CASE NOTE

B2 v Secretary of State for the Home Department [2013] EWCA Civ 616 (United Kingdom)

Deprivation of citizenship: the Court of Appeal takes a narrow view of statelessness

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As reported in March 2013, the UK government is making increased use of its power, under S. 40(2) British Nationality Act 1981 (BNA), to deprive dual national British citizens of their citizenship if this is considered by the Secretary of State to be conducive to the public good. This process is intimately linked to counter-terrorism and a recent report in the *Guardian* suggests close co-operation with the US. Two individuals who lost their citizenship while outside the UK were subsequently killed in US drone strikes and another was rendered to the US and charged with terrorism offences. A fourth individual whose citizenship was removed while he was within the UK successfully appealed to the Special Immigration Appeals Commission (SIAC) but was then immediately arrested in anticipation of extradition proceedings to the US on terrorism charges.

This fourth individual, called B2 in the proceedings, faces further misfortune as his successful appeal to SIAC against deprivation was recently reversed by the Court of Appeal of England and Wales. As is usually the case in deprivation appeals (see also the recent EUDO news item), the decision turned on whether deprivation would make B2 stateless. Given the breadth of executive power granted by the legislation, usually the only way to resist a deprivation order is to show that this would make the subject of the order stateless, which is prohibited both under the statute itself (s.40(4) BNA 1981) and international law.

In its determination, SIAC decided that B2 no longer possessed Vietnamese nationality. The Court of Appeal however found that he was still a Vietnamese citizen. The underlying premise of the Court of Appeal judgment is relatively uncontroversial. It adopts the SIAC finding in *Abu Hamza v SSHD* [2010] UKSIAC 23/2005 that statelessness, for the purposes of S.40(4) BNA 1981, means *de jure* statelessness. This reflects international law. Article 1 of the 1954 Convention relating to the Status of Stateless Persons says that a stateless person is "a person who is not considered as a national by any State under the operation of its law". The 1961 Convention on the Reduction of Statelessness does not define the meaning of 'stateless'. International law therefore does not cover the position where an individual formally possesses nationality under the law of a state but that state fails to meet the usual obligations connected to nationality, *de facto* statelessness. The difficulty however is that the line between *de facto* and *de jure* statelessness is not clearly demarcated. As the Court of

Appeal recognised, international law jurists have identified a number of situations where what might be considered *de facto* statelessness is, in reality, *de jure* statelessness.

It was not disputed that Vietnam was unwilling to accept B2 as a citizen although it had not taken any steps to remove his citizenship. The issue was whether this was *de facto* statelessness, in which case deprivation could proceed although it was unlikely he could ever be returned to Vietnam, or *de jure*, in which case deprivation was prohibited, B2 remained a British citizen and, even if he were extradited to the US, could return or be deported to the UK at the end of criminal proceedings or any sentence. SIAC heard conflicting expert evidence on this and concluded that the executive branch of the Vietnamese government would make the decision and was not subject to court oversight. As the executive did not accept B2 as a citizen, he would be *de jure* stateless and could not be deprived of his British nationality. The Court of Appeal took a different view; under the relevant Vietnamese legislation, B2 was a Vietnamese citizen. That the Vietnamese government was unwilling to act lawfully did not make him stateless *de jure*:

> The position under Vietnamese nationality law is tolerably clear. B2 retained his Vietnamese nationality through all the events of the 1980s and the 1990s. The 2008 Law did not change B2's legal status. The fact that in practice the Vietnamese Government may ride roughshod over its own laws does not, in my view, constitute "the operation of its law" within the meaning of article 1.1 of the 1954 Convention. I accept that the executive controls the courts and that the courts will not strike down unlawful acts of the executive. This does not mean, however, that those acts become lawful (Jackson LJ at [88]).

In an article to be published later this year in *Journal of Immigration Asylum and Nationality Law,* Eric Fripp suggests that this takes too narrow a view of the meaning of *de jure* statelessness. It fails to acknowledge that the 'operation' of a state's law means more than the application of the wording of legislation but includes the entirety of its legal system including the constitutional provisions by which powers are distributed. Under the Vietnamese constitution, the courts cannot impose legislative compliance on the executive so that it is not a question of the state acting outside its own laws but of the hierarchy of legal powers within the state. Even if the Vietnamese state is acting outside the letter of its own legislation, it is not doing so in defiance of international law, and it cannot necessarily be regarded as acting with no legal effect.

In any event, it would be a bitter irony if a restrictive view of *de jure* statelessness had the consequence that individuals whose states of origin were the most arbitrary and autocratic in their citizenship practices received a lesser degree of international protection than those whose states of

origin observed the rule of law as more commonly understood. Such a position would go firmly against the spirit of international norms of human rights protection. Even an act of deprivation that is formally justified under UK law because of a narrow view of what *de jure* statelessness means may not relieve the UK of many of its obligations to B2 in international law, including, Fripp argues, the obligation to readmit.