STATELESSNESS
Case Law Database

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

The Secretary of State for the Home Department appealed a decision to overturn two orders depriving E3 and N3 of their British citizenship. The issue raised by the appeal was whether the Secretary of State was precluded by section 40(4) of the 1981 Act from making the orders, because they rendered E3 and N3 stateless. The focus of the Court of Appeal's judgment was whether the burden of proof concerning whether E3 and N3 would be rendered stateless following deprivation of their British citizenship fell on the Secretary of State or E3 and N3.

Case status: Decided
Case number: [2019] EWCA Civ 2020
Date of decision: 21/11/2019
State: United Kingdom
Court / UN Treaty Body: Court of Appeal (Civil Division)
Language(s) the decision is available in: English
Applicant's country of residence: United Kingdom
Key aspects: Burden of proof, Deprivation of nationality
Facts

E3 was born in the UK on 27 May 1981 so that he was a British citizen at birth under section 4 of the British Nationality Act 1948. His parents were both citizens of Bangladesh at the time of his birth and accordingly, he was a Bangladeshi citizen by descent under the Bangladesh Citizenship Act 1951, at least at the time of his birth. N3 was born in Bangladesh on 12 December 1983 and acquired Bangladeshi citizenship at birth. His parents were both naturalised British citizens, so that he was also a British citizen at birth pursuant to section 2(1)(a) of the 1981 Act.

In 2017, the Secretary of State gave E3 and N3 notice that she intended to make an order under section 40(2) of the 1981 Act, depriving E3 and N3 of their British

citizenship, on the grounds that they were Islamic extremists who had sought to travel abroad to participate in terrorist related activity and that they posed a threat to national security. The notices stated that, in accordance with section 40(4), the Secretary of State was satisfied that the orders would not make E3 and N3 stateless.

Both E3 and N3 appealed those deprivation decisions to the Special Immigration Appeals Commission ("SIAC") on a number of grounds, including that, at the date of the decisions they did not hold Bangladeshi nationality, so that the decisions rendered them stateless. SIAC decided to deal with the issue of statelessness as a preliminary issue.

In its decision of 15 November 2018 (*E3 & N3 (Exclusion : Preliminary issue) [2018] UKSIAC SC_146_2017*), SIAC considered whether the Secretary of State had established, on the balance of probabilities, that there existed in Bangladesh a settled or established practice which meant that E3 and N3 were not stateless, on deprivation of their British citizenship. It concluded that, on the balance of probabilities, the Secretary of State had not made out its case, particularly by reference to a document called the "*Note Verbale*", by which the Bangladeshi authorities responded to a series of questions submitted by the British High Commission in Dhaka as to the application and effect of certain laws governing Bangladeshi citizenship. The Secretary of State would have rendered them stateless had she deprived them of their citizenship.

The Secretary of State appealed to the Court of Appeal.

Legal arguments by the applicant

The Secretary of State (the applicant) contended that SIAC had made two material errors of law in determining the preliminary issue of statelessness:

1. It had erred in law in concluding that the Secretary of State bore the burden of proof regarding the effect of the Note Verbale, and therefore the burden of proof concerning whether E3 and N3 would be rendered stateless on deprivation of their British citizenship.

2. Even if the burden of proof in respect of the Note Verbale was on the Secretary of State, SIAC was wrong to conclude that the evidence was insufficient to discharge that burden.

Legal arguments by the opposing party

E3 and N3 (the respondents) argued that:

1. The burden of proof was not on them to prove statelessness. The burden was on the Secretary of State to show that deprivation of British citizenship was lawful and that the decision did not render E3 and N3 stateless.

2. The Secretary of State's reliance on the Note Verbale was undermined by inconsistent statements of the Bangladeshi government regarding its nationality law.

3. The SIAC had erred by taking account of the relevance of practice when considering statelessness.

Decision & Reasoning

The Court of Appeal noted that there was a consistent line of authority establishing that once the Secretary of State has demonstrated that he is satisfied that the deprivation order will not render the individual stateless, the burden of proving that the individual will be rendered stateless by the deprivation order then switches to the individual.

The Court of Appeal held that the statutory regime under section 40(4) of the 1981 Act has two stages. The first stage is that the Secretary of State demonstrates that he is satisfied that the deprivation order will not render the appellant stateless and on that issue the burden is on the Secretary of State. Once that burden is satisfied, at the second stage, if the appellant wishes to establish that nonetheless the deprivation order will render him stateless, the burden of so proving is on the appellant, given that, as SIAC said at [5] of its judgment in *Abu Hamza v SSHD* (SC/23/2003), the appellant is alleging that there should be an exception to a general power. This analysis does not detract from the appellant's fundamental rights of citizenship. The fact that, before making a deprivation order the Secretary of State has to be satisfied that the order will not render the appellant stateless requires a degree of investigation by the Home Office and thus provides a safeguard in respect of those rights.

Therefore, to the extent that the SIAC judgment suggested that the burden of proof in relation to the issue of statelessness at the second stage is on the Secretary of State, the Court of Appeal suggested that it was wrongly decided.

The evidential burden was on the Secretary of State in the sense that if he wished to call evidence on the interpretation of Bangladeshi citizenship law (whether in the form of the *Note Verbale* or otherwise), it was incumbent on him to do so. However once such evidence was adduced it did not follow that the legal burden of proof which on the issue of statelessness was on E3 and N3 throughout, suddenly switched to the Secretary of State in relation to the *Note Verbale*, as SIAC had concluded.

Accordingly, SIAC erred in law in reaching the conclusion it did that the burden of proof in relation to the *Note Verbale* was on the Secretary of State. The burden of proof on the issue of statelessness was on E3 and N3 throughout. This error of law infected the reasoning of SIAC in relation to the *Note Verbale* generally.

Furthermore, the SIAC also erred in law in mischaracterising the *Note Verbale*. For the Court of Appeal, it was clear from both the questions and answers in the document that what is being addressed is application or interpretation of the *law* of Bangladesh. The *Note Verbale* was an official document which complied with all the relevant formalities. For whatever reason, SIAC failed to take account of the level of formality it entailed and disregarded that this was an official response as to the law from the correct ministry of a friendly foreign government. SIAC mischaracterised the *Note Verbale* as being somehow “extra-official” and only evidence of or an opinion about *practice*. The Court of Appeal observed that the *Note Verbale* was dealing with application of the law, not practice, particularly given that nowhere in any of the questions or answers was there any mention of practice. It was essentially at the behest of SIAC, during the course of argument, that there was more focus on practice which had not previously been at the forefront of the case for the Secretary of State.

Decision documents

[2019] EWCA Civ 2020

UKSIAC E3 and N3 Preliminary issue SC_198_2017 & SC_146_2017

Outcome

The Secretary of State’s appeal was allowed on the first ground of appeal. So far as the consequences of allowing the appeal are concerned, the Court of Appeal did not consider that it would be appropriate for the Court to substitute its own findings of fact for those of SIAC. In the Court of Appeal’s judgment, the appropriate course was to remit the case to a differently constituted Commission to decide the issue of statelessness, applying the correct approach to the burden of proof, as set out in the

present judgment and giving proper consideration to the status and effect of the *Note Verbale*. It would also be open to E3 and N3 before the reconstituted Commission to adduce any evidence upon which they wish to rely suggesting an inconsistency of approach on the part of the Bangladeshi government.

Links to other relevant materials related to the case (blogs, analysis, articles, reports, etc.)

Alison Harvey, Burden of proof in statelessness cases and the meaning of “by operation of its law”, 31 January 2020