Neutral Citation Number: [2021] EWHC 2179 (Admin)

Case No: CO/1145/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

THE QUEEN on the application of D4	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Dan Squires QC and Jessica Jones (instructed by **Birnberg Peirce**) for the **Claimant**
Lisa Giovannetti QC and Andrew Deakin (instructed by **the Government Legal Department**) for the **Defendant**

Hearing date: 22 July 2021

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Approved Judgment

Mr Justice Chamberlain:

Introduction

1 In s. 40(2) of the British Nationality Act 1981 ("the 1981 Act"), Parliament gave the Home Secretary the power to make an order depriving a person of British citizenship if satisfied that deprivation would be conducive to the public good. Parliament provided by s. 40(5) that, before making such an order in respect of a person, she must give the person written notice specifying that she has decided to make an order, the reasons for it and the right of appeal. In s. 41(1)(e), it also conferred power to make regulations "for the giving of any notice required or authorised to be given to any person under this Act".

2 The British Nationality (General) Regulations 2003 (SI 2003/548: "the Regulations") were made under this provision. They set out the methods by which notice is to be given. As originally made, they provided for notice to be sent to the person's last known address. In 2018, the Home Secretary amended the Regulations to deal with cases in which the person's whereabouts are unknown, there is no valid address for correspondence and no representative acting: see SI 2018/851. As amended, reg. 10(4) provides that, in such a case, "the notice shall be deemed to have been given" when the Secretary of State makes a record of these circumstances and places the notice or a copy of it on the person's file.

3 This case is not about whether there were good reasons to make this rule. It is about whether Parliament gave the Home Secretary the power to make it. That depends on whether the power to make regulations "for the giving of any notice" includes a power to allow the Home Secretary to treat notice as given by placing it on a private file in the Home Office, even though it could never come to the attention of the affected person by that means. If the answer is "No", reg. 10(4) has no effect in law.

4 In that event, a second issue arises about the consequences for the Claimant, D4. She is assessed to have travelled to Syria to align with the proscribed terrorist organisation Islamic State. She knew nothing of the decision to deprive her of her British citizenship when notice of that decision was placed on her Home Office file on 27 December 2019. The deprivation order was made on the same day. If she was not given notice before the order was made, contrary to s. 40(5) of the 1981 Act, should the order now be declared invalid or quashed? Or should relief be refused by the Court in the exercise of its discretion? And, if relief is granted, can the Home Secretary proceed to make another order straight away, or must she first consider up-to-date information?

Background

5 D4 is currently detained at Camp Roj in north-eastern Syria. She has been there since around January 2019. On 27 December 2019, the decision to deprive her of her British citizenship was made by the Chancellor of the Exchequer (in the Home Secretary's absence) and placed on D4's Home Office file. On the same day, officials acting on behalf of the Chancellor made an order depriving D4 of her citizenship. For all practical purposes, the decision and order can be and have been treated as made by the Home Secretary.

6 On 28 September 2020, D4's solicitors wrote a pre-action letter to the Foreign and Commonwealth Office asking them to assist in repatriating her. On 14 October 2020, the

Home Office wrote to the solicitors informing them that she had been deprived of her British citizenship on 27 December 2019. This information was passed on to D4.

7 D4 then appealed to the Special Immigration Appeals Commission ("SIAC") under s. 40A of the 1981 Act and s. 2B of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"). One of her grounds of appeal was that reg. 10(4) of the Regulations was *ultra vires* and the deprivation order was therefore invalid.

8 D4 and her lawyers assumed that SIAC would determine this issue. On 18 March 2021, however, a panel of SIAC of which I was a member handed down a decision in *C3, C4 and C7 v Secretary of State for the Home Department* (SC/167/2020), in which the same issue arose in two of the three joined cases. At [116], we decided that the appeal to SIAC under s. 2B of the 1997 Act was from the decision to make the deprivation order, not the order itself. The requirement to give notice applied after making the decision, but before making the order. If the original notice was defective, that might affect the validity of the order, but not the validity of the decision to make it. Applying the reasoning of the Court of Appeal in *S1 v Secretary of State for the Home Department* [2016] EWCA Civ 560, [2016] 3 CMLR 37 and *R (W2) v Secretary of State for the Home Department* [2017] EWCA Civ 2146, [2018] 1 WLR 2380, we had no jurisdiction to consider whether the service of notice to file was valid. The appeals succeeded in any event on the ground that the orders would make the appellants stateless.

9 D4 therefore brought these judicial review proceedings. The specific relief sought was: (1) a declaration that reg. 10(4) of the Regulations is *ultra vires* ss. 40(5) and 41 of the 1981 Act; and (2) a quashing order to quash the deprivation order.

10 In her original appeal to SIAC, D4 also argued that, even if reg. 10(4) were valid, the Secretary of State could not rely on it because she did know D4's whereabouts and because her family still live at her previous address. But D4 has decided not to advance these contentions in this claim. I therefore need say nothing more about them.

11 On 14 June 2021, after considering the papers, Morris J granted an extension of time, permission to apply for judicial review and expedition.

The statutory scheme

12 The first Act which conferred power to deprive a person of the status of a British subject was the British Nationality and Status of Aliens Act 1914 ("the 1914 Act"), though the power was limited to revoking a certificate of naturalisation. Section 7(3) provided that, where the revocation was on certain grounds, "the Secretary of State shall, by notice given or sent to the last-known address of the holder, give him an opportunity of claiming that the case be referred for… inquiry".

13 The 1914 Act was replaced by the British Nationality Act 1948 ("the 1948 Act"). The Summary of Main Provisions of the Bill shows that the 1948 Act intended to replicate s. 7. However, the 1948 Act did not deal with service on the last known address in the main body of the Act. Instead, in s. 29(1)(d), it conferred power to make regulations "for the giving of any notice required or authorised to be given to any person under this Act".

14 A number of different provisions were made under this provision. For example, reg. 12 of the British Nationality Regulations 1948 (SI 1948/2721) and reg. 22(1) of the British National Regulations 1972 (SI 1972/2061) both made provision for service by post and, where a person's whereabouts were not known, on their last known address.

15 The 1981 Act has been amended many times, most recently by the Immigration Act 2014. As currently in force, it provides materially as follows:

> "**40. Deprivation of citizenship**
>
> …
>
> (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.
>
> …
>
> (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.
>
> …
>
> **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) Subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public—
>
> (a) in the interests of national security,
>
> (b) in the interests of the relationship between the United Kingdom and another country, or
>
> (c) otherwise in the public interest.
>
> …

41. Regulations and Orders in Council

(1) The Secretary of State may by regulations make provision generally for carrying into effect the purposes of this Act, and in particular provision—

(e) for the giving of any notice required or authorised to be given to any person under this Act…"

16 Section 2B of the 1997 Act provides:

"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 (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)..."

17 When s. 40A was first inserted by the Nationality, Immigration and Asylum Act 2002 with effect from 1 April 2003, there was a provision preventing an order under s. 40 from being made in respect of a person while an appeal under that section or under s. 2B of the 1997 Act was pending or while time for appealing had not yet expired. That provision was removed by the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. Paragraph 121 of the Explanatory Notes to that Act say that this "also has the effect that a deprivation order can be made before any appeal is heard, thereby allowing deprivation and deportation proceedings to take place concurrently".

18 The Regulations came into force on 1 April 2003. From that date until 9 August 2018, reg. 10 provided as follows:

"(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—

(a) in a case where that person's whereabouts are known, by causing the notice to be delivered to him personally or by sending it to him by post;

(b) in a case where that person's whereabouts are not known, by sending it by post in a letter addressed to him at his last known address.

(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.

(3) A notice required to be given by section 40(5) of the Act shall, unless the contrary is proved, be deemed to have been given—

(a) where the notice is sent by post from and to a place within the United Kingdom, on the second day after it was sent;

(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

(c) in any other case on the day on which the notice was delivered."

19 Regulation 10 was amended with effect from 9 August 2018. These are the material provisions of the regulation as amended:

"(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 the person may be—

(a) given to the person by hand;

(b) sent by fax;

(c) sent by email;

(d) sent by courier;

(e) sent by document exchange;

(f) sent by post, whether or not delivery or receipt is recorded; or

(g) sent by any of the means set out at (b) to (f) to—

(i) the person's representative; or

(ii) if the person is under 18, their parent or guardian.

(2) Where the notice is sent under paragraph (1)(b), it must be sent to a number provided by the person or the person's representative.

(3) Where the notice is sent under any one or more of paragraphs (1)(c) to (g), it must be sent—

(a) to the address for correspondence provided by the person or the person's representative; or

(b) where no such address has been provided, the person's last known address or the address of their representative.

(4) Where—

(a) the person's whereabouts are not known; and

(b) either—

(i) no address has been provided for correspondence and the Secretary of State does not know of any address which the person has used in the past; or

(ii) the address provided to the Secretary of State is defective, false or no longer in use by the person; and

(c) no representative appears to be acting for the person or the address provided in respect of that representative is defective, false or no longer used by the representative,

the notice shall be deemed to have been given when the Secretary of State enters a record of the above circumstances and places the notice or a copy of it on the person's file.

(5) A notice required to be given by section 40(5) of the Act is, unless the contrary is proved, deemed to have been given—

(a) where the notice is sent by fax, when it is sent;

(b) where the notice is sent by email, when it is sent;

(c) where the notice is sent by document exchange, on the day after the day on which it is sent;

(d) where the notice is sent by post from and to a place within the United Kingdom, on the second day after the day on which it is sent;

(e) where the notice is sent by post from or to a place outside the United Kingdom, on the twenty-eighth day after the day on which it is sent;

(f) where the notice is sent by post where delivery or receipt is recorded, when the notice is recorded as having been delivered or received;

(g) in any other case on the day on which the notice is delivered."

Issue 1: Is reg. 10(4) *ultra vires*?

Submissions for D4

20 For D4, Dan Squires QC invites me to focus on the words Parliament used in s. 40(5) and s. 41:

(a) "It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation: other sources are subordinate to it…": *R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45 [44] (Lord Steyn).

(b) "Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context": *R v Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd* [2001] 2 AC 349 at 396 (Lord Nicholls).

(c) "When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used. As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613, 'We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used'": *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] AC 1189, [72] (Lord Neuberger).

21 Outside the exceptional category where an "obvious drafting error" has been made (see *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586), there is no basis for deviating from the plain words of the provision. The conditions set out in that case were that the court must be "abundantly sure" of three matters: "(1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed": see at p. 592 (Lord Nicholls). These conditions are not satisfied.

22 There is a presumption against a construction that produces absurdity, but a construction is not absurd merely because it creates operational difficulties for the Secretary of State: *AA (Sudan) v Secretary of State for the Home Department* [2016] EWHC 1453 (Admin), [2017] 1 WLR 145.

23 Mr Squires submits that "giving a notice means causing it to be received… unless the context or some statutory or contractual provision otherwise provides": *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 WLR 177, 185 (Lord Salmon), cited with approval in *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67, [2019] PTSR 128, [15] (Lord Carnwath). But, at minimum, giving notice requires that "reasonable steps" be taken to communicate the decision to the affected person: *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, [43] (Lord Millett).

24 On no view can placing a document in a file to which the affected person has no access be "giv[ing] the person… notice". "Serving" notice "to file" is a euphemism. It gives no notice at all. The requirement to give written notice imports an obligation to "take steps that have at least a reasonable prospect of bringing the deprivation decision to the attention of the affected individual".

25 These submissions are reinforced, not undermined, by the context. The notice in question is of a decision to deprive an individual of her citizenship. The central importance of citizenship has been repeatedly vouchsafed by the courts: see *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, [120] (Lord Reed); *R (Project for the Registration of Children of British Citizens) v Secretary of State for the Home Department* [2021] EWCA Civ 193, [2021] 1 WLR 3049, [33] (David Richards LJ). This makes it understandable that Parliament would wish to provide that steps must be taken to bring the decision to her attention before the order is made. There is nothing absurd about a construction with that result.

26 The provisions of the 1981 Act can be compared with those of the Counter-Terrorism and Security Act 2015 ("the 2015 Act"), which confers power to impose temporary exclusion orders on those suspected of terrorist activity who otherwise have a right of abode in the United Kingdom. Section 13(1) authorises regulations about giving notice of such orders. Section 13(2) provides: "The regulations may, in particular, make provision about cases in which notice is to be deemed to have been given." The absence of an equivalent provision in the 1981 Act is telling. It is also readily explicable, because an order depriving a person of citizenship represents an interference with a much more fundamental right than a temporary exclusion order.

27 Furthermore, one of the matters of which notice is required to be given is the right of appeal. Timely knowledge of the right of appeal is critical given that:

(a) the time limit for initiating an appeal in SIAC runs from the date of service of the notice: see r. 8 of the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034: "the Procedure Rules");

(b) the appeal is not suspensive of the legal effect of the deprivation order (so there is an imperative for expeditious resolution);

(c) the evidence relevant in an appeal is that which was available to the decision-maker at the time of the decision (so any delay is likely to diminish the quality of the evidence and/or the appellant's access to it).

28 Finally, Mr Squires submits in the alternative that reg. 10(4) is unlawful because it contravenes the principle that specific statutory rights are not to be cut down under the *vires* of the enabling Act or a different statute: *R v Secretary of State for Social Security ex p. Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, 292-3; *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869, [103]-[104]; and *R (Al-Enein) v Secretary of State for the Home Department* [2019] EWCA Civ 2024, [2020] 1 WLR 1349, [28]. On the Home Secretary's construction, reg. 10(4) of the Regulations would cut down the statutory right to be given notice in s. 40(5).

Submissions for the Home Secretary

29 For the Home Secretary, Lisa Giovannetti QC submits that, in statutory interpretation, the statutory context and purpose are critical: *R (Black) v Secretary of State for Justice* [2017] UKSC 81, [2018] AC 215, [36] (Lady Hale), *Bloomsbury International Ltd v Sea Fish Industry Authority* [2011] UKSC 25, [2011] 1 WLR 1546, [10] (Lord Mance); *R*

(Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ 1605, [2021] 1 WLR 2326, [68]-[71].

30 Ms Giovannetti submits that [15] and [16] in the judgment of Lord Carnwath in *UKI Kingsway* show that Parliament can specify methods of service or giving notice which, if used, have the effect of deeming notice to have been given. She also relies on *R (Alam) v Secretary of State for the Home Department* [2020] EWCA Civ 1527, [2020] INLR 74. There, the power at issue was to curtail leave to remain in the UK. Section 4(1) of the Immigration Act 1971 provided that this power was to be exercised "by notice in writing given to the person affected". The Immigration (Leave to Enter and Remain) Order 2000 (SI 2000/1161) was made under the Act. Article 8ZA(4) of that Order contained a provision materially identical to reg. 10(4) of the Regulations. Floyd LJ (with whom Henderson and Phillips LJJ agreed) noted at [11] that

> "it is clear that at least the special deeming provision in art 8ZA(4) was an attempt to provide for valid service… where successive attempts to serve by recorded delivery had failed. It allows for what the Home Office sometimes refer to as 'service to file', although it is not in any real sense service at all."

31 Although the issue in *Alam* concerned the construction of other provisions of the Order, there was no suggestion that there was anything objectionable about this deeming provision.

32 *Anufrijeva* was not directly concerned with what constitutes effective service. In any event, although the majority identified a general principle that an uncommunicated decision had no legal effect (see Lord Steyn at [26]), Lord Millett thought that it might be enough if "reasonable steps were taken" to communicate the decision to the person concerned: [43].

33 If, as Mr Squires submits, it was necessary for the Home Secretary to "take steps that have at least a reasonable prospect of bringing the deprivation decision to the attention of the affected individual", the test would be effectively in the hands of the affected person: unless she maintained some potential channel by which notice could be given, she would be able to "effectively insulate herself from being given notice".

34 Mr Squires' formulation would also lead to uncertainty. Can the Regulations properly deem notice to be given when it is delivered to the person's last known address, so long as there is some prospect that those now living there have a forwarding address? Or must the timing make allowance for onward transmission? What if there is "a reasonable prospect" that the deprivation decision may be "brought to the attention of the affected individual" at some point in the future, but not immediately?

35 Mr Squires' formulation gains no support from the legislative history. The 1914 Act made express provision for service on the last-known address. There was no intention to change this in the 1948 Act. The 1981 Act adopts the same structure as the 1948 Act. There is no warrant for reading it differently.

36 Ms Giovannetti submits that the power in s. 41 to make regulations "for the giving of any notice required or authorised to be given to any person under this Act" must be read consistently with the policy and purposes of the 1981 Act and with general principles of

constitutional and administrative law, including principles of fairness and rationality. Parliament intended that there should be an effective deprivation power, to be exercised in the public interest. The correct reading of s. 41 is that it confers a broad power to make regulations which, *taken as a whole*, provide for the Home Secretary to take "reasonable steps" to communicate with the person affected (Lord Millet's formulation in *Anufrijeva*).

37 Regulation 10 satisfies those requirements. Service to file is permitted *only* where (a) the person's whereabouts are not known, (b) no address has been provided and the SSHD does not know of any address which the person has used in the past or the address provided to the SSHD is defective, false or no longer in use by the person and (c) no representative appears to be acting or the representative's address is false/no longer used. Even then, the ordinary requirements of public law mean that the Home Secretary will be required to bring the notice to the person's attention once it appears that there is a reasonably practicable means of doing so.

38 This reading does not impermissibly cut across the affected person's due process rights:

(a) Although historically appeals were suspensive, the current scheme allows the order to be made immediately after notice has been given.

(b) Although time for appealing runs from the date of service of the notice to file, SIAC can extend time where "by reason of special circumstances it would be unjust not to do so" (as it has done in this case): see r. 8 of the Procedure Rules.

(c) There can be no valid argument that delay cuts down an appellant's ability to gather evidence for an appeal, since the statute allows for a delay between the decision to deprive and the service of the notice in any event.

(d) In any event, the Supreme Court held in *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] 2 WLR 556, at [135], that an appeal may have to be stayed where an appellant who is abroad cannot play an effective part in her appeal – i.e. that a delay might make an appeal more (rather than less) effective.

39 The argument that reg. 10(4) on the Home Secretary's construction cuts down the statutory right to "notice" adds nothing. If reg. 10(4) falls within the regulation-making power in s. 41, then that is because it is consistent with s. 40(5) on a proper reading of that provision.

Discussion

40 My reasoning proceeds in ten stages.

41 First, the import of the authorities set out at [20] and [29] above can be summarised in this way. The court's task when interpreting statutes is to ascertain the meaning of the words Parliament used. Where the words can bear more than one meaning, it is legitimate to take account of the legislative history, the context and the purpose of the statute. In the end, however, the words themselves provide a hard limit to the meanings they can bear.

42 Second, in s. 40(5), Parliament said that, before making an order in respect of a person, the Home Secretary must give the person written notice of the decision to do so. It could have imposed a requirement to give notice "where possible" or "if practicable", but it did not. When in 2004 it removed the provision preventing the Home Secretary from making an order until time for appealing had expired or while an appeal was pending, it could have repealed or amended s. 40(5), but it did not. Instead, then and subsequently, it maintained in force an unqualified requirement to give written notice before making an order. The natural inference is that, if for whatever reason notice cannot be given, the order cannot be made.

43 Third, s. 41(1)(e) confers power to make regulations "for the giving of any notice required or authorised to be given to any person under this Act". On its face, that power authorises the making of regulations about *how*, not *whether*, notice is to be given. It does not on any view authorise regulations which dispense with the requirement to give notice, whether generally or in any case or category of case.

44 Fourth, Parliament can and sometimes does specify particular methods of giving or serving notice which, if used, will result in an irrebuttable presumption that notice has been given and received: *UKI Kingsway*, [15]-[16], *Alam*, [12]. This was done in the 1914 Act, but not in the 1981 Act. It cannot be said that the omission was a "drafting error" in the sense in which that term is used in *Inco Europe*. It does not satisfy any of the conditions set out by Lord Nicholls in that case: see [21] above.

45 Fifth, Parliament can and sometimes does confer power to make regulations creating an irrebuttable presumption that notice has been given and received. Section 13(2) of the 2015 Act is an example of such a power. That confers power to deem notice to have been given – i.e. to create a statutory fiction that notice has been given and received when it has not. Parliament conferred no equivalent power in the 1981 Act, whether at the time of its enactment or by subsequent amendment.

46 Sixth, since s. 40(5) does not specify particular methods which, if used, result in notice being deemed given and received and s. 40(1)(e) does not authorise the making of regulations having that effect, it is strongly arguable that "give notice" bears the same meaning as the provisions in issue in *Sun Alliance* and *UKI:* i.e. "cause the notice to be received" (though not necessarily read or understood). Such a reading would not be inconsistent with the existence of a regulation-making power. That power can on any view be used to create rebuttable presumptions which allocate the burden of proving whether and when notice is received, such as the one in reg. 10(5) (which is a close analogue of s. 7 of the Interpretation Act 1978). Such presumptions contribute to legal certainty by helping to fix the date on which notice has been received. This is important because time for appealing runs from this date.

47 Seventh, there is an argument that the concept of "giving notice" does not always require the notice to be *received*. Depending on context, the requirement to give notice might be satisfied provided only that reasonable steps have been taken to bring the notice to the attention of the person concerned (the formulation used by Lord Millett to describe the requirements of communication in *Anufrijeva*). On this argument, regulations made under s. 41 could do more than just create rebuttable presumptions. For example, they could conclusively deem notice to have been given when sent to the affected person's last known address. This might be regarded as a "reasonable step" on the footing (which

seems to underlie provisions of this kind) that people generally make arrangements to forward their mail when they move.

48 Eighth, it is not necessary to decide whether this argument is correct, because reg. 10(4) does not require *any* step that is even capable of bringing the notice to the affected person's attention. No case has been cited to me in which a requirement to give notice has been held satisfied by putting the notice in a place where it *could not* come to the affected person's attention. *Alam* is not such a case, because (i) the enabling power under the 1971 Act was different from (and broader than) s. 41(1)(e) of the 1981 Act; (ii) there was in any event no argument about whether the provision for "service to file" was *ultra vires* that power; and (iii) the Court of Appeal did not consider that question.

49 Ninth, as a matter of ordinary language, you do not "give" someone "notice" of something by putting the notice in your desk drawer and locking it. No-one who understands English would regard that purely private act as a way of "giving notice". That is so even if there is no reasonable step that could be taken to bring the notice to the attention of the person concerned. It is no doubt true that, having made the decision to deprive a person of her citizenship, the common law would require the Home Secretary to take such a step when possible. But this demonstrates only that there may come a time when the Home Secretary can "give" the notice she has placed on the file, not that she has already done so by placing it there.

50 Tenth, there is nothing absurd about construing ss. 40(5) and 41 of the 1981 Act as precluding a deeming provision such as reg. 10(4). In the first place, reg. 10(4) was only inserted in 2018. The statutory scheme was not unworkable before that. In any event, citizenship is a fundamental status. To deprive a person of her citizenship is a very substantial interference with her rights, as the cases cited at [25] above show. It is perfectly coherent for a statutory scheme to provide that an order having that effect can only be made only after causing notice of the decision to be received by her or, at least, after taking reasonable steps to bring the decision to her attention. There are, no doubt, arguments in favour of amending the statutory scheme so as to permit the making of an order without giving notice in a case where it is not reasonably possible to do so, but the proper place for those arguments is Parliament, which can amend the 1981 Act if it wishes to do so.

51 For these reasons, I conclude that Parliament did not give the Home Secretary power to make regulations that treat notice as having been given to the person affected when it has not been given to that person but instead has simply been placed on a Home Office file. Regulation 10(4) is accordingly *ultra vires* ss. 40(5) and 41(1) of the 1981 Act. It is void and of no effect. As it is severable, its invalidity does not affect the other parts of reg. 10.

Issue 2: Relief

Submissions for D4

52 Mr Squires submits that, if reg. 10(4) is *ultra vires*, the order made on 27 December 2019 was made in breach of s. 40(5) of the 1981 Act. It should therefore be quashed or declared to be a nullity, with the effect that D4 remains in law a British citizen.

53 In that event, Mr Squires accepts that, as notice has now been given to D4 of the decision to deprive her of her citizenship, it is open to the Home Secretary to exercise the power in s. 40(2) and make a new order. Before doing so, however, she would have to consider any developments in the period between 27 December 2019 and the present date. It would be unlawful simply to make a new order without doing so.

54 In any event, even if it were open to the Home Secretary to make a new order without considering any further evidence, there is no evidence that she intends to do so. This may well be because she has been advised that she must not predetermine whether to make the order. That being so, the Court must assume that the Home Secretary has not determined whether to make the order. It therefore cannot proceed on the footing that relief would be futile.

Submissions for the Home Secretary

55 Ms Giovannetti submits that, if reg. 10(4) is *ultra vires*, it would follow that the order was made unlawfully, but it is a separate question whether it should be quashed. She submits that I should withhold relief in the exercise of my discretion, because quashing would be futile. She relies on *R (W2) v Secretary of State for the Home Department* [2017] EWHC 928 (Admin), where Elisabeth Laing J at [23] held as follows:

> "The provisions show that the decision of which the Secretary of State is required to give notice is given effect by the order, and that the order and notice are not, in substance, distinct decisions. Whether or not the order is made as soon as possible after the decision is notified, the reasons for the decision and for the order are and must be the same. The making of the order does not require a distinct process of reasoning, nor does the legislative scheme permit that."

56 This reflects the reasoning of the Court of Appeal in *S1* at [61] ("it is difficult to see how a decision lawfully made could become unlawful in consequence of the timing of the subsequent order"), which was effectively endorsed by the Court of Appeal in *W2* (see [2017] EWCA Civ 2146, at [63]) and is consistent with SIAC's decision in *C3, C4 and C7*, at [116(e)].

57 Since the failure to give notice does not affect the validity of the decision, it would be open to the Home Secretary to make another order immediately without considering evidence which has arisen since 27 December 2019. That being so, an order quashing the existing order would be futile.

58 If D4 believes that events that have taken place since December 2019 affect the decision, she should invite the Home Secretary to reconsider the decision and, if the Home Secretary refuses to do so, the proper remedy is to seek judicial review of the refusal. That would enable any reconsideration to take while the order remains in force, thereby conferring protection on the public.

Discussion

59 The consequence of my conclusion that reg. 10(4) is *ultra vires* and of no effect is that the Home Secretary failed to give D4 written notice of the decision as required by s. 40(5) of the 1981 Act before the order depriving her of her citizenship was made.

60 The first issue to determine concerns the impact of that failure on the validity of the order. There is no doubt that the requirement to give written notice is mandatory: the statute provides that the Home Secretary "must" give such notice before making the order. This does not, on its own, determine the order's validity. That turns on "what Parliament intended to be the consequences of non-compliance": *Director of Public Prosecutions v McFarlane* [2020] 1 Cr App R 4, [25] (Males LJ), approved in *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22, [2021] 3 WLR 231, [196] (Lord Stephens).

61 In my judgment, Parliament must have intended that, unless and until written notice of the decision was given, the Home Secretary would have no power to make the order and, if she purported to do so, the resulting order would be invalid:

(a) The language of s. 40(5) suggests that the giving of written notice is a condition precedent to the existence of the power.

(b) This is consistent with, and may be considered a reflection of, the principle identified by Lord Steyn at [26] of his speech in *Anufrijeva* that "[n]otice of a decision is required before it can have the character of a determination with legal effect".

(c) That principle is of particular importance where the decision is to deprive a person of a status as fundamental as citizenship.

(d) If an order made in breach of the requirement in s. 40(5) were nonetheless valid, there would be no way of enforcing the requirement and no effective sanction for non-compliance. The Home Secretary could simply ignore it. Parliament does not legislate in vain, so cannot have intended that.

62 It follows that the deprivation order purportedly made on 27 December 2019 was a nullity. This means that D4 has since that date been a British citizen and remains so. In those circumstances, Mr Squires and Ms Giovannetti agree that a declaration and a quashing order would have the same legal effect. In my judgment, the proper relief is a declaration: where the challenged decision is in law a nullity, there is no need for a quashing order.

63 I consider that it would be inappropriate to withhold relief for two reasons. First, to do so would obscure the true legal position. A claimant who challenges a deprivation order is entitled to a clear answer to the question whether she remains a British citizen. In D4's case, the answer is "Yes". Second, the refusal of relief on the ground of futility would require a finding that a fresh order would *inevitably* be made: see e.g. Sir Michael Fordham, *Judicial Review Handbook* (7th ed., 2020), §4.3. I accept Mr Squires' submission that no such finding can be made on the material currently before the court. It was no part of Ms Giovannetti's submission that the Home Secretary is legally required

to issue the order. In the absence of any evidence about the Home Secretary's current intentions, it would be wrong to conclude that she will inevitably do so.

64 On one view, that determines the issues which arise in this claim. However, it was part of Ms Giovannetti's argument in favour of withholding relief that the Home Secretary could now lawfully proceed to make a fresh order immediately and without considering material arising since the decision was taken. She invites me to determine that issue and observes that, if I do not, further judicial review proceedings are inevitable.

65 I am not confident that anything I say on this issue will obviate the need for further proceedings. However, since I have heard argument on it and there is a possibility that my observations may narrow the issues in any further litigation, I have concluded that it would be wrong to say nothing at all.

66 In my judgment, the position is as follows:

(a) The Home Secretary's failure to give notice of her decision to deprive D4 of her citizenship invalidates the order. It does not, however, affect the validity of the decision: see the authorities cited at [56] above.

(b) The legislative scheme does not permit the making of the order to be subject to a process of reasoning differing from that which resulted in the decision: see Elisabeth Laing J's decision in *W2* at [23], cited at [55] above.

(c) This does not mean that, once the decision is made, the Home Secretary is obliged to make the order, no matter what has happened in the interim. For example, it would be nonsensical to suppose that the Home Secretary is obliged to give effect to a decision taken years earlier if in the interim it has become clear that the intelligence on which the decision was based related to someone else.

(d) However, nothing in s. 40 of the 1981 Act and no common law principle requires that:

(i) the order can only be made within a particular period of time after the decision to make it; or

(ii) if a substantial period elapses after making the decision, the Home Secretary must in every case embark on a lengthy process of reconsidering the decision before making the order.

(e) On the contrary, once notice of the decision has been given, the power to make the order is conferred by s. 40(2) on the Home Secretary in broad terms. Where, as here, a substantial period has elapsed since the making of the decision, it is for the Home Secretary to determine, based on all the circumstances, whether:

(i) to make the order straight away and *then* reconsider the underlying decision (leaving the order in place while that reconsideration takes place); or

(ii) to re-consider the decision before any order is made.

(f) The factors relevant to this determination are likely to include:

(i) the basis for the decision (which will include both the basis disclosed in OPEN and any CLOSED reasons);

(ii) in the light of (i), the likelihood that any developments since the decision was taken might affect the outcome; and

(iii) whether it would be consistent with the interests of national security, and otherwise conducive to the public good, for there to be no order in place while the decision is reconsidered.

67 Given that the papers before me do not include any detailed indication of the basis (OPEN or CLOSED) for making the order in D4's case, it would not be possible or sensible to say more. It will be for the Home Secretary to determine how to proceed, subject to the usual public law constraints. If that determination is challenged, the principles applicable are likely to include those identified by Lord Reed in *Begum* at [66]-[71].

Conclusion

68 For these reasons, I conclude and shall declare as follows:

(a) Regulation 10(4) of the British Nationality (General) Regulations 2003 is *ultra vires* ss. 40(5) and 41(1) of the British Nationality Act 1981.

(b) Regulation 10(4) is therefore void and of no effect.

(c) The order of 27 December 2019 which purported to deprive D4 of her British citizenship was made in breach of s. 40(5) of the 1981 Act and so is also void and of no effect.

(d) D4 was from that date, and remains, a British citizen.

69 In the light of (a)-(d) above, it is for the Home Secretary to decide how to proceed, as set out at [66]-[67] above. There is no need, and it would not be appropriate, to make any declaration reflecting those parts of the judgment.

Interim suspension of the effect of the declarations

70 On receipt of the draft judgment, the Home Secretary invited me to suspend the effect of the declarations pending the resolution of any application for permission to appeal. D4 does not accept that the court can or should do that. However, the parties agreed that there should be further written submissions about this and that the declarations should be suspended on an interim basis pending resolution of the issue. Given that it is arguable that there is jurisdiction to do this, I shall suspend the effect of the declarations for a short period to allow the parties to make further written submissions on this question.