Neutral Citation Number: [2022] EWCA Civ 33

Case No: CA-2021-000739 (formerly C4/2021/1553)

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**MR JUSTICE CHAMBERLAIN**
**[2021] EWHC 2179 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 January 2022

**Before :**

**SIR GEOFFREY VOS, MASTER OF THE ROLLS**
**LORD JUSTICE BAKER**
and
**LADY JUSTICE WHIPPLE**

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**Between :**

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| **THE QUEEN (on the application of D4) (NOTICE OF DEPRIVATION OF CITIZENSHIP)** | **Claimant/ Respondent** |
| **- and -** | |
| **SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Defendant/ Appellant** |

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**Lisa Giovannetti QC and Andrew Deakin** (instructed by the **Treasury Solicitor**) for the **Appellant**
**Dan Squires QC and Ayesha Christie** (instructed by **Birnberg Peirce**) for the **Respondent**

Hearing date : 7 December 2021

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# Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30am on Wednesday 26 January 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

**Lady Justice Whipple**

## Introduction

### *The Issue*

1. This appeal raises the issue of whether Regulation 10(4) of the British Nationality (General) Regulations 2003 (the "2003 Regulations") is *ultra vires*. Regulation 10(4) permits the Home Secretary to serve notice of a decision to deprive a person of their citizenship under section 40 of the British Nationality Act 1981 (the "1981 Act") by placing a copy of that notice on the person's file at the Home Office.

2. D4 succeeded in her challenge before Chamberlain J. He decided that regulation 10(4) was *ultra vires.* He declared that provision and the order purportedly depriving D4 of her nationality under section 40(2) of the 1981 Act to be nullities, and he declared that D4 remained a British citizen. The Home Secretary appeals that decision.

3. The issue raised in this appeal is one of statutory construction going to the *vires* of regulation 10(4). There may be many good reasons why the Home Secretary might wish to be able to serve notices to file in some circumstances. But this appeal is not about the merits of having such a provision, but rather about whether regulation 10(4) goes beyond what was permitted by the statute.

### *Background Facts*

4. The Claimant is a woman born in 1967 who has been detained at Camp Roj in north-eastern Syria since January 2019. She was born in the United Kingdom and had British nationality from birth. She also has Pakistani nationality. On 27 December 2019, the decision to deprive her of her British citizenship was made by the Chancellor of the Exchequer in the Home Secretary's absence, on grounds that the decision was conducive to the public good. He certified that the decision was made on information which should not be made public in the interest of national security and accordingly that D4's right of appeal lay to the Special Immigration Appeals Commission ("SIAC"). That decision was placed on D4's Home Office file, in reliance on a note provided by officials which recorded that:

> "[Home Office Legal Advisors] advised that service to file was appropriate, given that we do not know [D4's] current precise whereabouts so as to somehow effect service on [*sic*] the notice on her. We assess that her last known address in the UK is no longer in use by [D4]. …"

On the same day, officials acting on behalf of the Chancellor made an order depriving D4 of her citizenship.

5. Chamberlain J treated the decision and order as having been made, for all practical purposes, by the Home Secretary, and I do the same.

6. On 28 September 2020, D4's solicitors asked the Foreign and Commonwealth Office for assistance in repatriating her, by way of pre-action protocol letter. On 14 October

2020, the Home Office wrote to the solicitors telling them that she had been deprived of her citizenship on 27 December 2019. This was the first time that the deprivation of citizenship had been communicated to D4 or her advisors. D4 appealed to SIAC, as she was entitled to do under section 2B of the SIAC Act 1997. One of her grounds of appeal was that Regulation 10(4) of the 2003 Regulations was *ultra vires* and that the deprivation order was therefore invalid. However, in *C3, C4 and C7 v Secretary of State for the Home Department* (SC/167/2020), another deprivation of nationality case which was handed down on 18 March 2021, SIAC determined that it lacked jurisdiction to determine whether service to file was lawful.

### *The Judicial Review*

7. In consequence, D4's solicitors issued this judicial review on 29 March 2021, seeking an extension of time for judicial review as well as expedition so that this judicial review could be determined in advance of the substantive appeal in SIAC scheduled for July 2022. Morris J granted permission, extension of time and expedition by order dated 14 June 2021.

8. Chamberlain J heard the judicial review on 22 July 2021, handing down judgment on 30 July 2021. Chamberlain J granted the application for judicial review, refused permission to appeal but granted a stay pending the Home Secretary's application to this court.

9. The Home Secretary was granted permission to appeal on the papers by Nicola Davies LJ, on the single ground that Chamberlain J erred in law in concluding that Regulation 10(4) of the 2003 Regulations was *ultra vires*. She extended the stay for the duration of this appeal or until further order.

10. In seeking permission to appeal, the Home Secretary advanced a second ground of appeal which raised a new point about relief, submitting that the judge was wrong to declare the order a nullity. Permission to appeal was refused on that second ground. In consequence, we have not heard argument on any aspect of relief, and our attention has been focussed only on the single ground for which permission was granted concerning the *vires* of regulation 10(4).

11. Before this Court D4 was represented by Dan Squires QC and Ayesha Christie, and the Home Secretary was represented by Lisa Giovannetti QC and Andrew Deakin. I am grateful to all counsel and their respective legal teams for preparing this appeal in a short timeframe and for their careful submissions which have been of great assistance.

## Legislation

### *The 1981 Act*

12. Section 40 of the 1981 Act is headed "Deprivation of Citizenship" and provides as follows:

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

> …
>
> (5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying-
>
> (a) that the Secretary of State has decided to make an order,
>
> (b) the reasons for the order, and
>
> (c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997."

13. Although the language of the Act has changed over time, section 40 has always contained provisions permitting the Secretary of State to deprive a person of their citizenship in certain circumstances, but has also always contained a requirement that before making an order depriving citizenship, the Secretary of State shall give notice in writing to the person against whom the order is proposed to be made, setting out the grounds or reasons for the order and informing the person of their right to appeal (or, at the date of inception of the Act, to the right of "inquiry" by a committee of inquiry). The current version of section 40 has been in place since 28 July 2014.

14. Section 40A of the 1981 Act was first introduced in 2003 and the current version has been in effect since 20 October 2014. It is headed "Deprivation of citizenship: appeal". It provides a right of appeal to the First-tier Tribunal except where the decision was taken for certain specified reasons, including "in the interests of national security", see section 40A(2)(a). In national security cases, a right of appeal lies to SIAC instead, pursuant to section 2B of the SIAC Act 1997 (the "1997 Act").

15. As originally enacted, section 40A(6) of the 1981 Act provided that appeals under sections 40A(1) of the 1981 Act or section 2B of the 1997 Act were suspensive, and that no order depriving a person of citizenship could take effect while an appeal was pending. But that provision was repealed by paragraph 4 of Schedule 2 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 with the effect that a deprivation order now takes effect from the moment that it is made, but that order remains subject to a (non-suspensive) right of appeal.

16. Section 41 of the 1981 Act is headed "Regulations and Orders in Council" and provides, so far as relevant, that:

> "(1) The Secretary of State may by regulations make provision generally for carrying into effect the purposes of the Act, and in particular provision –
>
> …
>
> (e) for the giving of any notice required or authorised to be given to any person under this Act;
>
> …
>
> (3) Regulations under subsection (1) or (2) may make different provision for different circumstances, …"

17. Although section 41 has been subject to a number of amendments over time, the general power to make regulations in section 41(1) and the specific power to make regulations for the giving of notice in sub-section 41(1)(e) are in the same form as originally enacted.

***The 2003 Regulations***

18. The 2003 Regulations came into force on 1 April 2003. The preamble to those Regulations stated that they were made pursuant to powers conferred on the Secretary of State by section 41(1) and (3) of the 1981 Act.

19. As originally enacted, and until 9 August 2018, regulation 10 provided:

> "(1) Where it is proposed to make an order under section 40 of the Act depriving a person of a citizenship status, the notice required by section 40(5) of the Act to be given to that person may be given-
>
> (a) in a case where that person's whereabouts are known, by causing the notice to be delivered to him personally or by sending it to him by post;
>
> (b) in a case where that person's whereabouts are not known, by sending it by post in a letter addressed to him at his last known address.
>
> (2) If a notice required by section 40(5) of the Act is given to a person appearing to the Secretary of State or, as appropriate, the Governor or Lieutenant-Governor to represent the person to whom notice under section 40(5) is intended to be given, it shall be deemed to have been given to that person.
>
> (3) A notice required to be given by section 40(5) of the Act shall, unless the contrary is proved, be deemed to have been given –
>
> (a) where the notice is sent by post from and to a place within the United Kingdom, on the second day after it was sent;
>
> (b) where the notice is sent by post from or to a place outside the United Kingdom, on the twenty-eight day after it was sent, and
>
> (c) in any other case on the day on which the notice was delivered."

20. By regulation 3 of the British Nationality (General) (Amendment) Regulations 2018/851 (the "2018 Amending Regulations", passed into law by the negative resolution procedure), from 9 August 2018 regulation 10 was amended. The preamble to the 2018 Amendment Regulations stated that they were made pursuant to powers conferred by section 41(1)(b) and (e) and (3) of the 1981 Act.

21. Amended regulation 10 provided as follows (with emphasis added to regulation 10(4)):

> "(1) Where it is proposed to make an order under section 40 of the Act depriving a person of a citizenship status, the notice required by section 40(5) of the Act to be given to the person may be—

(a) given to the person by hand;

(b) sent by fax;

(c) sent by email;

(d) sent by courier;

(e) sent by document exchange;

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

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

(i) the person's representative; or

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

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

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

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

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

(4) Where—

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

(b) either—

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

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

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

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

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

> (a) where the notice is sent by fax, when it is sent;
>
> (b) where the notice is sent by email, when it is sent;
>
> (c) where the notice is sent by document exchange, on the day after the day on which it is sent;
>
> (d) where the notice is sent by post from and to a place within the United Kingdom, on the second day after the day on which it is sent;
>
> (e) where the notice is sent by post from or to a place outside the United Kingdom, on the twenty-eighth day after the day on which it is sent;
>
> (f) where the notice is sent by post where delivery or receipt is recorded, when the notice is recorded as having been delivered or received;
>
> (g) in any other case on the day on which the notice is delivered.
>
> (6) In this regulation *"representative"* is a person who appears to the Secretary of State to be representing the person to whom the notice under section 40(5) of the Act is required to be given, and, where the notice is sent to the person's representative by any of the means set out in paragraph (1), it is deemed to have been served on the person in accordance with that section.
>
> …"

***Earlier legislation***

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

23. The 1914 Act was replaced by the British Nationality Act 1948. The 1948 Act did not provide for service at a person's last known address but instead section 29(1)(d) conferred power to make regulations "for the giving of any notice required or authorised to be given to any person under this Act". As the judge recorded at [13] and [14], a number of different regulations were made under this power, for example regulation 12 of the British Nationality Regulations 1948 (SI 1948/2721) and regulation 22(1) of the British Nationality Regulations 1972 (SI 1972/2061), both of which made provision for service by post and, if a person's whereabouts were unknown, at their last known address. The material parts of the 1948 Act were repealed and replaced by the 1981 Act.

***The Nationality and Borders Bill***

24. We were shown extracts from the Nationality and Borders Bill which is currently before Parliament. It contains proposed legislation which would have the effect of disapplying the notice requirement in section 40(5) in certain circumstances including where the Home Secretary lacks the information needed to be able to give notice under section 40(5) or it is not for any other reason reasonably practicable to give notice under section 40(5).

***Service to file***

25. There are other regulations which permit service "to file" in the context of immigration and nationality, see, as examples, regulation 7(2) of the Immigration (Notices) Regulations 2003, article 8ZA of the Immigration (Leave to Enter and Remain) Order 2000 (the "2000 Order"), and regulation 4(2) of the Immigration (Removal of Family Members) Regulations 2014. Article 8ZA of the 2000 Order was considered in *R (Masud Alam) v Secretary of State for the Home Department* [2020] EWCA Civ 1527, although that case did not involve any challenge to the provision itself on grounds of *vires* or otherwise. The validity of serving notices "to file" has not, this case apart, been previously considered.

**The Judgment Below**

26. The Judge identified two issues which were before him. The first related to the *vires* of regulation 10(4) (outlined at [3] of his judgment). That is the issue now before us on appeal. The second related to relief, specifically, whether the order dated 27 December 2019 should be declared invalid or quashed, whether relief should be refused in the exercise of the Court's discretion and, if relief was granted, whether the Home Secretary could proceed to make another order straight away or would first have to consider up to date information (see [4]). That issue is not before us on appeal.

27. The Judge summarised the background, the law and the submissions of the parties before turning to the issue of *vires*. He addressed the arguments before him in ten stages of reasoning ([40] – [50]) which led him to conclude at [51] that regulation 10(4) was *ultra vires*:

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

28. I have found Chamberlain J's analysis of the issues to be of considerable assistance. His judgment at [2021] EWHC 2179 (Admin) warrants reading in full. As will become clear, I reach the same conclusion as he did, for many of the same reasons.

**Approach to Statutory Interpretation**

29. The issue in the case relates to the *vires* of regulation 10(4) and the resolution of that issue depends on the construction of the statute and the regulations made under it.

30. The Judge summarised the approach to be adopted based on a number of authorities cited to him in this way:

> "41. … The court's task when interpreting statutes is to ascertain the meaning of the words Parliament used. Where the words can bear more than one meaning, it is legitimate to take account of the legislative history, the context and the purpose of the statute. In the end, however, the words themselves provide a hard limit to the meanings they can bear."

31. Neither party challenges that formulation in this appeal. I am satisfied that it reflects the law and I adopt it as my starting point.

32. In those circumstances, it is not necessary to refer to the many authorities cited to the judge, some of which were also referred to in argument before us. I simply pick out two of those authorities for mention. First, to support the uncontroversial proposition that the intention of Parliament is to be derived from the words of the statute and that it is not part of the function of judges to amend statutes by judicial interpretation, I draw on the words of Davis LJ in *R (AA (Sudan) v Secretary of State for the Home Department* [2017] 1 WLR 2894 at [47]:

> "It is elementary that the intention of Parliament is ultimately to be derived from the statutory language it actually has used. If the result … is unwelcome to the present Government then its remedy is to amend the statutory provisions. It is not, however, a proper exercise of the judicial function to achieve such amendment by distorting the statutory language, under the guise of a purported process of statutory interpretation."

33. Secondly, and of assistance in defining the boundaries of what is permissible within an exercise of statutory interpretation, I note this passage from Lord Neuberger's judgment in *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] AC 1189 at [72]:

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

34. Finally, I record that neither party suggested that there was an obvious drafting error in the legislation. The conditions in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 are not met (see p 592 F-H per Lord Nicholls), and this is a not therefore a case where the court is invited to add to, omit from or substitute the words of the statute.

**Parties' submissions**

35. Ms Giovannetti's case is that the *vires* for regulation 10(4) exists either within the general power at section 41(1) "The Secretary of State may by regulations make provision generally for carrying into effect the purposes of this Act…" or within the particular power at section 41(1)(e) "and in particular provision -… (e) for the giving of any notice required or authorised to be given to any person under this Act".

36. Ms Giovannetti argues that the power is a wide one and the Home Secretary has a wide discretion to regulate the giving of notice required or authorised under the 1981 Act. Specifically, she argues, the Home Secretary is entitled to implement provisions about notice being deemed to have occurred. She argues that notice is not the same thing as receipt, and there are many cases, in private and public law, which illustrate the principle that notice can for legal purposes be deemed "given" even though the person in question may not actually have received the notice at all. There are good reasons why the Home Secretary may wish to deem receipt to have taken place, given the context in which a decision such as deprivation of nationality takes place. If the state was in those circumstances prevented from exercising its powers to make a deprivation of nationality order the purpose of the legislation could be frustrated. This measure is intended to promote national security and protect British citizens. Regulation 10 read as a whole provides a coherent and reasonable approach to notice, only permitting notice to be served to file where there is no other practicable means of giving notice; in any event, as a matter of public law, the Home Secretary would be required to give notice as soon as that person's whereabouts became known (as in fact occurred in this case once D4's representatives made themselves known to the Secretary of State). If the consequence of not in fact notifying is that the individual is out of time to appeal the deprivation decision, that can be mitigated by an application to extend time to appeal, which would be likely to find favour with the Commission in these circumstances. Regulation 10(4) is a deeming provision, it creates the statutory fiction that service has taken place; intrinsically this is no different from other provisions which deem service to have taken place – and those are commonplace and legally effective even in circumstances where the person in question has not or may not, in fact, have received the notice. If the judge's reasoning in this case is correct, it will have a potentially wider impact on other cases where notice was served to file in deprivation of citizenship cases (we were told there were about 63 of those known to the Home Secretary), and possibly on other cases where it is said, for whatever reason, that notice was not in fact received by the relevant person.

37. Mr Squires for D4 submits that Chamberlain J was right essentially for the reasons he gave. Although the 1981 Act conferred power on the Home Secretary to make regulations, that power did not extend to removing the requirement for notice contained in the statute, which is the effect of deeming service to have taken place when an order is served to file. The 1981 Act could have introduced the requirement for notice at section 40(5) by words "so far as reasonably practicable" or equivalent, but those words do not appear and instead section 40(5) is a mandatory requirement for notice to be given. The Home Secretary seeks to argue that that requirement can be met by putting the notice on the person's file, but that does not constitute notice by any ordinary use of language. Regulation 10(4) is the antithesis of notice, it is in effect a regulation permitting service to be dispensed with altogether. The Home Secretary does not have power, by section 41(1)(e) or by any other provision, to make secondary legislation which has the effect of removing the requirement for notice in the primary legislation. That requirement is there for good reason, the removal of a person's citizenship is an

interference with a person's fundamental rights, and the notice requirement is a safeguard to ensure that a person knows of the decision and of their right of appeal against it. It is there because it is fair. There is no ambiguity in the statute and the words must mean what they say. Moreover, case law indicates that notice is only given when it is actually received, and that therefore remains the common law requirement.

**Notice and Deemed Notice**

38. Much of the argument in this appeal has centred on what "notice" means. A number of cases have examined the meaning of that word and the related concept of deemed notice or service.

39. In *Goodyear Tyre and Rubber Company v Lancashire Batteries Ltd* [1958] 1 WLR 857, the court construed a provision in the Restrictive Trade Practices Act 1956 requiring notice to be given about any condition imposed by the manufacturer on the sale of goods through retailers. Lord Evershed MR said at p 863:

> "The word 'notice' to a lawyer, in my judgment, means something less than full knowledge. It means, no doubt, that the thing of which a man must have notice must be brought clearly to his attention. What, in different cases, may be sufficient notice is a matter which will be decided when those cases come before the courts; …"

40. In *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 WLR 177, a case under the Landlord and Tenant Act 1954, Lord Salmon (sitting in the Court of Appeal) said at p 185:

> "According to the ordinary and natural use of English words, giving a notice means causing a notice to be received. Therefore, any requirement in a statute or a contract for the giving of a notice can be complied with only by causing the notice to be actually received - unless the context or some statutory or contractual provision otherwise provides …"

41. This passage was cited in *UKI (Kingsway) v Westminster City Council* [2019] 1 WLR 104, where the Supreme Court construed the terms of the Local Government Finance Act 1988, Schedule 4A of which set out a procedure for a completion notice to be served on the owner of a new building. Paragraph 8 of Schedule 4A provided that "without prejudice to any other mode of service" a completion notice may be served on a person in one of three ways. The completion notice in this case was not served in any one of those three ways but instead was handed to the receptionist at the building who had scanned and emailed it to the building owner. The case turned on whether that constituted valid service under the Act. Lord Carnwath JSC noted that there was no difference in the cases between 'serving' and 'giving' a notice (at [15]). He continued:

> "16. Specific statutory provisions such as paragraph 8 are designed, not to exclude other methods, but rather to protect the server from the risk of non-delivery. As was said by Slade LJ in *Galinski v McHugh (1988) 57 P & CR 359* (in relation to a similar service provision in the Landlord and Tenant Act 1927 section 23(1)):

> "This is a subsection appearing in an Act which … contains a number of provisions requiring the giving of notice by one person to another and correspondingly entitling that other person to receive it. In our judgment, the object of its inclusion …is not to protect the person upon whom the right to receive the notice is conferred by other statutory provisions. On the contrary, section 23(1) is intended to assist the person who is obliged to serve the notice, by offering him choices of mode of service which will be *deemed* to be valid service, *even if in the event the intended recipient does not in fact receive it* ." (p 365, original emphasis)."

42. In *Alam*, the Court of Appeal construed section 4(1) of the Immigration Act 1971 which provided that the power to curtail a person's leave to remain "shall be exercised by notice in writing given to the person affected", in the context of the 2000 Order which permitted service in various ways and, where attempts to give notice had failed, by article 8ZA(1)(4) of those regulations, permitted service to file. Floyd LJ noted that the process was "not in any real sense service at all" (at [11]). He held that notice was ultimately concerned with giving a person the opportunity to become acquainted with the decision (at [26]). Having referred to the *UKI* case, he said:

> "29. In my judgment, the giving of notice for the purposes of section 4(1) of the 1971 Act and the 2000 Order does not require that the intended recipient should have read and absorbed the contents of the notice in writing, merely that it be received. If it were not so, a failure to open an envelope containing the notice, for whatever reason, would mean that notice was not given. Similarly, I do not consider that the recipient must be made aware of the notice. Again, a recipient who allows mail to accumulate in a mailbox or on a hall table will not be aware of the notice. Proof of such facts should not enable the person to whom the mail is addressed to establish that the notice was not given, by being received.
>
> 30. Receipt, and thus the giving of notice, can plainly be effected by placing the notice in the hands of the person affected. So much is recognised by Article 8ZA(2)(a) . In my judgment, however, receipt in the case of an individual is not so limited. Receipt of an email, for example, will be effected by the arrival of the email in the Inbox of the person affected. Likewise, documents arriving by post will normally be received if they arrive, addressed to the person affected at the dwelling where he or she is living, at least in the absence of positive evidence that mail which so arrives is intercepted. A document received at an address provided to the SSHD for correspondence is received by the applicant, even if he does not bother to take steps to collect it."

43. The Court in *Alam* was also taken to *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604. That case established that an administrative decision adverse to an individual had to be communicated to that person before it could take full effect, subject to Parliament expressing a contrary view in the legislation. That case involved legislation which provided for income support to cease from the moment an adverse asylum determination was "recorded". The Home Secretary did not notify the refusal to the asylum seeker, but recorded the refusal internally and communicated the decision to the Benefits Agency, who ceased the

payment of income support. Lord Steyn stated that individuals had the right to know of a decision before their rights could be adversely affected, stating that this was a "fundamental and constitutional principle of our legal system" [26], but he accepted that there were exceptions to that principle, namely if Parliament legislated otherwise [27], [31], or in certain other instances notably in the criminal field, for example arrest and search warrants [28]. Lord Millett concluded that the individual in question could not be deprived of her rights until the decision refusing her asylum was communicated to her, or at least "reasonable steps were taken to do so" [43]. Lord Scott held that the refusal had to be communicated "by words or by conduct from which the requisite inference can be drawn" [55]. *Anufrijeva* is a case about the necessity of giving notice in cases involving fundamental rights, absent legislation to contrary effect; as Ms Giovannetti noted, it is not about how that notice is to be given. It is common ground that the removal of a person's citizenship engages a person's fundamental rights: see, for example, *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591 per Lord Carnwath JSC at [60], Lord Mance JSC at [97], Lord Sumption JSC at [108] and Lord Reed JSC at [120].

44. In addition to these authorities which deal with notice and deemed notice, we were referred to *Fowler v HMRC* [2020] 1 WLR 2227, a case about a deeming provision in section 15 of the Income Tax (Trading and Other Income) Act 2005 (the case report was sent to us after the hearing and was not the subject of submissions). Lord Briggs summarised the common law principles about the way in which statutory deeming provisions ought to be interpreted and applied:

> "27. (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
>
> …"

45. That case concerned a deeming provision in primary statute in relation to which no issue of *vires* arose. But the case supports the proposition that construction of the legislation is key to determining the scope of a deeming provision. In *Fowler,* the Supreme Court held that the fiction created by section 15 did not operate for all purposes and specifically not for the purpose of applying the United Kingdom/South Africa double tax treaty; on a proper construction, its only intended purpose was to adjust the basis of UK income tax liability, and not to render a qualifying individual immune from UK tax altogether ([33]). This case stands for the principle that a statutory fiction should only be taken as far as is necessary to achieve the purpose for which it has been included in the legislation, and no further. As Lord Briggs noted, the extent of the fiction is a matter of statutory construction.

46. Finally, section 7 of the Interpretation Act 1978 establishes a rebuttable presumption of service in the following way:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any

> other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

47. For the purposes of this appeal, I confine myself to noting the following relevant points extracted from these sources. First, the natural meaning of the word "notice" is that it is "received". But that is not an invariable rule. The meaning of "notice" varies from case to case, and there will be exceptions to the idea that notice equates with receipt (*Goodyear; Sun Alliance*). Secondly, receipt does not mean full knowledge. At most, receipt means that the person receiving the notice should have an opportunity to inform him or herself about the contents of the notice (*Alam*). So even if a notice is received, in a legal sense, there is no certainty that the recipient will in fact become aware of the contents of the notice. Thirdly, it is possible for a contract or provision of statute to deem notice to have been given. Once notice is deemed to have occurred, it is possible that notice has not actually been given or received at all (*Sun Alliance; UKI*).

48. Mr Squires submitted that notice necessarily involves receipt at common law. That submission is not supported by these authorities and must be rejected. I would accept that receipt is in general the intended outcome of any process which involves giving notice, and that the purpose of giving notice is to allow the person to have the opportunity to know of the decision. But there are exceptions to that general position and notice can in some circumstances have been validly given, even in the absence of deeming provisions, and even where there has been no receipt in fact.

**Scope of Regulation 10**

49. I turn then to regulation 10 which lies at the heart of this appeal. Much of the argument centred on whether section 41(1) or 41(1)(e) permitted regulation 10 to contain provisions deeming notice to have been given. The focus of that argument was on regulation 10(4), but it is important to note that regulation 10 contains two other deeming provisions as well: first, regulation 10(5) which contains a number of presumptions which are rebuttable by the contrary being proved; and secondly, regulation 10(6) which provides that service on a person who appears to the Secretary of State to represent that person is deemed to have been served on the person.

50. In my judgment, the question is not whether the enabling statute permitted the Home Secretary to make regulations which included provisions about deemed service. That is too simplistic. The question is whether the enabling statute permitted the Home Secretary to make *these particular deeming regulations*. The answer depends on the scope of the enabling power and the particular deeming provision in question. The authorities on notice summarised at paragraphs 39-47 above serve to emphasise the wide variety of circumstances in which questions about notice arise and the importance of resolving those questions in their particular context.

51. For that reason, I have not found the parties' submissions about section 13(2) of the Counter-Terrorism and Security Act 2015 to be of particular assistance. Section 13(1) confers powers on the Home Secretary to make regulations about the giving of notice of a temporary exclusion order (notice being required under section 4) or "permitted obligations" to be imposed on a person who is the subject of a temporary exclusion

order when they return to the United Kingdom (notice being required under section 9). Section 13(2) provides that the Home Secretary may include in regulations provisions about cases in which "notice is deemed to have been given". It may be that regulations permitting service to file would, with an enabling power expressed in this way, be *intra vires* – certainly, the Judge thought so (see [45]), and both Mr Squires and Ms Giovannetti agreed with his conclusion. But if that it is so, it is not because the enabling power expressly refers to deemed notice. It is because, properly construed, the enabling power permits that specific regulation in that particular context.

52. Similarly, I have not found the analogy drawn by Ms Giovannetti between the service to file provisions in article 8ZA of the 2000 Order and regulation 10(4) to be of assistance. As Chamberlain J said at [48], article 8ZA is a different provision in a different legislative context, the validity of which has never been adjudicated.

53. To resolve this appeal, it is necessary to consider first the purpose of sections 40 and 41 of the 1981 Act. Section 40 permits deprivation of citizenship in various circumstances, including at section 40(2) where the individual's deprivation is conducive to the public good (the other circumstance is where the person's citizenship has been obtained by fraud: see section 40(3)). Such an order cannot be made if it will render the person stateless (section 40(4)), but there are exceptions to that prohibition, see section 40(4A)). Section 40(5) provides that the Secretary of State must, before making a deprivation order, give notice to the person, specifying certain matters (the decision to make the order, the reasons for the order and the person's right of appeal). The reason for and purpose of giving notice is clear from section 40(5) itself: the person needs to know that a decision has been made; the person is entitled to know the reasons for that decision; and the person is put on notice of their appeal rights. It can be inferred from the legislation that the Parliamentarians who debated and passed this bill into law, even as long ago as 1981 when the world looked very different, deliberately structured the process for depriving someone of their citizenship to include minimum safeguards for the individual. Section 40(5) thus represents a balance between the public interest in permitting the Home Secretary to deprive a person of their citizenship, and the individual's rights to know that has occurred, why, and what avenues are open to them to challenge the decision.

54. Those Parliamentarians would have understood that notice is not an absolute concept and that it is subject to limitations. As early as 1914, it was understood that service might be to a "last known address" (see section 7(3) of the 1914 Act), which imports the possibility of non-receipt. The use of a last known address for persons whose whereabouts were unknown was the default position until 2018 (regulation 10(1)(b) in the original version of the 2003 Regulations). Thus the problem of not knowing the whereabouts of a person has long been in view. Parliament must have intended that the Home Secretary could still deprive a person of their citizenship, for the public good, even in circumstances where that person's whereabouts were unknown. Likewise, Parliament must have intended that the regulations would include some means to effect notice in such a case. But importantly, the statute did not say that notice could be dispensed with in such circumstances; notice still had to be given.

55. The purpose of section 41 is to make provision generally for carrying into effect the purposes of the 1981 Act. The section is concerned with implementation of those purposes and with the mechanics of the Act. It has no free-standing purpose which is

different from the purpose(s) already expressed or evident from other provisions of the Act.

56. According to the preamble to the 2018 Amending Regulations, the amendments which included regulation 10(4) were made under the particular power at section 41(1)(e). In light of that preamble, Ms Giovannetti's submission that regulation 10(4) is authorised by the general power in section 41(1) appears to proceed on a false basis. Her more realistic argument is that the amendments proceed under the specific power to make regulations about notice, contained in section 41(1)(e), and that that provision is sufficiently broad to permit regulation 10(4). I would accept Ms Giovannetti's basic proposition that section 41(1)(e) is a broad power which permits the Home Secretary to make regulations about the giving of notice for the purposes of the 1981 Act. So, for example, I accept that the Home Secretary can make regulations about giving notice to persons of unknown whereabouts about a decision to deprive them of their citizenship. I would further accept that it is permissible for the Home Secretary to make regulations about notice being deemed in certain circumstances. The issue in the case is whether regulation 10(4) exceeds what is permitted by section 41(1)(e) and in turn by section 40.

57. It is useful to consider the other deeming provisions in regulation 10. There is surely no difficulty with regulation 10(5), which is an inoffensive measure, similar in content to section 7 of the Interpretation Act 1978, by which the notice is deemed to have been received on a certain date unless the contrary is proved. This rebuttable presumption of notice lies well within the bounds of the power conferred and is consistent with the purpose of section 40. Regulation 10(6) goes further: it permits the Home Secretary to give notice to a person who appears to the Home Secretary to be the person's representative; this is not a rebuttable presumption, rather it is a straightforward provision deeming notice to have been given in that way. The parties did not address regulation 10(6) in their submissions to the Court, but it is self-evidently less extreme than regulation 10(4), in that it does at least involve some steps to be taken with a view to giving notice, in fact. These could be said to be "reasonable step(s)" adopting the words of Lord Millett in *Anufrijeva*. I would at least provisionally accept that it lies within the scope of the enabling power at section 41(1)(e).

58. The difference with regulation 10(4) is that it involves no step at all towards communicating notice. The point about regulation 10(5), regulation 10(6), and indeed the provisions contained in the original version of the 2003 Regulations which permitted service at the last known address, is that service in those ways carried at least the possibility, even in some cases the reasonable prospect (eg where notice is served on a representative), that the notice in question would be received. That cannot be said of the deeming process in regulation 10(4). Under that process there is no possibility that the notice will come to the person's attention. The effect of regulation 10(4) is not in any real sense to give notice at all (as Floyd LJ noted, in *Alam*). Instead, it is a provision which in practical terms dispenses with the giving of notice. It derogates from the notice requirement contained in section 40(5).

59. In my judgment, section 41(1)(e) does not permit that to be done. Section 41(1)(e) is there to carry into effect the other provisions of the Act. Section 40(5) provides that the Secretary of State "must give the person written notice…". As a matter of language, regulation 10(4) is at odds with section 40(5); it does not provide for the giving of notice, but rather for notice to be dispensed with. Further, to dispense with notice is

contrary to the purpose of section 40(5), which provision expressly requires notice to be given before an order is made, as a protection to the individual and as part of the balance between public and private interests. Yet further, to dispense with service is inconsistent with the constitutional principle recognised in *Anufrijeva;* as the House of Lords recognised in that case, it would be possible for Parliament to legislate contrary to that principle, either expressly or by necessary implication in the statute, but there is nothing in section 40(5) to suggest that notice should be given "so far as is possible" or similar, and there is nothing in the language of section 41(1) or section 41(1)(e) to support the extreme effect of this deeming provision.

60. I have had the opportunity of reading in draft the judgments of the Master of the Rolls who does not agree with me, and Lord Justice Baker who does agree with me. I regret that we are split. I think the Master of the Rolls is right to highlight differences of view about the nature and scope of section 40(5) as the main reason for disagreement. I make two points. First, I consider section 40(5) to be at the heart of the legislative scheme, and explicit in its requirements. I accept that notice is not an absolute concept and there are circumstances when notice can be deemed to have occurred, even if notice has not in fact been received, consistently with section 40(5). But section 40(5) has its limits. Specifically, section 40(5) requires written notice to be given. I consider that requirement to be a fixed parameter of the statutory scheme for deprivation of citizenship, taken as a whole. Regulation 10(4) does not provide for written notice to be given. In my judgment it does not carry the purpose of section 40 into effect. Secondly, I accept that there may be cases where the Home Secretary is simply not able to give notice consistently with section 40(5) as I construe it – because the person's whereabouts is unknown, they are over 18, and have no representative known to the Home Secretary – and I further accept that there might well be a compelling reason to dispense with the notice requirement in such a case, made stronger in circumstances where the individual in question has deliberately avoided the attention of the authorities and made detection of their whereabouts difficult. But these points, relied on heavily by Ms Giovannetti in her submissions, seem to me to go to the merits of regulation 10(4), rather than to the prior question of construction of the regulation-making power in section 41(1) (noting the limits of the latter exercise, see eg *Williams v Central Bank of Nigeria* cited at paragraph 33 above). It is for Parliament to decide whether in such circumstances the requirement for notice in section 40(5) should be forgone, or whether the Home Secretary should be precluded from making an order. These are legislative choices for Parliament: see *AA (Sudan)* noted at paragraph 32 above.

## Conclusion

61. I conclude that regulation 10(4) is *ultra vires*. The 1981 Act does not confer powers of such breadth that the Home Secretary can deem notice to have been given where no step at all has been taken to communicate the notice to the person concerned and the order has simply been put on the person's Home Office file. To permit that would be to permit the statute to be subverted by secondary legislation. Only Parliament can decide that the requirement for notice contained in the 1981 Act should be altered in this way.

62. I would dismiss this appeal.

## Lord Justice Baker

63. I agree that this appeal should be dismissed for the reasons given by Whipple LJ.

64. The purpose of section 40 of the British Nationality Act 1981 is to establish a process by which the Secretary of State may deprive a person of citizenship. The statutory provisions as to the grounds on which he or she may do so have been amended on several occasions since the Act was passed and since 2006 have extended to cases where the Secretary of State is satisfied that deprivation is conducive to the public good. But the requirement to give notice, now contained in section 40(5), is, and has always been, an integral part of the way in which deprivation of citizenship is intended to occur.

65. Section 41(1) empowers the Secretary of State to make regulations for the giving of the notice required by section 40(5). I agree with Whipple LJ that the question is whether the enabling statute permits the Secretary of State to make these particular deeming regulations. There are a number of ways in which notice can be given but putting the document in a drawer is not one of them. That is not "giving notice". Accordingly, regulation 10(4) is *ultra vires*.

66. There may be good policy reasons for empowering the Secretary of State to deprive a person of citizenship without giving notice, but such a step is not lawful under this legislation. If the government wishes to empower the Secretary of State in that way, it must persuade Parliament to amend the primary legislation. That is what it is currently seeking to do under the Nationality and Borders Bill.

**Sir Geoffrey Vos, Master of the Rolls**

67. I gratefully adopt Lady Justice Whipple's account of the facts, the relevant legislation and authorities. Unfortunately, however, I differ in my conclusion and would have allowed the Secretary of State's appeal. Since I am in the minority, I will give my reasons shortly.

68. As Whipple LJ has said at [53] above, it is necessary to consider first the purpose of sections 40 and 41 of the 1981 Act. Section 41 makes clear that the Secretary of State may make regulations "generally for carrying into effect the purposes of the Act, and in particular provision … – (e) for the giving of any notice required or authorised to be given to any person under this Act". I do not think there is anything in the point that the 2018 Amending Regulations were made under the particular power in section 41(1)(e), rather than the general power in section 41(1). Section 41(1)(e) cannot sensibly be read except in the way I have just quoted it, as being a power to make regulations generally for carrying into effect the purposes of the Act, and in particular for the giving of any notice required or authorised to be given. Put another way, regulations made under section 41(1)(e) have to be made to carry into effect the purposes of the Act.

69. In my judgment, the purposes of 1981 Act in general and sections 40 and 41 in particular are broader than Whipple LJ has suggested. They are, so far as relevant, to enable the Secretary of State to deprive a person of a citizenship status where she is satisfied that such a step is conducive to the public good. The notice provision in section 40(5) is part of the statutory mechanism for achieving the statutory purpose, not a purpose in itself.

70. In these circumstances, the real question is whether the power in section 41(1)(e) is broad enough to allow regulations to be made deeming written notice to have been given, when it has not in fact been received. In my judgment it is.

71. First, the context is the giving of notice to persons who are inherently unlikely to be either co-operative or to want to receive that notice. It must have been understood by Parliament that those being deprived of citizenship for the public good might be abroad or uncontactable.

72. Secondly, it is not suggested by the judge or by Whipple LJ that the other provisions of the 2003 Regulations that deem notice to have been given are *ultra vires*, and I do not think such a proposition would anyway be seriously arguable. The 2003 Regulations provide a coherent hierarchy designed to give practical effect to the requirement to give notice. In broad terms:

    i) Such notice may be given or sent by various physical or electronic means, either to the persons themselves, their representatives or parent or guardian (if under 18). If sent by those means, the notice has to be either to an address provided by the person or their representative or to their last known address, and is then deemed, unless the contrary is proved, to have been given at certain times specified in regulation 10(5).

    ii) Notice is deemed to have been given by placing it on file only if the person's whereabouts are not known, **and** either (a) no address has been provided and the Secretary of State does not know of any past address, or (b) the address provided is defective, false or no longer in use by the person, **and** no representative appears to be acting for the person or the address provided for that representative is defective, false or no longer used by the representative.

    iii) Where notice is sent to the person's representative under (i) above, that notice is deemed to have been served on the person.

73. In each of those three ways of giving notice, there is an effective deeming provision. In (i) the deeming is as to the time the notice is given, depending on how the notice is given. In (ii) the deeming is as to notice having been given, when it has in fact only been placed on file. In (iii) the deeming is as to notice having been given to the person, when it has in fact been given to a representative. In each case, there is the real possibility, sometimes likelihood, of the notice not actually being received by or communicated to the person concerned. Moreover, where the notice is sent to the last known address of the person concerned, as is permitted, it will be unlikely in some cases, and in other cases impossible, that it will come to the attention of the person concerned. This will be particularly so where that person is known to be abroad and the last known address was not a family home, but was, for example, short-term rented accommodation. Valid notice can be given by sending the notice to the last known address even if the Secretary of State knows that the person is not at that address and that it will not come to their attention by sending it there. Despite these possibilities, it is submitted that the only deeming that is *ultra vires* is when the notice is served to file. There is, in my view, no substantive difference between a regulation that allows valid service of a notice by sending it to an address at which it is known the person will not receive it and serving it to file.

74. To be clear, I disagree with what Whipple LJ says at [58] above namely that the provision which permitted service at the last known address in regulation 10(3)(b) "carried at least the possibility, even in some cases the reasonable prospect …, that the notice in question would be received". That may or may not be the case.

75. Thirdly, in my view, both the judge and Whipple LJ place too much emphasis on the words in section 40(5) saying that the Secretary of State **must** give the person written notice. In reality, the 1981 Act, read as a whole, requires that the Secretary of State must give written notice to the person in the manner contemplated in regulations made under section 41(1)(e) to carry the purposes of the 1981 Act into effect. One of those purposes is, as I have said, to enable the Secretary of State to deprive a person of a citizenship status where she is satisfied that such a step is conducive to the public good. The 1981 Act would be neutered if citizenship could not be removed from a person, who has no representative and who cannot be contacted and for whom no current address or email is known. It would be equally unsatisfactory if the Secretary of State were, in effect, required to serve the notice in such a case at a last known address with which the person was known to have no continuing connection. Moreover, the Secretary of State has accepted that the 1981 Act must be read subject to a general duty to take reasonable steps to communicate with the person affected (by reference to Lord Millett in *R (Anufrijeva) v. Secretary of State for the Home Department* [2004] 1 AC 604 at [43]). In this case, communication and actual, as opposed to deemed, notice did occur once the person concerned made themselves known to the Secretary of State.

76. Like Whipple LJ, I do not find much assistance from the references to other similar statutory provisions. Whilst I accept that a requirement to give notice generally implies that it should be received, I agree with Whipple LJ that that is not an invariable rule. In this case express deeming provisions were provided for in the 2003 Regulations, both in their original form and as amended in 2018. I fully endorse what Lord Briggs said in *Fowler v. HMRC* [2020] 1 WLR 2227 at [27] to the effect that the extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears (and, I would add, the delegated legislation made under that statute). It is that exercise of statutory construction upon which I have sought to focus.

77. In these circumstances, I would not have held that the deeming provision in Regulation 10(4) was *ultra vires*. Since Baker and Whipple LJJ disagree, this appeal will be dismissed.