a way in which no reasonable Secretary of State could have acted; has taken into account some irrelevant matter; has disregarded something which should have been given weight; has been guilty of some procedural impropriety; or has not complied with section 40(4) (which prevents the Secretary of State from making an order to deprive if she is satisfied that the order would make a person stateless).

(7) In reaching its conclusions under (6) above, the Tribunal must have regard to the nature of the discretionary power in section 40(2) or (3) and the Secretary of State's responsibility for deciding whether deprivation of citizenship is conducive to the public good.

SSHD v P3 [2021] EWCA Civ 1642

114 Finally, in the course of his oral submissions, Mr Blundell QC indicated that SIAC might now be taking an approach to its role on appeals such as section 2B appeals which caused this Court some concern, and as I have mentioned in paragraph 6, above, led to further written submissions after the hearing. This approach seems to have been prompted by the decision in Begum. I consider that this approach may be unduly narrow, and one which is not required by Begum. Begum is authority for the proposition that, broadly, SIAC should take a public law approach to challenges to the Secretary of State's assessment of national security. It is not authority for any wider proposition.

115 The 1997 Act clearly distinguishes between appeals and applications for statutory reviews (see sections 2C-E of the 1997 Act). SIAC must apply the principles which apply on an application for judicial review to the latter, but not to the former. On the appeals which are not statutory reviews, SIAC is not confined, on all issues which might arise on that appeal, to applying public law principles, still less to considering only the materials which were before the Secretary of State when the Secretary of State made the impugned decision. There are at least two relevant distinctions. First, on some issues, the law does not require SIAC to apply a traditional public law approach at all (for example, on issues about Convention rights, as is clear from many of the passages in Begum which I have quoted or summarised above) and see paragraph 82, above. Second, even where SIAC is limited to applying public law principles (for example, when it considers the Secretary of State's assessment of the interests of national security), it does not necessarily follow that SIAC should confine itself to material which was before the Secretary of State. For example, SIAC is entitled to take into account material which comes to light on an exculpatory review; and that material might not have been before the

Secretary of State when she made the decision. Moreover, SIAC may exclude material which the Secretary of State took into account, for example, if it decides that there is a risk that it was obtained as a result of article 3 ill treatment. In any event, SIAC hears evidence on an appeal, which was not before the Secretary of State, and is entitled to make of that evidence what it may.

Berdica v Secretary of State for the Home Department (Deprivation of citizenship: consideration) [2022] UKUT 276 (IAC)

(1) In deprivation of citizenship appeals, consideration is to be given both to the sustainability of the original decision and also whether upon considering subsequent evidence the Secretary of State's maintenance of her decision up to and including the hearing of the appeal is also sustainable. The latter requires an appellant to establish that the Secretary of State could not now take the same view.

(2) Decisions of the Upper Tribunal are binding on the First-tier Tribunal, not only in the individual case by virtue of section 12 of the Tribunal, Courts and Enforcement Act 2007, but also as a matter of precedent.

Muslija (deprivation: reasonably foreseeable consequences) [2022] UKUT 337 (IAC)

(1) The reasonably foreseeable consequences of the deprivation of citizenship are relevant to an assessment of the proportionality of the decision, for Article 8(2) ECHR purposes. Since the tribunal must conduct that assessment for itself, it is necessary for the tribunal to determine such reasonably foreseeable consequences for itself.

(2) Judges should usually avoid proleptic analyses of the reasonably foreseeable consequences of the deprivation of citizenship. In a minority of cases, it may be appropriate for the individual concerned to demonstrate that there is no prospect of their removal. Such cases are likely to be rare. An example may be where (i) the sole basis for the individual's deprivation under section 40(2) is to pave the way for their subsequent removal on account of their harmful conduct, and (ii) the Secretary of State places no broader reliance on ensuring that the individual concerned ought not to be allowed to enjoy the benefits of British citizenship generally.

(3) An- overly anticipatory analysis of the reasonably foreseeable consequences of deprivation will be founded on speculation. The evidence available and circumstances obtaining at the time of making of the deprivation order (and the appeal against that decision) are very likely to be different from that which will be available and those which will obtain when the decision regarding a future application or human rights claim is later taken.

(4) Exposure to the "limbo period", without more, cannot possibly tip the proportionality balance in favour of an individual retaining fraudulently obtained citizenship. That means there are limits to the utility of an assessment of the length of the limbo period; in the absence of some other factor (c.f. "without more"), the mere fact of exposure to even a potentially lengthy period of limbo is a factor unlikely to be of dispositive relevance.

(5) It is highly unlikely that the assessment of the reasonably foreseeable consequences of a deprivation order could legitimately extend to prospective decisions of the Secretary of State taken in consequence to the deprived person once again becoming a person subject to immigration control, or any subsequent appeal proceedings.

Walile (deprivation: self-incrimination: anonymity) [2022] UKUT 17 (IAC)

(1) An applicant for British citizenship who commits a criminal offence before the application is decided by the Secretary of State cannot rely upon the privilege against self-incrimination as a reason for not informing the Secretary of State of the crime.

(2) The mere fact that a foreign criminal has children is not a reason to impose an anonymity order, preventing disclosure of the foreign criminal's name in immigration proceedings in the First-tier Tribunal or the Upper Tribunal.

(3) Begum [2021] UKSC 7 authoritatively explained how the scope of an appeal against a decision under section 40(2) or (3) of the 1981 Act is narrower than the Upper Tribunal and the Court of Appeal previously thought; but it did not introduce the ability to bring an appeal based on public law grounds, which have always been available.