Case No: T3.2011.2046 & T3.2011.1988

Neutral Citation Number: [2012] EWCA Civ 867

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION (ADMINSTRATAIVE COURT LIST)**
**(MITTING J)**
**CO/9760/2010**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2012

**Before :**

**LORD JUSTICE LAWS**
**LORD JUSTICE RIX**
**and**
**LORD JUSTICE LEWISON**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **G1** | **Appellant** |
| **- and -** | |
| **Secretary of State for the Home Department** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Hugh Southey QC and Ms Amanda Weston** (instructed by **Birnberg Peirce & Partners**) for the **Appellant**
**Mr Tim Eicke QC and Mr Rory Dunlop** (instructed by **The Treasury Solicitor** ) for the **Respondent**

Hearing date: 21st May 2012

- - - - - - - - - - - - - - - - - - - - -

# Judgment

**Lord Justice Laws:**

***INTRODUCTION***

1. This is an appeal, with permission granted by Maurice Kay LJ on 8 March 2012, against the dismissal by Mitting J in the Administrative Court on 19 July 2011 of the appellant's claim for judicial review. The proceedings were brought to challenge the decision of the Secretary of State, made on 14 June 2010, to exclude the appellant from the United Kingdom on the ground that it was conducive to the public good to do so.

2. The appellant was born in the Sudan. He arrived in the United Kingdom as a child and was granted indefinite leave to remain as the child of a refugee, namely his father. In 2000 he became a naturalised British citizen. In 2009 he was arrested and charged with a public order offence arising out of his participation in protests against Israeli military action in Gaza. He was bailed to appear at the magistrates court but in October 2009, before he was required to surrender to his bail, he left the United Kingdom for Sudan. It appears that he has remained there ever since, a fugitive from justice in this country.

3. By letter dated 11 June 2010 the Secretary of State notified the appellant of her intention to make an order pursuant to s.40(2) of the British Nationality Act 1981 (the 1981 Act) depriving him of his British citizenship on the ground that to do so would be conducive to the public good. On 14 June 2010 the Secretary of State signed an order to that effect. By letter of the same date the Secretary of State intimated her decision, made personally, to exclude the appellant from the United Kingdom. The reasons were stated as follows:

> "Her Majesty's Government assesses that you
>
> - are involved in terrorism-related activities;
>
> - have links to a number of Islamic extremists."

4. The decision to exclude was taken under the Crown's common law prerogative powers. It was not an "immigration decision" within the meaning of s.82(2) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), and so did not attract any statutory right of appeal. Hence this challenge by way of judicial review. The appellant does however enjoy a statutory right of appeal to the Special Immigration Appeals Commission (SIAC) against the decision to deprive him of his citizenship. I will set out or summarise the relevant statutory references below. The appellant has launched such an appeal. The effect of the decision to exclude him from the United Kingdom, if it stands, means of course that the appellant can only conduct his statutory appeal from outside the country. The principal thrust of the judicial review claim is that this state of affairs is legally impermissible.

***THE LEGISLATION***

5. The power to deprive a person of his British citizenship was introduced for the first time by s.40 of the 1981 Act. S.40(2) provides in its present form:

> "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."

S.40(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."

S.40(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."

A right of appeal to the First-Tier Tribunal (Immigration and Asylum Chamber) against a decision to make an order under s.40(2) (not the order itself) is given by s.40A(1) of the 1981 Act. By s.40A(2), and s.2B of the Special Immigration Appeals Commission Act 1997, such an appeal is to SIAC in a case where (as happened here) the Secretary of State certifies that the decision has been made wholly or partly in reliance on information which should not be made public in the interests of national security. An appeal under s.40A of the 1981 Act was given a particular suspensive effect by s.40A(6), as follows:

> "An order under s.40 may not be made in respect of a person while an appeal under this section or s.2B of the Special Immigration Appeals Commission Act 1997 –
>
> (a) has been instituted and has not yet been finally determined, withdrawn or abandoned, or
>
> (b) could be brought (ignoring any possibility of an appeal out of time with permission)."

S.40A(6) was however repealed by Schedule 4 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (the 2004 Act). Schedule 2 paragraph 4 of the 2004 Act enacted a new s.40A(3) of the 1981 Act as follows:

> "The following provisions of the [2002 Act] shall apply in relation to an appeal under this section as they apply in relation to an appeal under section 82, 83 or 83A of that Act—

> (a) section 87 (successful appeal: directions) (for which purpose a direction may, in particular, provide for an order under section 40 above to be treated as having had no effect)."

In the present case the notice given to the appellant under s.40(5) stated:

> "Should any appeal in respect of the deprivation of your citizenship be successful, the order depriving you of your citizenship will be treated as never having had effect."

In fact the discretion to give such a direction lies with the First-Tier Tribunal or SIAC, not the Secretary of State. I do not know by what warrant or authority the Secretary of State included this statement in the notice.

6. Given the scope of the arguments before us I must also set out or summarise some of the provisions dealing with statutory appeals against immigration decisions. Such a decision includes a variation of a person's leave to enter or leave to remain in the United Kingdom where the person has no leave when the variation takes effect (s.82(2)(e) of the 2002 Act); and includes also a revocation of an indefinite leave to enter or remain (s.82(2)(f)). By s.83(2) of the 2002 Act such a variation or revocation was not to have effect while an appeal against it was outstanding or could be brought: so this was a parallel provision with s.40A(6) of the 1981 Act. Like s.40A(6) it was repealed, in this case by the Immigration, Asylum and Nationality Act 2006 (the 2006 Act). However the 2006 Act also introduced a new s.3D into the Immigration Act 1971 (the 1971 Act) as follows:

> "(1) This section applies if a person's leave to enter or remain in the United Kingdom—
>
> (a) is varied with the result that he has no leave to enter or remain in the United Kingdom, or
>
> (b) is revoked.
>
> (2) The person's leave is extended by virtue of this section during any period when—
>
> (a) an appeal under section 82(1) of [the 2002 Act] could be brought, while the person is in the United Kingdom, against the variation or revocation (ignoring any possibility of an appeal out of time with permission), or
>
> (b) an appeal under that section against the variation or revocation, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).
>
> (3) A person's leave as extended by virtue of this section shall lapse if he leaves the United Kingdom.

> (4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section."

7. Accordingly since the coming into force of the 2004 Act and the 2006 Act respectively, there have existed (1) in relation to a successful appeal against a decision to deprive a person of citizenship status, a discretion to direct that an order under s.40 of the 1981 Act shall be treated as having had no effect (s.40A(3)(a) of the 1981 Act); and (2) in relation to appeals against decisions to vary limited leave (s.82(2)(e)) of the 2002 Act) or revoke indefinite leave (s.82(2)(f) of the 2002 Act), an automatic extension of the leave while an appeal is pending or could still be brought (s.3D of the 1971 Act). This was the position at the time of the decision and order under s.40 of the 1981 Act in the present case.

8. There is one other provision relating to appeals under s.82(2)(e) and (f) of the 2002 Act which I should cite. S.92 of the 2002 Act provides:

> "(1) A person may not appeal under section 82(1) while he is in the United Kingdom unless his appeal is of a kind to which this section applies.
>
> (2) This section applies to an appeal against an immigration decision of a kind specified in section 82(2) …, (e), (f) …"

***THE FIRST GROUND OF APPEAL***

9. The first ground of appeal (I summarise) is that Parliament has impliedly extinguished the Crown's common law or prerogative power to exclude a person from the United Kingdom pending his appeal against the decision under s.40(2) of the 1981 Act to deprive him of his citizenship status.

10. The argument as I understand it goes like this.

(1) Under the regime which included s.40A(6) of the 1981 Act (which was repealed as I have said by the 2004 Act) no question of excluding such a person from the United Kingdom during the currency of his appeal could arise because s.40A(6) continued his citizenship in being until the appeal was concluded or could not be brought; and it goes without saying that there was (and is) no prerogative power to exclude a British citizen from the United Kingdom.

(2) However Mr Southey QC for the appellant submits that the repeal of s.40A(6) of the 1981 Act did not open the way for the Secretary of State to exclude a s.40(2) appellant from the United Kingdom whilst his appeal was pending or could still be brought, because –

> (a) The Explanatory Note to paragraph 4 to Schedule 2 to the 2004 Act, and the observations of Lord Rooker proposing relevant amendments to the 1981 Act, demonstrate that the legislative purpose was to allow deprivation and deportation appeal proceedings to take place concurrently. It was not to grant or leave a power in the hands of the Secretary of State to exclude a person from the United

Kingdom with the consequence that he would be unable to pursue his s.40A appeal from within the United Kingdom.

(b) The efficacy of the statutory right of appeal is so important that it is not to be diminished or undermined without clear legislative warrant: *Ex parte Asifa Saleem* [2001] 1 WLR 443, 457 *per* Hale LJ. *Al-Rawi* [2011] 3 WLR 388 paragraph 13 shows (if authority were needed) the importance of the right to cross-examine witnesses. In *BA (Nigeria)* [2009] QB 686 this Court described the pursuit of an appeal from outside the United Kingdom as having "a degree of unreality about it". Mr Southey also relied on the first instance decision of Collins J in *MK (Tunisia)* [2010] EWHC Admin 2363, paragraphs 17-19, and in the Court of Appeal [2011] EWCA Civ 333 the judgment of Pill LJ at paragraphs 29(d) and 30. He referred us also to *E1 v Secretary of State* [2012] EWCA Civ 357 paragraphs 39 and 43, endorsing Collins J in *MK*, and referring to Sir David Keene's judgment in *W (Algeria) v Secretary of State* [2010] EWCA Civ 898, in which emphasis is placed (paragraph 15) on the unusual nature of the SIAC procedure which, says Mr Southey, makes it all the more important that such safeguards as can be provided are in place.

(c) On the facts, the pursuit of an appeal from outside the United Kingdom is fraught with particular difficulties and disadvantages in the case of this appellant. Three solicitors who act or have acted for him have deposed to the problems they have encountered or anticipate: Ms Bajaria, Mr Croft and Ms Peirce.

(d) Accordingly, it is submitted, it cannot have been within the contemplation of the statutory measures as they stood after the changes effected by the 2004 Act that the Secretary of State, having made a deprivation order under s.40(2) of the 1981 Act, might lawfully exclude a person from the United Kingdom while his appeal rights against the decision to make the order are running.

11. I cannot accept this argument. First, however, I should observe with respect that in my judgment Mitting J was wrong to state at paragraph 5 of his judgment that the question was whether "Parliament had authorised the exercise of the prerogative power to exclude" in the circumstances contemplated. By definition the prerogative power is not authorised by Parliament. It is the residue of legal authority remaining in the hands of the Crown which Parliament has not abrogated or modified. It is common ground that by virtue of its prerogative the Crown has ample power to exclude an alien from the United Kingdom, unless the power has been abrogated or modified. The question on this part of the case is (and is only) whether it has been so abrogated or modified by the material statutory provisions upon their correct construction.

12. I am clear that the provisions cannot be so construed. The repeal of s.40A(6) extinguished the suspension of the Secretary of State's power to make a s.40(2) order while an appeal against the deprivation decision was pending or could be brought. Parliament made no provision analogous to s.3D(2) of the Immigration Act 1971 (for whose effect see *MK (Tunisia)* in this court: a decision to which I must refer further). In those circumstances there is nothing in the statutory provisions applicable after the repeal of s.40A(6) which touches the Crown's undoubted common law prerogative power to exclude the appellant once the s.40(2) order had been made. It cannot be supposed that by some hitherto unknown legal metaphysic, s.40A(6) though repealed

left behind a shade of its former self, prohibiting the exclusion from the United Kingdom of an appellant against whom a s.40(2) order had been made.

13. Nor can it be supposed, without express provision to that effect, that s.40A(6) was repealed for one purpose but kept alive for another. Accordingly neither the Explanatory Note to paragraph 4 of Schedule 2 to the 2004 Act nor the observations of Lord Rooker can assist Mr Southey. I will assume without deciding that in the circumstances it is proper for the court to consider such materials. No doubt they indicate, as Mr Southey submitted, that the legislature intended to allow deprivation and deportation appeal proceedings to take place concurrently. But the repeal of s.40A(6) was without qualification.

14. Mr Southey also relied on the enactment of s.40A(3) by the 2004 Act. But the discretionary power which it confers plainly cannot be read as impliedly prohibiting the Secretary of State from excluding an appellant from the United Kingdom.

15. Mr Southey sought to dignify his argument by an appeal to the principle of legality; but this adds nothing to what is, and under this ground of appeal is only, a question of statutory construction. Nor does his submission that the existence of a two stage process – first the decision to deprive, secondly the deprivation order – implies a legislative intention to secure for an appellant an in-country appeal, on the footing that the person in question would be entitled to remain in the United Kingdom until an order is made. I cannot find any warrant for such an implication.

16. In addition I consider that Mr Eicke QC for the Secretary of State was right to submit that the reason why the appellant must conduct his appeal from outside the United Kingdom is not, in fact, the Secretary of State's decision to exclude him. The appellant had, it will be recalled, fled the United Kingdom before he was required to surrender to his bail in 2009. Once the Secretary of State's order under s.40(2) of the 1981 Act was made, the appellant would have required an entry clearance to enter this country: he no longer had a right of abode as a British citizen and had no subsisting leave to enter or remain. He would plainly have been refused entry clearance given the Secretary of State's substantive view that his exclusion was conducive to the public good: see the witness statement of Philip Larkin of the UK Border Agency dated 29 June 2011, paragraphs 37-39. In those circumstances Mr Southey's case on this part of the appeal must be that the Secretary of State owes his client a positive statutory duty to facilitate his return, outside the Immigration Rules, to conduct his appeal. There is no statutory provision which begins to have such an effect.

17. For all these reasons I do not consider there is anything in this first ground of appeal. There has been no statutory abrogation or modification of the Crown's prerogative power to exclude an alien from the United Kingdom.

***THE SECOND GROUND OF APPEAL***

18. The second ground of appeal is that the Secretary of State's decision to exclude the appellant from the United Kingdom is so procedurally unfair as to be legally insupportable. This argument has both common law and European Union law elements.

19. As a matter of domestic law it is first submitted that any want of fairness or due process in the application of a statutory regime will be supplied by the common law: *Wiseman v Borneman* [1971] AC 297. As a general proposition this has of course been established for a long time. The question is whether it falls to be deployed in this case.

20. As a matter of European Union law it is submitted that the failure to inform the appellant of his right to an in-country appeal against the deprivation decision, and the failure to accord such a right, constitute a violation of his right to an effective remedy which is a cardinal feature of EU law (see for example *Ex parte Gallagher* [1996] 2 CMLR 951 *per* Lord Bingham at paragraph 10). I should say, however, that the principal focus of Mr Southey's submissions on EU law was that it gives rise to arguments of unlawful discrimination; that is the third ground of appeal.

21. Just as in relation to the first ground, given that (as I have held) even if the Secretary of State had never made the exclusion decision the appellant would be outside the United Kingdom with no realistic prospect of obtaining an entry clearance to return, his case must be that the Secretary of State is required (under this ground by reference to the dictates of procedural fairness or the right to an effective remedy) to facilitate his return, outside the Immigration Rules, to conduct his appeal.

*The Common Law*

22. With that in mind I turn first to the position at common law. It is clear that the common law presumes no right to be present at a statutory appeal; and certainly does not do so in the face of a properly constituted legal power in the Crown to exclude him. An in-country right of appeal can only be guaranteed by legislation. There is in my judgment plainly no such guarantee here. That is the effect of my conclusion on the first ground of appeal.

23. Might the dictates of procedural fairness nevertheless generate a right to be present in the circumstances of this type of appeal, or indeed this particular appeal? Mr Southey's first difficulty here is the submission against him, which I accept, that s.92(1) of the 2002 Act indicates a view on the part of the legislature that out of country appeals to the FTT are in principle neither unfair nor ineffective; and while, as I have also accepted, the common law will supply the want of the legislature where a statutory scheme lacks fair procedure, it is also the case that the requirements of fairness are shaped by the statute in question: see for example *R (Smith and West) v Parole Board* [2005] 1 WLR 350, *per* Lord Bingham at paragraph 27, referring to Lord Mustill's observations in *Doody* [1994] 1 AC 531, 560.

24. Mr Southey suggested that where, as in a SIAC appeal, the appellant will in any event suffer disadvantage compared with the position of an appellant in the ordinary way, the difficulty must be counterbalanced: *A v UK* (2009) 49 EHRR 29, paragraph 218. However that consideration, in my judgment, cannot of itself generate a right to be present at the appeal.

25. As to the circumstances of this particular case, I see no reason with respect to disagree with Mitting J's conclusions at paragraphs 9-11 of his judgment:

"9. On that shaky foundation, Miss Weston submits that, on the facts, the Claimant will not have an adequate opportunity to present his appeal unless his return to the United Kingdom is facilitated. There is a good deal of evidence about this issue. The Defendant suggests that he can give instructions and evidence by Skype or television link, for which there are adequate facilities in Khartoum: see the letter from the British Embassy of 1 July 2011. The Claimant has obtained an opinion from an apparently well informed expert that to do so would put him at risk of becoming of adverse interest to the Sudanese security service, NISS, an occurrence which would put his safety at risk: see the reports of 21 May and 8 July 2011 of Peter Verney. Further, the Claimant's skilful and conscientious solicitors maintain that they cannot fulfil their professional duties to him adequately unless they are able to speak to him face to face and in confidence: see the witness statement of Smita Bajaria of 11 February 2011, prepared for the purposes of MK's appeal to the Court of Appeal, C4/2010/2146. It is neither possible nor necessary for me to resolve these differences. They can be circumvented if the Claimant can travel to a safe third country, in or from which he can give instructions and from which he can give evidence by television link – a means of giving evidence which is not significantly less satisfactory than giving evidence when physically present in court, as I explained in paragraph 24 of my judgment in *El v SSHD* [2011] EWHC 1047 (Admin)."

10. The live question is whether the Claimant can travel to a safe third country. For that, he will require a Sudanese identity document and passport. He already has a nationality certificate which his solicitors understand 'absent other factors' entitles him to obtain a Sudanese passport: see their letter of 11 April 2011 to SIAC. Mr Verney states that his Sudanese sources confirm that it would not be possible 'under normal circumstances' to obtain a Sudanese passport without showing that national service had been completed. The June 2003 issue of the Sudanese Human Rights Quarterly stated that persons who refused to enter national service 'may also be prevented from obtaining official identity documents, such as travel documents, identity papers and drivers licenses': see paras 13 and 16 of Mr Verney's letter of 8 July 2011. If there is a legal principle which requires that the Claimant can give evidence in a manner which permits SIAC to hear and observe him which, for the reasons expressed above, I doubt, it must, as a matter of principle, be for the Claimant to demonstrate that that course is not open to him. The material which he has deployed is, at best, equivocal. On balance, it seems to be more likely than not that he can obtain a Sudanese passport, just as he has obtained a nationality certificate.

> 11. Further, he would, in any event, require a Sudanese passport lawfully to leave Sudan. His British passport has been withdrawn. If, nevertheless, he would propose to depart Sudan by using it, he could also use it to visit a third country. Further, if he were to return to the United Kingdom, there is no guarantee – indeed, in my judgment, little likelihood – that he would return to Sudan if he were to lose his appeal. If he left without a Sudanese passport and, probably, exit visa, he would have no travel document which would secure his re-entry into Sudan. Emergency travel documents would have to be obtained from the Sudanese Embassy in London. If his concerns about NISS are justified, that would immediately alert the Sudanese authorities to the fact that he was unable to travel on his British passport. The most obvious of enquiries would reveal why – that it had been withdrawn on conducive grounds. It would then be open to him to claim that it would not be safe to return him to Sudan – a ground of challenge, which, given Sudan's notoriously poor human rights record, might well succeed. Accordingly, the step which the Claimant suggests is required of the Defendant would, if he were found to pose a threat to national security, frustrate a decision which would, by then, have been established to be lawful and justified. In my judgment, the Defendant cannot be criticised for refusing to take a step which would, in all probability, have the effect of frustrating a decision which, if upheld on appeal, would have been lawfully and properly taken in the interests of national security."

In fact the Secretary of State has a substantial case (summarised at paragraph 40 of Mr Eicke's skeleton argument) to the effect that the appellant would be perfectly able to pursue his appeal, and give evidence and instructions, from the Sudan. But I think Mr Justice Mitting was right in any event to hold that the burden of proof on this issue lay upon the appellant: as I have said he was and is asserting a positive claim that the court should direct the Secretary of State to facilitate his return to the United Kingdom in circumstances where there is no warrant in the legislation or rules for any such obligation. To require the appellant to make such a case, if he can, is not in my judgment contradicted by *EH (Iraq)* [2005] UKIAT 00062 on which the appellant relies; and if it were I would respectfully disagree with it.

*The Law of the European Union*

26. I turn to Mr Southey's case on the application of the law of the European Union. EU law guarantees no right to be present at the hearing of a statutory appeal such as the appellant has launched in this case. But Mr Southey submits, as I have indicated, that the failure to inform the appellant of his right to an in-country appeal against the deprivation decision, and the failure to accord such a right, constitute a violation of his right to an effective remedy guaranteed by EU law.

27. Mr Southey first has to demonstrate that EU law is engaged at all; this is also the first issue upon the third ground of appeal asserting unlawful discrimination. I propose to address the issue under that head, because in my judgment, even if the decision to

exclude is subject to the law of the EU, it is not shown that the right to an effective remedy entitles the appellant to be present for his appeal under s.40A any more than does the common law. I do not consider that Mr Southey's reference to Article 47 of the European Charter of Fundamental Rights (the Charter) adds anything.

28. In the circumstances there is in my judgment nothing in the second ground of appeal.

***THE THIRD GROUND OF APPEAL***

29. Mr Southey submits that the appellant has suffered discrimination by being prevented from attending his statutory appeal, in contrast to the position of an alien appealing against the revocation of his leave to remain who would be entitled to be present. Save for one point on Article 14 of the European Convention on Human Rights, to which I will come, the argument wholly depends on the application of European legislative measures which forbid discrimination – Article 18 of the Treaty on the Functioning of the European Union (TFEU) and Article 21 of the Charter; Mr Southey referred also to Article 31(4) of the Citizens Directive. The first question is whether these or any provisions of EU law are engaged in the case at all.

*Does the Law of the European Union Apply?*

30. Mr Southey submits that the way in, so to speak, lies in the fact that because the loss of national citizenship entails the loss also of EU citizenship (conferred by Article 9 of the Treaty on European Union and Article 20(1) of TFEU), the deprivation of the citizenship of a national of an EU Member State "falls within the ambit of EU law". He relies principally on the decision of the Court of Justice of the European Union in *Rottmann v Bayern* [2010] ECR 1-1449.

31. Mr Rottmann was an Austrian citizen by birth. He moved from Austria to Munich and applied for German nationality, which he obtained by naturalisation. He thereby lost his Austrian citizenship. But he had deceived the German authorities in the course of the naturalisation procedure (by concealing the existence of criminal process against him in Austria). His German citizenship was withdrawn with retroactive effect. The result, on the face of it, was that Mr Rottmann became stateless and lost his citizenship of the EU which was, of course, an incident of his citizenship of a Member State – originally Austria. The Administrative Court of Bavaria sought a preliminary ruling of the Court of Justice. The first question asked was in these terms:

> "Is it contrary to Community law for Union citizenship... to be lost as the legal consequence of the fact that the withdrawal in one Member State..., lawful as such under national... law, of a naturalisation acquired by intentional deception, has the effect of causing the person concerned to become stateless because... he does not recover the nationality of another Member State... which he originally possessed, by reason of the applicable provisions of the law of that other Member State?

32. It was submitted to the Court of Justice that the rules on the acquisition and loss of nationality fall within the competence of the Member States (judgment, paragraph 37). In particular:

> "38 The German and Austrian Governments also argue that when the decision withdrawing the naturalisation of the applicant in the main proceedings was adopted, the latter was a German national, living in Germany, to whom an administrative act by a German authority was addressed. According to those governments, supported by the Commission, this is, therefore, a purely internal situation not in any way concerning European Union law, the latter not being applicable simply because a Member State has adopted a measure in respect of one of its nationals. The fact that, in a situation such as that in the main proceedings, the person concerned exercised his right to freedom of movement before his naturalisation cannot of itself constitute a cross-border element capable of playing a part with regard to the withdrawal of that naturalisation."

33. The Court held:

> "39 It is to be borne in mind here that, according to established case law, it is for each member state, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality: see *Micheletti* (Case C-369/90) [1992] ECR I-4239, para 10; *Belgian State v Mesbah* [1999] ECR I-7955, para 29 and *Chen v Secretary of State for the Home Department* (Case C-200/02), para 37.
>
> ...
>
> 42 It is clear that the situation of a citizen of the Union who... is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.
>
> 43 As the Court has several times stated, citizenship of the Union is intended to be the fundamental status of nationals of the Member States (*Grzelczyk* [2001] ECR I-6193, paragraph 31; *Baumbast and R* [2002] ECR I-7091, paragraph 82).
>
> 44 Article 17(2) EC attaches to that status the rights and duties laid down by the Treaty, including the right to rely on Article 12 EC in all situations falling within the scope *ratione materiae* of Union law...
>
> 45 Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law (*Micheletti and Others* [1992] ECR I-4239 paragraph 10...).

> 46 In those circumstances, it is for the Court to rule on the questions referred by the national court which concern the conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status.
>
> 47 In this regard, the national court essentially raises the question of the proviso formulated in the Court's case-law cited in paragraph 45 above, to the effect that the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law...
>
> 48 The proviso that due regard must be had to European Union law does not compromise the principle of international law previously recognised by the Court... that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law."

34. The court went on to hold that a withdrawal of naturalisation on account of deception practised in obtaining it "corresponds to a reason relating to the public interest" (paragraph 51) and "cannot be considered to be an arbitrary act" (paragraph 53: the court refers to "the general principle of international law that no one is arbitrarily to be deprived of his nationality"); but it was for the national court to consider whether the decision in the particular case "observes the principle of proportionality" (paragraph 55). I should cite paragraph 56:

> "56 Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality."

35. Mr Southey submits that the reasoning in *Rottmann* applies to the present case, and its effect is that in the procedures applicable to his appeal the appellant must be accorded the benefit of the anti-discrimination measures prescribed by EU law. In a note submitted after the hearing he relied also on the decisions of the Court of Justice in *Zambrano* [2012] 2 WLR 886 and *McCarthy* [2011] 3 CMLR 10. These cases were, however, concerned with decisions of a Member State which would or might affect

the enjoyment of rights enjoyed by EU citizens whose entitlement to citizenship was not itself in question. They do not, I think, assist in ascertaining the scope of the *Rottmann* judgment, though I shall make further brief reference to both of them.

36. Mr Eicke submits that *Rottmann* was concerned with a special state of affairs. Mr Rottmann's EU citizenship originally derived from his Austrian nationality, which he had from birth. Only the circumstances of his moving to Germany (and so, Mr Eicke would say, his exercise of free movement rights) led to the deprivation of his EU citizenship, albeit through his own fault. The present case, by contrast, concerns a wholly internal situation to which the decision in *Rottmann* does not apply.

37. I have with great respect found some difficulties with the reasoning in *Rottmann*. On the one hand there are passages which appear to suggest that national courts must "have due regard to European Union law" in adjudicating upon a question of deprivation of citizenship (because that entails the deprivation of EU citizenship) even where there is no cross-border element in the case: Mr Southey would I think emphasise in particular the terms of paragraphs 45 and 48. But there are also elements suggesting that the particular history – the applicant's having lost his Austrian nationality upon moving to Germany and seeking naturalisation there – informed the court's reasoning, notably paragraphs 42 ("...after he has lost the nationality of another Member State that he originally possessed...") and 56 ("whether it is possible for that person to recover his original nationality").

38. Moreover this uncertainty as to the decision's scope betrays, to my mind, a deeper difficulty, which may be explained as follows. The distribution of national citizenship is not within the competence of the European Union. So much is acknowledged in *Rottmann* itself (paragraph 39, cited by Advocate General Sharpston in her Opinion in *Zambrano*, paragraph 94), as is "the principle of international law... that the Member States have the power to lay down the conditions for the acquisition and loss of nationality" (*Rottmann* paragraph 48). Upon what principled basis, therefore, should the grant or withdrawal of State citizenship be qualified by an obligation to "have due regard" to the law of the European Union? It must somehow depend upon the fact that since the entry into force of the Maastricht Treaty in 1993 EU citizenship has been an incident of national citizenship, and "citizenship of the Union is intended to be the fundamental status of nationals of the Member States" (*Rottmann* paragraph 43 and cases there cited).

39. But this is surely problematic. EU citizenship has been attached by Treaty to citizenship of the Member State. It is wholly parasitic upon the latter. I do not see how this legislative circumstance can of itself allocate the grant or withdrawal of State citizenship to the competence of the Union or subject it to the jurisdiction of the Court of Justice. Article 17(2) of the EC Treaty ("Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby"), referred to at paragraph 44 of the *Rottmann* judgment, does not purport to have any such consequence. A generalised aspiration to the enjoyment of a "fundamental status" can surely carry the matter no further. In the result I am none the wiser as to the juridical basis of an obligation to "have due regard" to the law of the European Union in matters of national citizenship.

40. Nor is it clear what is meant by such an obligation, or by the proposition that decisions as to the loss or acquisition of citizenship are "amenable to judicial review

carried out in the light of European Union law" (*Rottmann* paragraph 48). Some passages (see paragraphs 53 and 55) suggest that the court has in mind, primarily at least, only the application of general principles: proportionality and the avoidance of arbitrary decision-making. But if that is right, I apprehend it would not be enough for Mr Southey. His argument was grounded on provisions of black-letter EU law: TFEU Article 18, Article 21 of the Charter, and Article 31(4) of the Citizens Directive.

41. In these circumstances I consider with respect that the *Rottmann* decision has to be read and applied with a degree of caution. It cannot in my judgment be applied so as to require that in a case such as this the adjudication of a decision to deprive an individual of citizenship must be conducted subject to any rules of law of the European Union. On the facts, as Mr Eicke submitted, there is no cross-border element whatever. There has been no actual, attempted or purported exercise of any right conferred by EU law. From first to last this is a domestic case. Quite aside from the difficulties as to the scope of EU competences,

> "it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State..." (*McCarthy*, paragraph 45)

42. For all these reasons *Rottmann* cannot in my judgment be read as importing any part of Mr Southey's panoply of black-letter EU law into the process of the appellant's appeal under s.40A. The effectiveness of the appellant's available remedies is given by the standards of the common law. Those standards, to be found in the principles of our public law, are well apt to vindicate "the general principle of international law that no one is arbitrarily to be deprived of his nationality" (*Rottmann* paragraph 53).

43. There is a further dimension to which I ought to refer. The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation State. They touch the constitution; for they identify the constitution's participants. If it appeared that the Court of Justice had sought to be the judge of any procedural conditions governing such matters, so that its ruling was to apply in a case with no cross-border element, then in my judgment a question would arise whether the European Communities Act 1972 or any successor statute had conferred any authority on the Court of Justice to exercise such a jurisdiction. We have not heard argument as to the construction of the Acts of Parliament which have given the Court powers to modify the laws of the United Kingdom. Plainly we should not begin to enter upon such a question without doing so. That in my judgment is the course we should have to adopt if we considered that the Court of Justice, in *Rottmann* or elsewhere, had held that the law of the European Union obtrudes in any way upon our national law relating to the deprivation of citizenship in circumstances such as those of the present case. But I do not think it has.

44. For the reasons I have given the law of the EU cannot, in my judgment, assist Mr Southey.

*The Appellant's Substantive Argument*

45. Subject to the point on ECHR Article 14, these conclusions (if my Lords agree with them) dispose of the third ground of appeal against the appellant. However I should make brief reference to the substance of Mr Southey's EU case on discrimination, both for completeness and to elucidate the Article 14 argument.

46. *MK (Tunisia)*, to which I have already referred, shows that an alien resident in the UK who leaves the country and is served with a decision cancelling his leave to remain is entitled to return here to exercise his statutory right of appeal against the cancellation. That arises, as the judgments show, by force of s.3D of the Immigration Act 1971. Mr Southey submits that the appellant is effectively in like case, but is the victim of the absence of any analogous provision relating to persons abroad with an extant appeal against deprivation of their citizenship.

47. TFEU Article 18 (second paragraph) provides:

> "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

Article 21(2) of the Charter provides:

> "Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."

I should notice also Article 51(2) of the Charter:

> "This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."

48. Chapter VI of the Citizens Directive (200458/EC) deals with free movement restrictions imposed on grounds (*inter alia*) of public security. Article 31(1) requires that there should be a right of appeal ("redress procedure") against expulsion decisions. Article 31(4) provides:

> "Member States may exclude the individual concerned from their territory pending the redress procedure, but they may not prevent the individual from submitting his/her defence in person, except when his/her appearance may cause serious troubles to public policy or public security or when the appeal or judicial review concerns a denial of entry to the territory."

49. The terms of Article 18 TFEU and Article 21(2) of the Charter to my mind underline my conclusion that these provisions cannot apply in the present case. Their scope or reach is firmly located within the EU competences: "within the scope of application of the Treaties/Treaty". In the case of the Charter, the point is given added emphasis

by Article 51(2). In *ZZ v Secretary of State* [2011] EWCA Civ 440 Maurice Kay LJ said this at paragraph 16:

> "[W]hat the Charter does not and cannot do is to give birth to rights, freedoms and principles in areas in which the Treaties claim no rule-making competence but acknowledge the exclusive competence of Member States. This is spelt out in art 51(2) of the Charter..."

50. Article 31(4) of the Citizens Charter is not on its face an anti-discrimination provision. Mr Southey's submission is, however, that it has to be applied without discrimination. But any comparator to be set alongside the appellant for the purpose of such an exercise would be, as I see it, a European citizen who is a citizen of another Member State.

51. Mr Southey relied on the case of *Impact v Minister for Agriculture and Food* (C-268/06). He submitted that paragraphs 43 – 45 of the judgment show that procedures in the field of EU rights should be no less effective than equivalent procedures where there is no EU element, and the equivalent non-EU case here would be the alien appellant in *MK (Tunisia).* But the submission's premise is that we are in the field of EU rights; and I have held that we are not.

52. I should add that in any event I entertain some doubt whether such difference in treatment as there is between a person in the appellant's position and an alien whose leave to remain has been cancelled – the *MK (Tunisia)* case – constitutes discrimination. The two situations are not readily comparable. The alien and the citizen (or ex-citizen) claim rights which are different in nature. Citizenship is a personal status primarily obtained by descent; the citizen might never have set foot in the country of his nationality. By contrast the rights of the resident alien consist in or arise from his presence here or his claim to be present. The citizen may be said to be less vulnerable than the alien: he cannot be deprived of his citizenship if that would render him stateless (s.40(4) of the 1981 Act). The fact that the appellant or claimant in each case seeks a like *outcome* – his return here to pursue an appeal – is not itself a basis upon which to hold that their situations are comparable.

53. But the principal ground on which I would reject Mr Southey's discrimination argument based on EU law is that EU law has no application to the case.

*ECHR Article 14*

54. The appellant seeks to deploy Article 14 of the European Convention on Human Rights, which as is well known provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

As the text demonstrates, Article 14 only regulates the distribution of other substantive rights set out in the Convention. Citizenship is not one of them.

Recognising as much, Mr Southey submits that the appellant's Article 8 right to respect for his private or family life is affected, and by that route Article 14 is engaged. But this case has nothing whatever to do with Article 8. The appellant is not asserting a claim to re-enter the United Kingdom in order to enjoy rights conferred by Article 8 (however much he might deploy arguments based on Article 8 in the course of his substantive appeal). The attempts to engage Article 14 through the gateway of Article 8 is in my judgment artificial and adventitious.

***NEW POINT***

55. Mr Southey has raised a fresh argument in his skeleton, for which he does not have permission. It is put thus:

> "The notice of the decision to make an order to deprive the appellant of his citizenship did not, contrary to the rights of a foreign national identified in *E1 v Secretary of State* [2012] EWCA Civ 357, inform the appellant that he may appeal from within the United Kingdom until he has been deprived of citizenship by order and/or excluded." (revised skeleton paragraph 3.24)

56. In my judgment this is unarguable. Regulations 4 and 5 of the Immigration Notices of Regulations 2003 which were critical to the decision in *E1*, have no application to a decision to deprive someone of British citizenship because, as I have already indicated, it is not an "immigration decision" within the meaning of s.82 of the 2002 Act. The only notice requirements which do apply to such a decision are those provided for in s. 40(5) of the 1981, which I have read, and which were fulfilled in this case in conformity with Regulation 10 of the of Nationality Regulations which I need not set out.

57. Nor is there any force in an argument about notice seen as an adjunct of any other part of Mr Southey's case. He submits that if the appellant had been told in the notice of the decision to deprive him of his citizenship that he had an in-country right of appeal, he could have exercised it before the order was made on 14th June. But the rules gave him no right to such a notice; its absence cannot generate a discrimination argument; and for reasons I have given EU law cannot help him.

***CONCLUSION***

58. I would dismiss the appeal.

**Lord Justice Rix:**

59. The difference between the alien with leave to enter or remain and the citizen is surprising and counter-intuitive (notwithstanding what is said in paragraph 52 above), and may not have been intended. However, since the statutory amendments referred to above, it is plainly there. It is not clear to me why it is there, nor why there may not be a discriminatory aspect to it. Nevertheless, where, as in this case, the appellant has himself already left the country of his own volition, for the reasons given by Laws LJ I see no requirement of domestic or EU law which can mandate his entry to this country for the purpose of pursuing his appeal to SIAC. It may not be as satisfactory

for the appellant as an in-country appeal but it is nevertheless an effective remedy, and the appellant has no one to blame but himself if he is not in a position either to conduct his appeal in country, or to argue by way of judicial review that it would be unlawful to remove him from this country pending his appeal.

**Lord Justice Lewison:**

60. I agree with both judgments.