THE COURT ORDERED that no one shall publish or reveal the names or addresses of the Appellants or of E3 who are the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellants or of E3 or of any member of the Appellants' families in connection with these proceedings.

Hilary Term
[2025] UKSC 6
On appeal from: [2023] EWCA Civ 26

JUDGMENT

N3 (Appellant) v Secretary of State for the Home Department (Respondent)
ZA (Appellant) v Secretary of State for the Home Department (Respondent)

before

Lord Reed, President
Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Sales
Lord Stephens

JUDGMENT GIVEN ON
26 February 2025

Heard on 19 November 2024

Appellant - ZA
Hugh Southey KC
Alasdair Mackenzie
(Instructed by Duncan Lewis Solicitors (City of London))

Appellant – N3
In person

Respondent
Neil Sheldon KC
James Stansfeld
(Instructed by Government Legal Department)

Intervener – Joint Council for the Welfare of Immigrants (written submissions only)
Amanda Weston KC
Ali Bandegani
(Instructed by Freshfields Bruckhaus Deringer)

LORD SALES AND LORD STEPHENS (with whom Lord Reed, Lord Hodge and Lord Lloyd-Jones agree):

1. Introduction

1. The Secretary of State for the Home Department made separate deprivation orders under section 40 of the British Nationality Act 1981 ("the 1981 Act") depriving E3 and N3 of their British citizenship because it was assessed that they posed a threat to the United Kingdom's national security. The order in respect of E3 was made on 4 June 2017 and the order in respect of N3 was made on 3 November 2017. It is sufficient for present purposes to state that there followed appellate proceedings to the Special Immigration Appeals Commission ("SIAC") against the orders on the grounds, amongst others, that they rendered E3 and N3 stateless as they no longer retained their status as Bangladeshi citizens, so that deprivation of British citizenship was prohibited by section 40(4) of the 1981 Act. The issue of statelessness was taken as a preliminary issue in those proceedings. It was E3's and N3's case that whilst they were Bangladeshi citizens at the time of their births, the effect of Bangladeshi law was that they no longer remained Bangladeshi citizens after their 21st birthdays so that depriving them of their British citizenship rendered them stateless.

2. The same issue as to statelessness, which in turn depended on the effect of Bangladeshi law on dual British and Bangladeshi nationals when they attained the age of 21, was litigated in other proceedings before SIAC involving individuals designated for the purpose of the proceedings as C3, C4 and C7. On 18 March 2021 SIAC handed down its judgment in *C3, C4 and C7 v Secretary of State for the Home Department* (SC/167/2020, SC/168/2020 and SC/171/2020) ("*C3, C4 and C7*"), allowing the appeals on the ground that the deprivation orders in respect of those individuals depriving them of their British citizenship rendered them stateless as they no longer retained their Bangladeshi citizenship.

3. The Secretary of State accepted that the decision in *C3, C4 and C7* could be read across to the proceedings involving E3 and N3. Therefore, the ultimate outcome of appellate proceedings involving E3 and N3 was that by letter dated 20 April 2021 the Secretary of State wrote conceding those proceedings by informing them that in light of the SIAC judgment in *C3, C4 and C7* the deprivation orders in relation to E3 and N3 were withdrawn. The letter also stated that E3's and N3's "British citizenship has therefore been reinstated." By letter dated 28 April 2021 the Secretary of State specified that the original orders were not unlawful and maintained that the orders, despite having been withdrawn, were nevertheless effective to deprive E3 and N3 of status as British citizens between the dates upon which they were made and the date upon which they were withdrawn. The Secretary of State also maintained that E3's daughter, ZA, who was born on 10 June 2019, during the period when the deprivation order was in force in respect of her father, was not a British citizen at birth, as her father was not then a British citizen.

4. On 1 November 2021, N3, E3 and ZA commenced these judicial review proceedings in respect of the refusal by the Secretary of State to accept that N3 and E3 were British citizens between the dates of the respective deprivation orders made against them and the withdrawal of those orders, and to accept that ZA was a British citizen at birth. The application failed at first instance before Jay J: ([2022] EWHC 1133 (Admin), [2022] 1 WLR 4632). It also failed on appeal to the Court of Appeal (Sir Julian Flaux Chancellor of the High Court, Lewis and Laing LJJ): ([2023] EWCA Civ 26, [2023] KB 149). In summary the Court of Appeal upheld the deprivation orders as lawful orders and held, at para 42, that:

> "A person is a British citizen if he meets the statutory requirements set out in the relevant section of the 1981 Act. He is deprived of that status by a deprivation order made under section 40 of the 1981 Act. Whilst deprived of that status, he is not entitled to British citizenship for the period whilst that order is in force. When the order is withdrawn, the legal barrier to enjoyment of his right to British citizenship is removed and, from the date of withdrawal of the order, he is a British citizen as he meets the statutory requirements for being a British citizen and there is no barrier in place depriving him of that status."

In conclusion, at para 50, the Court of Appeal held that "the withdrawal of the deprivation orders in the case of E3 and N3 took effect on the date that they were withdrawn, that is, on 20 April 2021." Accordingly, E3 and N3 were not British citizens between the dates of the respective deprivation orders made against them and the withdrawal of those orders, and ZA was not a British citizen at birth.

5. N3 and ZA appeal against the orders of the courts below dismissing their application for judicial review. On the hearing of the appeal N3 appeared in person but made no submissions. Rather, he relied on the submissions made by Mr Southey KC on behalf of ZA.

6. It was common ground that the relevant effect of a decision by the Secretary of State to withdraw a deprivation order is the same as that of a decision by SIAC to allow an appeal. Therefore, nothing turns on the fact that the deprivation orders made against E3 and N3 were withdrawn by the Secretary of State following the decision of SIAC in *C3, C4 and C7* and in anticipation that SIAC would make the same decision in their cases, rather than being subject to a decision of SIAC in their own cases.

7. As the effect of the withdrawal of a deprivation order is to be treated in the same manner as the effect of a successful appeal against a deprivation decision it is necessary

to determine what is the effect of a successful appeal. Mr Sheldon KC, on behalf of the Secretary of State, submits that after a successful appeal the deprivation order remains in force until the date upon which the Secretary of State implements the court's decision by withdrawing the order and that the withdrawal is "from now on" so that in the period between the date of the deprivation order and the date of its withdrawal the person concerned did not have British citizenship status. Mr Sheldon accepts that this would mean that E3 and N3 were rendered stateless between the date of the relevant deprivation orders and their withdrawal. Mr Sheldon also accepts that rendering E3 and N3 stateless would be a breach of the United Kingdom's international obligation under article 8.1 of the Convention on the Reduction of Statelessness ("the Statelessness Convention"). The primary contention on behalf of N3 and ZA is that after a successful appeal and the withdrawal of the deprivation orders they should be treated as if they had never been made so that they had no effect "from the outset." Accordingly, the main issue in this appeal, as defined by the parties, is as to the effectiveness of the deprivation orders between the dates upon which they were made and the date upon which they were withdrawn. The parties defined the issue as being whether:

> "the withdrawal of the order[s] mean[s] that [they] should be treated as if [they] had never been made and never had legal effect, such that [E3, N3, and ZA have] been at all times [British citizens]."

In view of the way in which the debate developed at the hearing, we consider it appropriate to define the issues differently.

8. The first issue raised on behalf of ZA is as to the lawfulness of the deprivation decisions and orders made by the Secretary of State. It is submitted on behalf of ZA that the power of the Secretary of State to make a deprivation decision or order depends on a precedent fact, namely that the person concerned is not rendered stateless.

9. We consider it appropriate to define the second issue by concentrating on the effect of the outcome of the appellate proceedings, rather than in the way in which the parties defined the issue in the appeal which assumes that the outcome of the appellate proceedings must be implemented by the Secretary of State withdrawing the deprivation order. We consider that the second issue is more appropriately defined as being what is the effect on the deprivation order of the outcome of the appellate proceedings. In the light of the outcome of the appellate proceedings, is the deprivation order to be treated as: (a) a nullity from the outset; (b) only having no effect from the date of the outcome of the appellate proceedings; or (c) having some effects only from the date of the outcome of the appellate proceedings and some effects from the outset?

2. Factual background

10. We gratefully adopt the facts as stated by the Court of Appeal in Lewis LJ's judgment delivered on 17 January 2023.

11. E3 was born in the United Kingdom on 27 May 1981. He had British citizenship at birth and that status was continued by section 11 of the 1981 Act. Both of E3's parents were Bangladeshi citizens at the time of his birth and, accordingly, E3 was also a Bangladeshi citizen by descent at least at the time of his birth.

12. On 2 June 2017, the Secretary of State gave notice that she intended to make an order depriving E3 of his British citizenship under section 40(2) of the 1981 Act as he was assessed as being an Islamist extremist who had previously sought to travel abroad to participate in terrorist activity and posed a threat to national security. The Secretary of State said that she was satisfied that such an order would not make E3 stateless. On 4 June 2017, the Secretary of State made an order stating that E3:

> "Be deprived of his British citizenship on grounds of conduciveness to the public good.
>
> The Secretary of State is satisfied that [E3] will not be rendered stateless by such action."

13. N3 was born in Bangladesh on 12 December 1983 and acquired Bangladeshi citizenship at birth. His parents were both naturalised British citizens, so that N3 was also a British citizen at birth by virtue of section 2(1)(a) of the 1981 Act.

14. On 1 November 2017, the Secretary of State gave notice that she intended to make an order depriving N3 of his British citizenship as he was assessed as being a British/Bangladeshi national who had travelled to Syria and aligned himself with Al-Qaeda. The Secretary of State assessed him as a threat to national security. She considered that making an order depriving him of his British citizenship would not make him stateless. On 3 November 2017 the Secretary of State made an order depriving N3 of his British citizenship.

15. Both E3 and N3 appealed against the decision to make such an order on a number of grounds including that, at the date of the decisions, they no longer held Bangladeshi citizenship, and the order would render them stateless. Their appeals were joined. On 15 November 2018, SIAC allowed their appeal, holding that E3 and N3 had ceased to be

Bangladeshi citizens at the age of 21 by virtue of Bangladeshi law. On 28 December 2018, the Secretary of State appealed against the decision of SIAC.

16. On 10 June 2019, E3's daughter, ZA, was born in Bangladesh. If E3 had been a British citizen at the time of her birth, ZA would also have had British citizenship as she would have been a person born outside the United Kingdom whose father was a British citizen otherwise than by descent at the time of her birth.

17. On 21 November 2019, the Court of Appeal allowed the Secretary of State's appeal in the cases of E3 and N3 and remitted the matter to SIAC. E3 and N3 applied for permission to appeal to the Supreme Court.

18. Meanwhile, the issue of the effect of Bangladeshi law on dual British and Bangladeshi nationals when they attained the age of 21 was litigated in other cases. On 18 March 2021, SIAC handed down its judgment in *C3, C4 and C7*, allowing the appeals on the grounds that they had ceased to be Bangladeshi nationals on attaining the age of 21 and the effect of orders depriving them of their British citizenship was to render them stateless.

19. On 20 April 2021, solicitors for the Secretary of State wrote to E3 and N3 noting the judgment of SIAC in *C3, C4 and C7* on the question of statelessness. The letters said that:

> "In light of that SIAC judgment, we are instructed that the Home Secretary has withdrawn the deprivation order in relation to your client. Your client's British citizenship has therefore been reinstated."

20. Solicitors for E3 and N3 replied stating that as the Secretary of State had no power to make the deprivation orders as the orders rendered E3 and N3 stateless, "the decisions were a nullity and citizenship had always remained intact". On 28 April 2021, the solicitors for the Secretary of State replied stating:

> "In relation to reinstatement of citizenship, it is the Secretary of State's position that, at the time of making the deprivation orders in respect of both your clients, she was not satisfied that either order would make your clients stateless, in accordance with section 40(4) British Nationality Act 1981. Thus, the orders were lawful. Following SIAC's judgment in C3/C4/C7 and the decision not to appeal SIAC's determination, the Secretary of State reconsidered the matter, in light of the

> analysis of the statelessness issue and the evidence before SIAC, which was not available at the time that the orders were made. The Secretary of State is now satisfied that the deprivation orders would make your clients stateless, and accordingly the decisions have been withdrawn and your client's citizenship reinstated. The decision to reinstate your clients' citizenship, following extensive litigation and the consideration of further evidence, does not render the original decisions unlawful. For these reasons, your clients have not retained their citizenship throughout."

21. On 27 July 2021, this court issued a sealed consent order resulting in E3's and N3's applications for permission to appeal against the decision of the Court of Appeal being withdrawn, and the matter was remitted to SIAC. As the Secretary of State had notified SIAC that the decisions subject to appeal had been withdrawn, the appeals to SIAC were to be treated as withdrawn by application of rule 11A of the Special Immigration Appeals Commission (Procedure) Rules 2003 (SI 2003/1034). The proceedings in SIAC were, therefore, at an end.

22. On 1 November 2021, E3 and ZA sought judicial review of the refusal by the Secretary of State to accept that E3 was a British citizen between 5 June 2017 and 21 April 2021. They contended that the effect of the withdrawal of the decision depriving E3 of his citizenship was that the decision had never had legal effect. Consequently, they sought a declaration that E3 was a British citizen between the relevant dates and that ZA was a British citizen. N3 also brought a claim for judicial review challenging the refusal to accept that he was a British citizen between 31 October 2017 and 21 April 2021. The claims were dismissed by the judge, who held that the effect of the withdrawal of the decision was prospective only.

3. Acquisition of and the fundamental importance of a person's status as a British citizen

23. Sections 1 to 11 of the 1981 Act set out the circumstances in which a person acquires British citizenship. For the purposes of this appeal the relevant sections are sections 1(1) and 2(1)(a).

24. Section 1(1) of the 1981 Act, in so far as relevant, provides:

> "(1) A person born in the United Kingdom after commencement … shall be a British citizen if at the time of his birth his father or mother is –

(a) a British citizen; or

(b) settled in the United Kingdom …."

25. Section 2(1)(a) of the 1981 Act, in so far as relevant, provides:

> "A person born outside the United Kingdom … after commencement shall be a British citizen if at the time of the birth his father or mother—
>
> (a) is a British citizen otherwise than by descent …."

26. The status of citizenship is a fundamental status at common law. Because of that status, a British citizen has a common law right of abode in the United Kingdom. Lord Reed giving the judgment of this court in *QX v Secretary of State for the Home Department* [2024] UKSC 26, [2024] 3 WLR 547 stated, at para 71, that:

> "The common law has long recognised the right of abode of British subjects. As *Blackstone* stated, 'every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law': *Commentaries on the Laws of England*, 15th ed (1809), Book 1, Ch 1, p 137. In *R v Bhagwan* [at [1972] AC 60], decided shortly before the enactment of the [Immigration Act 1971], Lord Diplock, in a speech with which the other members of the House of Lords agreed, referred to 'the common law rights of British subjects … to enter the United Kingdom when and where they please and on arrival to go wherever they like within the realm' (p 77)."

27. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453, ("*Bancoult No 2*") at para 70, Lord Bingham of Cornhill cited a passage from the judgment in the Court of Appeal in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2000] EWHC 413 (Admin), [2001] QB 1067, ("*Bancoult No 1*") in which Laws LJ, at para 39, accepted "that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen." In *Bancoult No 2*, at para 151, Lord Mance described the common law right of abode as "fundamental and, in the informal sense in which that term is necessarily used in a United Kingdom context, constitutional." In the same case Lord Hoffmann cited Blackstone's discussion of the right of abode and said, at para 44, that "[a]t common law, any subject of the Crown has the right to enter and remain in the

United Kingdom whenever and for as long he pleases". He added, at para 45, that, whilst it did not assist to call the right of abode a constitutional right, it is an important right, and that general or ambiguous words in legislation will not readily be construed as intended to remove such a right. For the last proposition he cited his own speech in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131F–132 dealing with the principle of legality. In *QX v Secretary of State for the Home Department*, Lord Reed relied on the principle of legality, at para 73, as one of the reasons for rejecting the submission made on behalf of the Secretary of State that the right of a British citizen to enter and remain in the United Kingdom as a common law right was abolished by the Immigration Act 1971 and replaced by a statutory right.

28. We consider that it is unnecessary to cite any further authority for the fundamental importance of a person's status as a British citizen and for the engagement of the interpretative principle of legality.

4. The United Kingdom's Treaty obligation not to render a person stateless

29. On 30 August 1961 the United Kingdom signed, and on 29 March 1966 ratified, the Statelessness Convention. The Statelessness Convention entered into force on 13 December 1975 in accordance with article 18. Rendering a person stateless is prohibited by article 8.1 which provides that:

> "A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless."

5. The statutory provisions

30. The statutory provisions which are central to this appeal are sections 40 and 40A contained in Part V of the 1981 Act headed "Miscellaneous and Supplementary", together with section 2B of the Special Immigration Appeals Commission Act 1997. Section 40, headed "Deprivation of citizenship", sets out the circumstances in which a person may be deprived of his or her status as a British citizen by an order made by the Secretary of State. Section 40A, headed "Deprivation of citizenship: appeal", sets out provisions in relation to appeals against deprivation orders made by the Secretary of State. Section 40A must be read with section 2B of the Special Immigration Appeals Commission Act 1997 which provides for an appeal to SIAC if the Secretary of State has certified that the Secretary of State's decision to make a deprivation order was taken wholly or partly in reliance on information which in his opinion should not be made public in the interests of national security. We will set out both section 40 and section 40A of the 1981 Act as in force at the material time together with section 2B of the Special Immigration Appeals Commission Act 1997.

(a) The power of the Secretary of State in section 40 to deprive a person of citizenship status

31. Section 40, in so far as relevant, provides:

> "(1) In this section a reference to a person's 'citizenship status' is a reference to his status as—
>
> (a) a British citizen ….
>
> (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
>
> (a) fraud,
>
> (b) false representation, or
>
> (c) concealment of a material fact.
>
> (4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.
>
> (4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—
>
> (a) the citizenship status results from the person's naturalisation,

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

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

(5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—

(a) that the Secretary of State has decided to make an order,

(b) the reasons for the order, and

(c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c 68)….."

(b) The right of appeal in section 40A to the First-tier Tribunal

32. Section 40A, in so far as relevant, provides:

"(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 ….

> (3) The following provisions of the Nationality, Immigration and Asylum Act 2002 (c 41) shall apply in relation to an appeal under this section as they apply in relation to an appeal under section 82 of that Act–
>
> > (c) section 106 (rules),
> >
> > (d) section 107 (practice directions), and
> >
> > (e) section 108 (forged document: proceedings in private)."

(c) The right of appeal to SIAC in section 2B of the Special Immigration Appeals Commission Act 1997

33. Section 2B of the Special Immigration Appeals Commission Act 1997 provides that:

> "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 (c 61) (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) (and *section 40A(3)(a)* shall have effect in relation to appeals under this section)." (Emphasis added).

In passing we note that the emphasised cross reference in section 2B of the Special Immigration Appeals Commission Act 1997 to section 40A(3)(a) of the 1981 Act is of no effect, as section 40A(3)(a) has been repealed. The amendment to section 2B which would remove the cross reference has not been brought into force.

(d) The nature of an appeal to the First-tier Tribunal or to SIAC

34. Under section 40(2) of the 1981 Act, the Secretary of State "may by order deprive a person of a citizenship status if . . . *satisfied* that deprivation is conducive to the public good", but under section 40(4) "may not make [such] an order . . . if . . . *satisfied* that the order would make a person stateless" (emphasis added). Under section 40(3), the Secretary of State may also deprive a person of citizenship status which results from his registration or naturalisation if "satisfied" that the registration or naturalisation was

obtained by means of fraud, false representation or concealment of a material fact. Parliament has provided a right of appeal against a deprivation decision but on appeal it is common ground that it is for the appellate body, whether the First-tier Tribunal or SIAC, to determine for itself whether the ground exists and/or whether the order would make the person stateless (albeit that in those respects it may choose to give some weight to the views of the Secretary of State) and not simply to determine whether the Secretary of State had reason to be satisfied of those matters: see *Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62, [2014] AC 253, para 30 and *Pham v Secretary of State* [2015] UKSC 19, [2015] 1 WLR 1591, paras 1, 64 and 101.

35. Five further points can be made about the appeal to the First-tier Tribunal or to SIAC.

36. First, it is usual for more information to be available before the appellate body than was available to the Secretary of State when making the deprivation decision. For instance, in relation to statelessness it is common for expert evidence to be called before the appellate body.

37. Secondly, in hearing the appeal the appellate body makes its own decision on all facts in evidence before it. It is not restricted to the facts as known to the Secretary of State when making the deprivation decision.

38. Thirdly, the appellate body is not given the task of fulfilling a judicial review function. It does not examine the lawfulness of the Secretary of State's deprivation decision on public law grounds. For instance, it cannot and does not determine whether the Secretary of State's deprivation decision or order was *Wednesbury* irrational (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) or whether it was flawed in any other public law sense. The task given to the appellate body is different. It is required to examine whether the ground for a deprivation order exists and/or whether the deprivation order would make the person stateless. If the appeal is allowed by the appellate body, then the Secretary of State is bound by that court's decision in accordance with the rule of law and as the matter would be res judicata between the parties. For instance, if the appellate body finds that the person concerned would be rendered stateless then, at that stage, the Secretary of State is bound by that decision. However, the decision of the appellate body does not speak to whether the Secretary of State's deprivation decision was unlawful in public law terms and indeed there was no suggestion in this appeal that the Secretary of State was not entitled in public law terms to make the deprivation decision.

39. Fourthly, under ordinary principles a court order takes effect from the date of the order. The practice in SIAC is in many cases to allow a judgment to stand as the order to give effect to it, so that the date of the judgment is the relevant date.

40. Fifthly, ordinarily the outcome of an appeal is that the matter at issue is treated from the outset (ex tunc) in the manner determined by the appellate court. However, the outcome of an appeal can be that the matter at issue is treated from now on (ex nunc) in the manner determined by the appellate court. Furthermore, in some circumstances some of the matters at issue can be treated from the outset and others treated from now on in the manner determined by the appellate court.

(e) Several points in relation to sections 40 and 40A of the 1981 Act

41. It is convenient at this stage to make several points in relation to sections 40 and 40A of the 1981 Act and section 2B of the Special Immigration Appeals Commission Act 1997.

42. First, a ground on which a person may be deprived of status as a British citizen is where the Secretary of State is satisfied that deprivation is conducive to the public good: section 40(2).

43. Secondly, further grounds on which a person may be deprived of citizenship status which results from his registration or naturalisation are where the Secretary of State is satisfied that the registration or naturalisation was obtained by means of fraud, false representation or concealment of a material fact: section 40(3).

44. Thirdly, section 40(4) imposes a restriction, or a limitation, on the power of the Secretary of State to make a deprivation order under section 40(2) where the Secretary of State is satisfied that deprivation is conducive to the public good. The restriction or limitation is that the Secretary of State may not make a deprivation order if he or she is *satisfied* that the order would make a person stateless. Thus, section 40(4) permits a lawful decision to be taken on the basis that the Secretary of State is *satisfied* that a deprivation order will not render the person concerned stateless. It is common case that in determining whether he or she is so satisfied the Secretary of State must act in accordance with usual public law principles, so he or she must direct herself properly in law, take into consideration the matters he or she ought to consider and exclude from his or her consideration matters that are irrelevant to what he or she has to consider. Furthermore, it is common case that he or she must take reasonable steps to acquaint himself or herself with the relevant information to enable him or her to determine whether he or she is satisfied that the deprivation order would make the person concerned stateless: see the *Wednesbury* case, above, at 229 per Lord Greene MR, and *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B per Lord Diplock. However, Mr Southey goes further and submits that for the Secretary of State to exercise his or her power to deprive E3 of his British citizenship lawfully a precedent fact must be established, namely that E3 would not be rendered

stateless by the Secretary of State making a deprivation order: see para 69 below. We reject this submission for the reasons given in paras 71-83 below.

45. Fourthly, there is a process for making a deprivation order. The Secretary of State must first decide to make a deprivation order ("the deprivation decision") and must give the person concerned written notice specifying that the Secretary of State has decided to make an order, the reasons for the order, and the person's right of appeal: section 40(5). Necessarily, the reasons for the order will identify whether it is to be made under section 40(2) or (3) and, if under section 40(2), that the Secretary of State is satisfied that the order will not make the person concerned stateless. There is no requirement on the Secretary of State to await the response from the person concerned to the written notice before making the deprivation order. Rather, once the written notice has been given the Secretary of State, at a time of his or her own choosing, implements the deprivation decision by making the deprivation order itself. The fact that there is no statutory requirement as to the period after the written notice of the deprivation decision is given within which the deprivation order is to be made does not mean that there are two decisions being made by the Secretary of State as to deprivation of British citizenship. Rather, there is one decision followed by implementation of the decision.

46. Fifthly, on a literal reading the prohibition in section 40(4) applies only to the deprivation order and not to the anterior deprivation decision. We reject such a literal reading as being highly artificial. Rather, section 40(5) only refers to one decision, which is the decision to make the deprivation order. The Secretary of State is required to give reasons for making the order, not reasons for the decision as if the decision was something separate. In giving reasons for making the order on the ground in section 40(2), the Secretary of State must address the prohibition contained in section 40(4). There is no separate stage when the Secretary of State remakes the decision in order to make the order. Rather, the Secretary of State, based on the earlier decision, simply proceeds by making the order.

47. The only other decision to be made by the Secretary of State is as to the date upon which to make the deprivation order, as there is no statutory requirement as to the period after the written notice of the deprivation decision is given within which the deprivation order is to be made. For instance, if there was an appeal against the deprivation decision, the Secretary of State might delay making the order itself until after the outcome of the appeal. If the outcome of the appeal was, for instance, that some but not all of the facts upon which the Secretary of State made his or her decision that "deprivation is conducive to the public good" were rejected, then it would be open to the Secretary of State to make a new decision based on those facts which were upheld on appeal. However, that would be a new decision to make an order under section 40(5) which in turn would give rise to a new opportunity for an appeal.

48. Sixthly, the person concerned has a right of appeal against the deprivation decision, although not against the deprivation order itself. This is a further indication that, in the context of an appeal, no distinction is to be drawn between the deprivation decision and the order which implements it. The appeal against the deprivation decision necessarily involves an appeal against the grounds on which the order is to be made as set out in the written notice under section 40(5). If the order is made under section 40(2), then it is common ground that the appellate body determines for itself whether the order will make the person concerned stateless: see para 34 above.

49. Seventhly, where, as here, the Secretary of State's decisions in respect of E3 and N3 were certified as being taken on national security grounds, there is no right of appeal to the First-tier Tribunal under section 40A of the 1981 Act. Instead, there is a right to appeal to SIAC.

50. Eighthly, there are no statutory provisions dealing with the powers of SIAC on an appeal against the decision to make a deprivation order. Sections 40 and 40A do not identify the consequences of a successful appeal. The legislation operates on the basis of an assumption that the ordinary principles governing the effect of an appeal will apply.

51. Ninthly, there are no statutory provisions requiring the Secretary of State to implement a decision on such an appeal. If the Secretary of State must implement the decision, then there are no statutory provisions dealing with how this is to be achieved. For instance, there is no statutory warrant given to the Secretary of State to restore a person's status as a British citizen and there is no statutory provision which provides for the withdrawal of a deprivation order. Again, the legislation operates on the basis of an assumption that the ordinary principles governing the effect of an appeal will apply.

6. Legislative history

52. In construing sections 40 and 40A of the 1981 Act as in force at the material time it is necessary to trace two amendments which were made to section 40A and then repealed. By seeing what changes were made, why they were made and why they were repealed it is possible the better to assess the meaning of sections 40 and 40A.

(a) The amendment to impose a suspensive effect on the Secretary of State's power to make a deprivation order and then the subsequent repeal of that amendment

53. By an amendment made in 2002 by section 4(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), an appeal under section 40A of the 1981 Act was given suspensive effect on the Secretary of State's power to make a deprivation order by section 40A(6) during the period within which an in-time appeal could be brought and, if

an appeal was brought, during the period until the appeal was determined. Section 40A(6) provided that:

> "An order under section 40 may not be made in respect of a person while an appeal under this section or section 2B of the Special Immigration Appeals Commission Act 1997 (c 68) — (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)."

By virtue of that amendment, the Secretary of State could not make the deprivation order itself while an in-time appeal under section 40A could be brought or if an appeal was brought until the appeal was determined. The purpose was to enable a challenge to be made to the deprivation of citizenship status before deprivation occurred.

54. However, the amendment brought about in 2002 was repealed by section 47 of, and Schedule 4 to, the Asylum Immigration (Treatment of Claimants, etc) Act 2004 ("the 2004 Act"). An appeal or a potential appeal no longer has a suspensive effect on the Secretary of State's power to make a deprivation order. Rather, the Secretary of State may now proceed to make a deprivation order during the period within which an in-time appeal could be brought and despite the person concerned bringing an appeal against the deprivation decision. As soon as the deprivation order is made, and if the person concerned is in the UK, the Secretary of State can bring immigration enforcement action to remove the person, including potentially detaining the person with a view to removal. If the person concerned is not in, but attempts to enter, the UK then the Secretary of State can take urgent measures to prevent him or her from doing so. Looking at the statutory scheme as a whole, the problem to be addressed by Parliament was that the suspensive effect prevented urgent immigration enforcement action in the public interest until an appeal against the deprivation decision was determined. The purpose of repealing the amendment was to facilitate earlier removal from the UK (including, where appropriate, by subjecting the person to immigration detention pending removal) or the prevention of entry into the UK of the person concerned, thereby, for instance, enabling immediate action to be taken to protect the public from serious threats posed by terrorists.

55. By virtue of the amendment, and if there was an appeal against the Secretary of State's deprivation decision, the point at which the deprivation order could be made was postponed until after the outcome of the appellate proceedings. Now, because of the repeal of the amendment, the point at which the deprivation order can be, and usually is made, is before the outcome of any appellate proceedings. The repeal of the amendment affects the time at which the deprivation order can be made but it has no impact on the consequences of a successful appeal. The result is that the Secretary of State is bound by the decision of the appellate body.

56. In practical terms the issue raised in these appeals would not have arisen if the amendment was still in force. A deprivation order would not have been made prior to the outcome of the appellate proceedings, so E3 and N3 would have retained their status as British citizens. The Secretary of State, being bound by the outcome of the appellate proceedings, could not then have made the deprivation orders. By virtue of the repeal of the amendment there is now a period between the making of the deprivation orders and the successful outcome of the appeal during which E3 and N3 have been deprived of their status as British citizens. However, the purpose of the repeal of the amendment was to facilitate enforcement and thereby protection of the public at an earlier stage. It was not the purpose to enable the United Kingdom to breach its treaty obligation under the Statelessness Convention by making E3 and N3 stateless during the intervening period.

(b) The amendment to enable an appellate body to order that a deprivation order "be treated as having had no effect" and the subsequent repeal of that amendment

57. By an amendment made in 2004 the appellate body (either the First-tier Tribunal or SIAC) was given discretion to order that a deprivation order "be treated as having had no effect." The amendment was made by section 26(7) of, and paragraph 4 of Schedule 2 to, the 2004 Act. By virtue of that amendment the following provision was enacted, as part of section 40A(3) of the 1981 Act:

> "(3) The following provisions of the Nationality, Immigration and Asylum Act 2002 (c 41) 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: direction) (for which purpose a direction may, in particular, provide for an order under section 40 above to be treated as having had no effect), …"

58. However, section 40A(3)(a) was itself repealed on 19 October 2014. Accordingly, between 4 April 2005, when the amendment came into force, and 19 October 2014, when the amendment was repealed, a discretion was conferred on the appellate body under which a direction could be given that a deprivation order made under section 40 of the 1981 Act was to be treated as having had no effect. Lewis LJ, in giving the lead judgment in the Court of Appeal, at para 37, considered that:

> "The existence of such a power is inconsistent with a position whereby a successful appeal under section 40A has the automatic consequence that the decision to make a deprivation order has no effect and the deprivation order itself is, therefore, also a nullity. The fact that Parliament introduced such a power

> indicates that Parliament in 2004 considered that the other provisions of section 40 and 40A of that Act did not have that effect. The view of Parliament in 2004 as to the meaning of provisions first enacted in 2002 is not decisive. But it is at least consistent with the view, and an indication, that Parliament did not intend successful appeals on the issue of statelessness to have the automatic consequence that the decision to make a deprivation order was unlawful and a nullity *such that it could never have produced legal effects*." (Emphasis added).

59. We consider that the effect of the amendment and of its repeal is more nuanced.

60. It is significant that the suspensive effect of an appeal against a deprivation decision was removed by the 2004 Act and that the same Act provided a discretion so that the appropriate appellate body could direct that the deprivation order be treated as having had no effect. In this way, Parliament ameliorated the impact of the removal of the suspensive effect. However, if the discretion was exercised to direct that a deprivation order be treated as having had no effect then such a direction could undermine the purpose of the 2004 Act, which was to facilitate enforcement and protection of the public at an earlier stage whilst there was an undetermined appeal. If a direction was given that the deprivation order be treated as having had no effect, then this could impact adversely on the lawfulness of the immigration enforcement measures taken to remove the person concerned from the UK or to prevent the person concerned from entering the UK. For example, if the individual concerned had been detained with a view to his or her removal, when as a British citizen he or she could not be removed, he or she could maintain a claim for immediate release by applying for habeas corpus or judicial review and could also maintain a claim for damages for false imprisonment. We consider, looking at the legislative history as a whole, that the problem addressed by Parliament and the purpose of repealing the amendment was to maintain the lawfulness of immigration enforcement action taken under the deprivation order whilst an appeal was being determined, that is to say that the effectiveness of such enforcement action in the interim period before final determination by SIAC or the First-tier Tribunal should not be undermined by the availability of such claims, nor should the Secretary of State have to be exposed to the risk of a claim for damages in respect of such action. The purpose was not to secure that the effect of a successful appeal was never to produce any legal effects from the outset in respect of the deprivation order; nor was the purpose to facilitate a breach of the United Kingdom's treaty obligation by making a person stateless in the period between the date of the deprivation order and the date of the outcome of the appellate proceedings.

7. Statutory interpretation

61. The normal principles of statutory interpretation are engaged.

62. The courts in conducting statutory interpretation are seeking to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision.

63. In *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, Lord Hodge, with whom those in the majority agreed, stated, at para 29:

> "The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: '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, 396). Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'"

64. As Lord Bingham explained in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, para 8, legislation is usually enacted to make some change, or address some problem, and the court's task, within the permissible bounds of interpretation, is to give effect to that purpose. He also approved as authoritative that part of the dissenting speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822, where Lord Wilberforce said:

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair

> presumption that Parliament's policy or intention is directed to that state of affairs."

65. In *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684, para 28, Lord Nicholls also set out the requirement to have regard to the purpose of a particular provision, so far as possible. He said:

> "… the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose."

66. A further interpretative principle is the principle of legality under which the courts should be slow to impute to the legislature an intention to override, for instance, established rights where that is not clearly spelt out. A person's status as a British citizen is a fundamental right so that, under the principle of legality, the inference is that Parliament cannot be taken to have intended to restrict it unless clear statutory words are used to that effect. In *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131F Lord Hoffmann described the relationship between parliamentary sovereignty and the principle of legality in these terms:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

However, the principle of legality has no application where a proposition is laid down not "by general words but by provisions of a detailed, specific and unambiguous character": see *R (Gillan) v Comr of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307, para 15. Furthermore, the principle does not permit a court to "disregard an unambiguous expression of Parliament's intention": see *Ahmed v HM Treasury (Nos 1 and 2)* [2010] UKSC 2, [2010] 2 AC 534 per Lord Phillips of Worth Matravers at para 117.

67. In *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* Lord Hodge also stated the following in relation to external aids to interpretation at para 30:

> "External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole."

68. An external aid to interpretation is that courts should seek to interpret domestic law in a way that is compatible with the United Kingdom's international treaty obligations. In *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771B Lord Diplock said:

> "… it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."

The 1981 Act was passed after the Statelessness Convention and section 40 and section 40A deal with the subject matter of the international obligation not to render a person

stateless and the right of appeal from a deprivation decision. Those provisions are to be construed, if they are reasonably capable of bearing such a meaning, as not being inconsistent with the obligation to which they are intended to give effect.

8. The issues on the appeals

69. The primary submission advanced by Mr Southey on behalf of ZA is that for the Secretary of State lawfully to exercise his or her power to deprive E3 of his British citizenship a precedent fact must be established, namely that E3 would not be rendered stateless by the Secretary of State making a deprivation order. Therefore, Mr Southey submitted that the effect of the appeal being allowed by SIAC, on the basis that E3 would be rendered stateless by a deprivation order, is that the deprivation order is automatically of no effect, because a precedent fact necessary for the making of the order has been shown not to exist. He also submitted that the consequence of the order being of no effect is that E3 has always retained his British citizenship, so that ZA became a British citizen at birth. In advancing these submissions Mr Southey relied on *R (A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557, para 29; *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74 ("*Khawaja*"), 110E-F per Lord Scarman; and *R (Lim) v Secretary of State for the Home Department* [2007] EWCA Civ 773, [2008] INLR 60, para 18.

70. Alternatively, Mr Southey submitted that the Court of Appeal was wrong to treat the outcome of the appellate proceedings as producing no legal effects in the past in relation to the deprivation orders. Rather, Mr Southey submitted that the successful outcome of the appellate proceedings meant that the deprivation orders were to be treated as nullities from the outset.

9. The ground of appeal relying on a precedent fact analysis

71. The power of the Secretary of State to deprive a person of citizenship status is contained in section 40 of the 1981 Act (set out at para 31 above). The standard of the Secretary of State being "satisfied" is a consistent standard contained in sections 40(2), (3), (4) and (4A)(b). For the purposes of this appeal the relevant standard is contained in section 40(4) read with section 40(5). Section 40(4) prohibits the Secretary of State from depriving the person concerned of citizenship status on the ground that it is conducive to the public good if the Secretary of State "is satisfied that the order would make a person stateless." Section 40(5) requires the Secretary of State to give reasons for making a deprivation decision which necessarily involves him or her forming a view as to whether he or she is satisfied that the order would not make the person concerned stateless.

72. However, Mr Southey on behalf of ZA submits that the exercise of the power by the Secretary of State to make a deprivation decision or order is contingent on the absence

of statelessness as an objective fact. Accordingly, it is submitted that if the person concerned is stateless, not as a matter of the subjective opinion of the Secretary of State but as a matter of fact, then the Secretary of State does not have the power to make a deprivation order. Mr Southey also contends on behalf of ZA that as a matter of objective fact E3 was rendered stateless and therefore the Secretary of State had no power to make the order.

73. We reject those submissions for several reasons.

74. First, the plain meaning of section 40(5) read with section 40(4) is that before making a deprivation decision under section 40(5) or a deprivation order under section 40(4), the Secretary of State must form a subjective opinion acting on the facts as then known to him or her subject to the normal public law obligations including the *Tameside* obligation to make reasonable enquiries. The Secretary of State's subjective opinion is a state of mind and is not dependent on whether the situation in fact exists. The limitation imposed on the Secretary of State is that he or she may not exercise the power to deprive a person of his or her status as a British citizen if satisfied that would render him or her stateless. If the Secretary of State is not satisfied of that fact, the limitation on his or her power does not apply and the order will be lawful. Contrary to Mr Southey's submission, the language of the statute is not consistent with a precedent fact analysis of the kind of which *Khawaja* is the classic example.

75. Secondly, Parliament could have used, but did not use, language in section 40(4) specifying that the absence of statelessness, or to put it another way the possession of dual nationality, was a precedent fact for the exercise of the power to deprive the person concerned of his or her status as a British citizen. For instance, section 40(4) could have provided, but did not provide, that the Secretary of State may not make a deprivation order if the effect of the order would be to render the person concerned stateless. This was clearly a deliberate choice.

76. Lewis LJ made both these points at para 31 of his judgment, in a passage with which we agree. He stated that:

> "… the limitation on the exercise of the power is expressed by reference to the state of mind of the Secretary of State which will be based upon the evidence available to her at the time that she decides to make a deprivation order. The Secretary of State must consider whether a deprivation order would render a person stateless. If the Secretary of State 'is satisfied' that the order would render the person stateless, she cannot make the order. If she is not satisfied of that fact, she may exercise the power to make a deprivation order. But the limitation is

> expressed by reference to whether the Secretary of State is satisfied of a certain state of affairs. It is not dependent on whether or not the state of affairs exists. The subsection does not provide that the Secretary of State may not make a deprivation order 'if the order would render a person stateless'; it provides that the Secretary of State may not make such an order 'if he is satisfied' that the order would render the person stateless."

77. Thirdly, the authorities relied on by Mr Southey on behalf of ZA merely serve to illustrate the difference between a statutory regime where the exercise of a power or the creation of an obligation depends on the existence of a precedent fact and a statutory regime where the relevant power is stated to exist where the decision maker forms a subjective opinion. We illustrate this by reference to: (a) *R (Lim) v Secretary of State for the Home Department*, above*;* (b) *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] AC 385; and (c) *R (A) v Croydon London Borough Council*, above.

78. *R (Lim) v Secretary of State for the Home Department* concerned a decision by the Secretary of State to remove the claimant (L) to Malaysia under section 10(1) of the Immigration and Asylum Act 1999 on the ground that L, who was not a British citizen, had failed to observe a condition of his leave to remain in the UK by working at a restaurant other than the one specified in his work permit and at which he had been given permission to work. It was alleged that he had been found working at the other restaurant in breach of condition on two occasions. L, a chef, asserted that both restaurants were owned by his employer and that he had only gone to the restaurant where he had been found in order to collect food and to bring it back for use in the restaurant at which he himself worked. Section 10(1), in so far as relevant, provided that:

> "A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration officer, if—
>
> (a) having only a limited leave to enter or remain, he does not observe a condition attached to the leave …;"

Sedley LJ delivering the lead judgment in the Court of Appeal referred, at para 17, to the principle "that a decision taken without power is no decision at all." He then stated that *Khawaja* "establishes that the non-existence of a precedent fact relating to immigration status can deprive the decision-maker of power to decide and render any purported decision void." Thereafter, he entered the qualification, at para 18, that "whether something is in truth a precedent fact, absent which the decision-maker has no power to decide anything, or is one of the matters confided, at least initially, to the decision-maker

himself, has to depend on the terms of the empowering provision, in this case section 10 of the 1999 Act." Therefore, the question was whether on the proper construction of section 10(1) the power to remove required the establishment of a precedent fact or whether the matter was confided, at least initially, to the decision maker. Sedley LJ resolved that issue of construction at para 19, by stating that "[i]t is plain, in my judgment, that there are some material facts upon which the application of section 10 depends." The contrast between the wording of section 10(1) of the Immigration and Asylum Act 1999 and section 40(4) of the 1981 Act could not be starker. Section 40(4) uses the terminology of the Secretary of State being satisfied, which confides that issue, at least initially, to the Secretary of State.

79. In *Secretary of State for the Home Department v JJ* the provision in question was section 1(2) of the Prevention of Terrorism Act 2005 which provides that the power to make a control order shall be exercisable by the Secretary of State "except in the case of an order imposing obligations that are incompatible with the individual's right to liberty under article 5" of the European Convention on Human Rights. On the proper construction of section 1(2) the requirement to comply with article 5 was a precedent fact so the Secretary of State had no power to make an order that imposed any obligation incompatible with article 5. The terms of section 1(2) did not contain a limitation on the power of the Secretary of State by reference to him being satisfied that the order was not incompatible with article 5. Rather, section 1(2) set out a jurisdictional precedent fact that the order did not breach article 5. As the order in that case imposed an obligation incompatible with article 5 it was made without the power to make it and was a nullity.

80. In *R (A) v Croydon London Borough Council,* as a matter of statutory construction, the precedent or jurisdictional fact was whether the person in question was or was not a child: see paras 29 and 32. If they were a child, then the obligation under section 20 of the Children Act 1989 on the local authority to provide accommodation applied. In contrast to the terminology used in section 40(4) of the 1981 Act, the obligation in section 20 of the Children Act 1989 did not depend on the local authority being satisfied that the person was a child.

81. Fourthly, there is a contrast between the terminology in section 40(4) and (5) which supports the conclusion that statelessness in section 40(4) is not a precedent fact. The prohibition on the Secretary of State making a deprivation order in section 40(4) depends on the Secretary of State being satisfied regarding a particular state of affairs whilst section 40(5) provides that before making a deprivation order the Secretary of State must give the person concerned written notice. The language used in section 40(5) shows that the giving of a written notice is a precedent fact condition for the exercise of the power to make a deprivation order and underlines the point made at para 75 above that Parliament deliberately chose not to make statelessness an objective condition with the same status.

82. Mr Southey presented a further submission in relation to the proper construction of section 40(4) of the 1981 Act based on the common ground that in the appeals brought by E3 and N3 against the deprivation decisions it is for SIAC to determine for itself on the evidence before it whether the orders would make them stateless. Mr Southey maintained that as the appellate body objectively decides whether the person concerned would be rendered stateless it must follow that the absence of statelessness must be the condition precedent for the exercise by the Secretary of State of the power conferred on him or her to make a deprivation order. We reject this submission. The power of the Secretary of State is to be found in the plain words of 40(5) read with section 40(4). The power of the Secretary of State is not qualified by reference to the distinct function of the appellate body. As explained above, the appellate body has its own role to receive evidence which may be different from that available to the Secretary of State and decide matters for itself; the appellate body does not examine the lawfulness of the Secretary of State's decision, and no inference can be drawn from its role as to the nature of the condition on the basis of which the Secretary of State's power exists.

83. In conclusion, as a matter of the proper construction of section 40(4) read with section 40(5) the power of the Secretary of State to make the deprivation decisions and the deprivation orders depends on his or her forming a subjective opinion as to statelessness which complies with the usual public law standards referred to above. It does not depend on an absence of statelessness as a precedent fact. We would dismiss this ground of appeal.

10. The alternative ground of appeal relying on the effect on a deprivation order of a successful appeal

84. The submissions presented by each side had an all or nothing quality. Mr Southey submitted that once SIAC made a determination of statelessness (or, as happened in this case, the Secretary of State ceased to contest the appeal brought by E3 and N3 to SIAC to establish that point), then it followed that deprivation of their British citizenship would make them stateless, with the result that for all purposes and at all material times the deprivation order made by the Secretary of State had to be regarded as unlawful. A consequence of that analysis, if applied in relation to an individual subject to immigration detention on the basis of a deprivation order made pursuant to section 40(4) and (5) of the 1981 Act, would be that the individual would have a good claim for damages for false imprisonment in relation to the period between the making of the deprivation order and the decision of SIAC. In our view, however, this far-reaching submission cannot be accepted. It would undermine the intended effect of the applicable statutory provisions, as explained above.

85. Mr Sheldon, on the other hand, submitted that if it was accepted that a deprivation order made pursuant to section 40(4) and (5) did have validity and legal effect in the period until a contrary determination by SIAC (or concession by the Secretary of State of

an appeal to SIAC), that was so for all purposes. The result was that E3 was not a British national but was in fact stateless when ZA was born, so that ZA did not acquire British citizenship pursuant to the 1981 Act. Mr Sheldon also submitted that the 1981 Act contained no mechanism to undo the effect of the deprivation order made by the Secretary of State, meaning that further action was required by the Secretary of State to withdraw it and it would continue to have effect until so withdrawn (on this analysis, if the Secretary of State failed to withdraw it the affected individual would have to bring judicial review proceedings to compel him or her to do so, while remaining stateless in the intervening period until that was done). This was the analysis accepted by the Court of Appeal.

86. However, in our view the analysis proposed by Mr Sheldon also is too extreme and is flawed. It cannot be sustained because it would involve giving the relevant statutory provisions a wider effect than is justified by their limited purpose (see para 60 above), and would be contrary to their proper interpretation reflecting fundamental rights in accordance with the principle of legality and the principle of the presumption of compliance with the UK's obligation under the Statelessness Convention (paras 66-68 above).

87. In our view, the extreme submissions made on each side fall to be rejected. The proper analysis involves a middle position.

88. The legal effect of a failure to comply with a condition for the exercise of a power conferred by a statute, where that is not spelled out expressly, depends upon an inference as to Parliament's intention as to what that effect should be: *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340, paras 14-23, and *A1 Properties (Sunderland) Ltd v Tudor Studios RTM Company Ltd* [2024] UKSC 27, [2024] 3 WLR 601, paras 57-68. As was observed in *A1 Properties* at para 61, "[t]he point of adoption of the revised analytical framework in *Soneji* was to move away from a rigid category-based approach to evaluating the consequences of a failure to comply with a statutory procedural requirement and to focus instead on (a) the purpose served by the requirement as assessed in light of a detailed analysis of the particular statute and (b) the specific facts of the case, having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement". At para 63 it was pointed out that this allows for different interests to be taken into account and accommodated according to proper interpretation of the statute and analysis of its effects: "[t]he statutory regime may reflect, and balance, a number of intersecting purposes, both as to substantive outcomes and as to the procedural protections inherent in the regime. In that situation, a more nuanced analysis may be called for" than to treat the statute as having a simple clear-cut effect which is unchanging and uniform in all circumstances and for all purposes. This approach to statutory interpretation requires weight to be given to individual rights affected by the operation of the statutory regime: *A1 Properties*, para 64.

89. In the present case we consider that this approach to interpretation of the statutory provisions in issue calls for consideration and protection of E3's individual rights according to the principle of legality and under the Statelessness Convention, as explained above, in so far as that does not compromise the statutory purpose identified in para 60 above. An interpretation of those provisions is available which has an effect which both gives effect to that statutory purpose and respects E3's individual rights.

90. The statutory provisions should be given effect to achieve the purpose for which they were enacted, namely to provide legal protection for the Secretary of State and his or her officials in relation to immigration enforcement action taken on the basis of a deprivation of citizenship according to his or her order; but they should only be given that effect, and not the wider effect for which Mr Sheldon contended. In particular, they do not have the effect that a deprivation order made by the Secretary of State pursuant to section 40(4) and (5) has the result that the relevant individual in fact ceases to be a British citizen as a matter of his or her underlying status and is rendered stateless. Once SIAC determines that recognition of the validity of the deprivation order would render the individual stateless and it allows the appeal against it (or the Secretary of State concedes that SIAC must allow the appeal), then for the purpose of determining the individual's status in the period from the date of the making of the order until the appeal is allowed (as distinct from the purpose of deciding whether immigration enforcement action taken in that period on the basis of that order was unlawful) the order is to be treated as having no effect: the individual is to be regarded as having been a British citizen throughout. That is the position in relation to E3 and N3.

91. The consequence of this for ZA in the present case is that she is a British citizen by virtue of E3's status as a British citizen at the time of her birth (10 June 2019).

92. The analysis we have set out also explains why Mr Sheldon's submission regarding the need for further action by the Secretary of State to give effect to an order of SIAC determining the nationality status of an individual is incorrect. The submission was based on the idea that a deprivation order made pursuant to section 40(4) and (5) which could not be impugned according to ordinary public law principles of review was valid for all purposes and that SIAC did not review its legality at the time it was made. However, once it is appreciated that a determination by SIAC is effective to resolve authoritatively the underlying citizenship status of an appellant who appeals against such an order for all purposes other than those regarding the lawfulness of immigration enforcement action taken by the Secretary of State, the difficulty of giving effect to SIAC's order falls away. Once SIAC makes its determination that a deprivation order would make an individual stateless and accordingly allows the appeal against it, nothing more is required to be done. The Secretary of State is simply bound by that determination for all purposes (other than in respect of the validity of immigration enforcement action taken on the basis of the deprivation order up to the time the appeal against it is allowed): see *R (Majera (formerly SM (Rwanda)) v Secretary of State for the Home Department* [2021] UKSC 46, [2022] AC 461. In relation to those purposes the matter is res judicata

so far as concerns the Secretary of State, who is therefore not entitled to deny that the individual remained a British citizen throughout the whole period after the making of the deprivation order, with all that this entails.

93. As a matter of good practice and for good order, we consider that the Secretary of State should formally withdraw the deprivation order as from the date of the SIAC or tribunal order, to minimise the risk of confusion. But the binding effect of such an order does not depend upon the taking of such an administrative step.

11. Conclusion

94. For the reasons we have set out, we would uphold ZA's appeal and make a declaration that she is a British citizen. We would also allow the appeal by N3 in part, subject to the qualifications explained above.