Appeal No: SC/96/2010
Hearing Date: 22nd July 2013
Date of Judgment: 24th October 2013

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE IRWIN (Chairman)

'G1'

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant:	Mr H Southey QC and Ms A Weston
Instructed by:	Birnberg Peirce & Partners
For the Respondent:	Mr T Eicke QC
Instructed by:	The Treasury Solicitor
Special Advocates:	Mr A McCullough QC and Mr M Goudie
Instructed by:	The Special Advocates' Support Office

JUDGMENT IN RESPECT OF PRELIMINARY ISSUE

Mr Justice Irwin

1. On 11th June 2010, the Respondent notified the Appellant of her intention to make an order under section 40(2) of the British Nationality Act 1981 (BNA 1981) depriving the appellant of his British citizenship on the ground that such deprivation was conducive to the public good. He was so deprived. The appellant was born in the Sudan and had acquired his British citizenship by naturalisation in 2000. His wife has British and Sudanese nationality, as do their child.

2. The relevant family history is set out sufficiently in the judgment of Mitting J in associated judicial review proceedings *(R (G1) v Secretary of State for the Home Department* [2011] EWHC1875(Admin)) in paragraphs 1 and 2 of the judgment. It is not necessary to recite the facts here save to repeat that the appellant himself has remained at all stages outside the United Kingdom and is believed to be in the Sudan. His wife and child, according to the judgment referred to, returned to the United Kingdom after an extended period in Khartoum, on 4th February 2011. So far as the Commission is aware, those remain the facts.

3. Following an initial appeal on 7th July 2010, the appellant through his solicitors notified the Commission on 11th April 2011 that he had obtained a nationality certificate from the Sudanese authorities and would no longer contend that deprivation of his British citizenship would leave him stateless.

4. By a letter dated 14th June 2010, the Respondent gave notice that she had decided the appellant should be excluded from the United Kingdom, in parallel with the decision to deprive him of British citizenship and on the parallel ground that his presence in the country was not considered conducive to the public good, He was assessed to be involved in terrorism - related activities and to have links to a number of Islamist extremists.

5. The appellant applied for permission for judicial review of the decision to exclude him. It was that claim which was dismissed by Mitting J in the judgment cited above. His appeal from that dismissal was itself rejected by the Court of Appeal, in the judgment handed down on 4th July 2012: See *G1 v SSHD* [2012] EWCA CIV/867. As we shall see, the arguments advanced in that appeal are of some importance in deciding the issue before me.

6. On 8th February 2013, the Supreme Court refused permission to appeal from the Court of Appeal's decision in the judicial review. The SIAC proceedings had been stayed whilst the judicial review proceedings were pursued. Once the Supreme Court declined to accept the appeal, the SIAC appeal was relisted for directions. On 30th May 2013, the appellant amended the grounds of appeal, submitting, for the first time, that the deprivation decision engaged European Union law, because it denied his wife and child the genuine enjoyment of the substance of their rights as EU citizens. Further, in correspondence, the appellant raised the possibility that the judgment of the European Court of Justice [CJEU] in the case of *ZZ v SSHD* ref C-100/11 decided on 4th June 2013, had legal implications for his SIAC appeal. At a

7. Some 4 weeks elapsed between the direction for a preliminary issue and the hearing. The appellant has of course been aware of the arguments he sought to advance relevant to this preliminary issue for longer. No direction in respect of evidence before the preliminary issue hearing was sought or made. Against that context, the appellant's written submissions recite:

> "It has not been possible in the time available to make these submissions for witness evidence to be provided. That cannot be held against the appellant given that his evidence is not due until 3rd January 2014. At this stage it must be assumed that the appellant's case will be supported by evidence (sic). Nevertheless for the purposes of engaging principles of EU law, the issue of whether the decision of the Secretary of State breaches EU law is squarely before SIAC in this appeal".

8. It is perfectly correct that the direction for the overall conduct of the appeal requires evidence of the appellant to be served in January 2014. However, it was open to the appellant to introduce evidence earlier. No application was made to vary the directions to permit that. No submission was made that it was necessary to receive evidence for the purpose of this issue. No indication was given as to what evidence would have been relevant had it been provided. The Commission was not informed of any factual instructions which should be taken as relevant to the preliminary issue, even if requiring subsequent confirmation or expansion in evidence. It follows that this judgment must proceed necessarily on the factual picture available to date, namely that the appellant remains in the Sudan and that his wife and child have been able to return to the UK from the Sudan, following his deprivation and exclusion, and that they remain here. Had there been any change in those material circumstances, they should clearly have been brought to the attention of the Commission.

9. The appellant seeks to address three discretely stated issues under the rubric of the preliminary issue identified. These are:

> "(1) the engagement of EU procedural obligations on the issues arising in G1's appeal including *Ruiz Zambrano v Office National de l'emploi [2012] QB 265 (C-34/09)*;
> (2) the engagement of the equivalent procedural obligations by operation of Article 14 taken with Article 8 ECHR
> (3) the impact of ZZ on SIAC's approach to disclosure and future directions."

All three submissions amount to an argument that EU procedural law applied to the decision to deprive the appellant of his national citizenship, since such a loss also entailed a loss of his (parasitic) EU citizenship, or as a consequence,

deprived his wife and child of the "genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union."

10. The respondent submits that the arguments sought to be raised based on *Zambrano* and the engagement of EU law represent an abuse of process. Mr Eicke QC for the Secretary of State relies on the principles in *Johnson v Gore Wood* [2002] 2 AC 1, and submits that the argument based on *Zambrano,* if it was to be raised at all, could and should have been raised in the judicial review proceedings. Mr Eicke emphasises the commitment of time and public money to those proceedings, comments that during the course of the proceedings the appellant changed his arguments several times and added further submissions shortly before and shortly after the Court of Appeal hearing. The last round of submissions from the appellant, says Mr Eicke, expressly relied on *Zambrano*. But in none of those various submissions did the appellant suggest that his deprivation appeal engaged EU law because it denied his wife and child of the genuine enjoyment of the substance of their rights as EU citizens. Mr Eicke says it was unacceptable to raise this point now and thus to attempt to circumvent the outcome of the Court of Appeal decision in the judicial review.

11. Mr Southey QC for the appellant replies by contrasting the legal context of the judicial review with that of this appeal. Whilst the facts and underlying principles may be identical, the claim for judicial review challenged the lawfulness of the decision to exclude the appellant. The appellant/claimant was debarred from relying on matters for which he had an alternative remedy by way of statutory appeal. In this way, with some supplementary comment, Mr Southey seeks to refute the allegation of abuse of process.

12. I have sympathy with the complaints formulated by Mr Eicke, but I make no finding of abuse of process. It seems to me preferable to deal with the substance of the arguments sought to be advanced, albeit in some instances shortly.

13. The *Zambrano* case turned on its specific facts. The applicant in that case, and his wife, were Colombian nationals who were refused asylum in Belgium but were given leave to remain there. Two children were born in Belgium, both acquiring Belgian nationality and thus becoming citizens of the European Union. The children were wholly dependent on the parents. The applicant obtained work without a work permit. After losing his work the applicant was refused unemployment benefit, since his work experience did not qualify. On appeal to the European Court the court held that Article 20 of the FEU treaty precluded national measures, the effect of which was to deprive citizens of the EU of the genuine enjoyment of the substance of the rights which their status as citizens conferred. A refusal to grant a third country national with dependent minor children a right of residence or work permit, in the member state where those children were nationals and resided, had such an effect, since it would lead to a situation where those children, although citizens of the Union, would have to leave its territory in order to accompany their parents.

14. This appellant submits that the decision of the respondent in the instant case and its consequences constitute a denial of the genuine enjoyment of the substance of the rights of G1's wife and child since "they are or may be

15. I set aside for the moment the question of the applicability of EU law to the decision in this case: "the ZZ question". Even if the principle enunciated in *Zambrano* were directly applicable to the decision in relation to this appellant, it seems to me clear the principle would not avail the appellant on these facts. The appellant's wife and child can continue to live in the United Kingdom. They have not been and there is no reason to think they will be, deprived of citizenship or residency. They are not and will not be prevented from working or receiving benefits. They have freedom of movement within the European Union. The respondent's decision has the effect of preventing them living in the United Kingdom with the appellant, but that is a commonplace consequence of any such decision where other family members are British citizens. If the appellant's argument were correct, it would be hard to see how any British citizen could lawfully be deprived of citizenship whilst they had dependants with whom they have been enjoying family life.

16. In addition, as the respondent points out, there is nothing in this decision to prevent the appellant, his wife, and child resuming family life together in another member country of the Union, precisely in reliance on the appellant's wife's status as an EU citizen, unless and until the appellant is also excluded by that other member state. That situation is very far removed indeed from the facts in the *Zambrano* case.

17. The extent of the principle in *Zambrano* was more recently analysed in the opinion of Advocate General Bott of 27th September 2012, in the cases of *O, S and L,* reference C-356 and 357/11. The Advocate General, having analysed the *Zambrano* line of authority, observed at paragraph 44 as follows:

> "The reasons linked to the departure of the citizen of the Union from its territory are therefore particularly limited in the case law of the court. They concern situations in which the Union citizen has no other choice but to follow the person concerned, whose right of residence has been refused, because he is in that person's care and thus entirely dependent on that person to ensure his maintenance and provide for his own needs."

In my judgment this clearly circumscribes the ambit of the *Zambrano* principle in such a way in which excludes this appellant and his family.

18. In effect, that disposes of the appellant's first and second issues. However readily the engagement of EU procedural obligations may arise, and setting aside the ZZ question, my judgment is that the appellant here comes nowhere close to establishing that the decision appealed has the effect complained of.

19. Before concluding that part of the case, I note the remarks of Laws LJ when disposing of this appellant's appeal in the judicial review proceedings in the Court of Appeal. Mr Southey had sought to persuade the court that the exclusion decision represented a discriminatory step. As we shall see that

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

20. The argument on discrimination seeks to draw the analogy between the person who remains an EU national and the person who does not, the benefit for the former being the procedural advantages to be derived from the applicability of the ZZ procedural rights. Both groups enjoy the same right to an effective hearing. Hence the appellant's submissions conclude there "there will be a breach of Article 14 of the convention unless the appellant enjoys procedural rights equivalent to those in ZZ." As the respondent points out however, the effect of this argument is that the benefits derived from EU citizenship would have to be compulsorily extended to any citizen of the world. This flies in the face of common sense, and in the face of Strasbourg authority, see for example *Moustaquim v Belgium* (1991) 13 EHRR 802 where the European Court of Human Rights held:

> "as for the preferential treatment given to nationals of the other member states of the communities, there is objective and reasonable justification for it, as Belgium belongs, together with those states, to a special legal order."

21. That approach was confirmed by Ouseley J in *AHK and Other v SSHD* [2013] EWHC 1426 (Admin) when the Judge, having reviewed previous authority concluded that:

> "to hold that a refusal of naturalisation, in the absence of an arbitrary or discriminatory decision, interferes with Article 8 rights would be to advance beyond what the European Court of Human Rights has held…..That is very different from holding that interference can arise where naturalisation is refused on an arbitrary or objectionably discriminatory basis, ….."

22. I turn to the question of the impact of ZZ itself. It is helpful to begin with the leading judgment of Laws LJ in the Court of Appeal hearing in this appellant's judicial review. A cardinal point in that appeal was the submission by Mr Southey that the failure to inform the appellant of what was alleged to be his right to an in-country appeal against the deprivation decision, and the failure

23. The decision in *Rottmann v Bayern* [2010] was relied on by Mr Southey as authority for the proposition that the deprivation of the citizenship of a national of an EU member state "falls within the ambit of EU law". Laws LJ expressed himself respectfully as finding difficulties with the reasoning in *Rottmann*. He observed that there were passages within the decision appearing to suggest that national courts must "have due regard to European Union law" in adjudicating upon a question of deprivation of citizenship, even where there is no cross-border element in the case. However, there were also elements within the case suggesting that it turned upon the particular facts.

24. In important observations, Laws LJ went on as follows:

> "38. Moreover this uncertainty as to the decision's scope betrays, to my mind, a deeper difficulty, which may be explained as follows. The distribution of national citizenship is not within the comptence of the European Union. So much is acknowledged in *Rottmann* itself (paragraph 39, cited by Advocate General Sharpston in her Opinion in *Zambrano*, paragraph 94), as is "the principle of international law….that the Member States have the power to lay down the conditions for the acquisition and loss of nationality" (*Rottmann* paragraph 48). Upon what principled basis, therefore, should the grant or withdrawal of State citizenship be qualified by an obligation to "have due regard" to the law of the European Union? It must somehow depend upon the fact that, since the entry into force of the Maastricht Treaty in 1993, EU citizenship has been an incident of national citizenship, and "citizenship of the Union is intended to be the fundamental status of nationals of the member States" (*Rottmann* paragraph 43 and cases there cited).
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> 39. But this is surely problematic. EU citizenship has been attached by Treaty to citizenship of the Member state. It is wholly parasitic on the latter. I do not see how this legislative circumstance can itself allocate the grant or withdrawal of State citizenship to the competence of the Union or subject it to the jurisdiction of the Court of Justice. Article 17(2) of the EC Treaty ("Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby"), referred to at paragraph 44 of the *Rottmann* judgment, does not purport to have any such consequence. A generalised aspiration to the enjoyment of a "fundamental status" can surely carry the matter no further. In the result I am none the wiser as to the juridical basis of an obligation to "have due regards" to the law of the European Union in matters of national citizenship.

40. Nor is it clear what is meant by such an obligation, or by the proposition that decisions as to the loss or acquisition of citizenship are " amenable to judicial review carried out in the light of European Union law" (*Rottmann* paragraph 48). Some passages (see paragraphs 53 and 55) suggest that the court had in mind, primarily at least, only the application of general principles: proportionality and the avoidance of arbitrary decision-making. But if that is right, I apprehend it would not be enough for Mr Southey. His argument was grounded on provisions of black-letter EU law: TFEU Article 18, Article 21 of the Charter, and Article 31(4) of the Citizens' Directive.

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

Quite aside from the difficulties as to the scope of EU consequences, "it is settled case-law that the Treaty rules governing freedom of movement for persons, and the measures adopted to implement them, cannot be applied to situations which have no factor linking them with any of the situations governed by European law and which are confined in all relevant respects within a single Member State. (McCarthy [2011] CMLR10)".

25. For those reasons, the court rejected the proposition that *Rottmann* imported the " panoply of black-letter EU law" into the process of the appeal. Laws LJ emphasised the primacy of national law on questions of national citizenship as follows:

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

relating to the deprivation of citizenship in circumstances such as those of the present case. But I do not think it has."

26. The reasoning of Laws LJ, with which the other judges concurred, represents binding authority for the approach to be taken in SIAC. Unless and until the Court of Appeal expresses a different view, that decision must be followed.

ZZ v SSHD (2013) EUECJ C-300/11

27. The decision in ZZ came about because of a request for a preliminary ruling, made by the Court of Appeal to the CJEU, which in effect asked for a review of the SIAC procedure, and an opinion as to the compliance of SIAC's procedure with European Union law, focusing on the degree of disclosure to ZZ of the basis of the decision against him. The Court of Appeal judgment is reported as *R (ZZ) v SSHD* [2011] EWCA CIV 440. The terms of the request read as follows:

> "Does the principle of effective judicial protection, set out in Article 30(2) of Directive 2004-38, as interpreted in the light of Article 346(1)(a) [TFEU], require that a judicial body considering an appeal from a decision to exclude a European Union citizen from a member state on grounds of public policy and public security under chapter VI(v)1 of Directive 2004/38, ensure that the European citizen concerned is informed of the essence of the grounds against him, notwithstanding the fact that the authorities of the Member State and the relevant domestic court, after consideration of the totality of the evidence against the European Union citizen relied upon by the authorities of the Member State, conclude that the disclosure of the essence of the grounds against him would be contrary to the interests of state security?"

28. Clearly, the after-coming judgment of Laws LJ as to the applicability of EU law to deprivation of citizenship in this appellant's case cannot have been before the Court of Appeal in ZZ. The basis of the referral from the Court of Appeal in ZZ necessarily implies that EU law is or may be relevant.

29. Submissions were made in ZZ by the Italian Government, suggesting that the Court should decline the referral for a number of reasons, but centrally on the grounds that "the question referred thus relates to an area governed by nation law and, for that reason, does not fall within European Union competence": see paragraph 35. The court itself in paragraph 36 noted that:

> "it is solely for the national court…to determine… both the need for and the relevance of the questions that it submits to the court. Consequently, where the question submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (C-553-11 *Rintich* [2012] ECR I-0000 paragraph 15 and the case law cited.)"

30. In effect therefore, the ECJ answered the problem posed in deference to the request from the English Court of Appeal. In support of that they went on to say this:

> "First, the question relates to the interpretation of Article 30(2) of Directive 2004/38, read in the light, in particular, of Article 47 of the Charter. Second, that question arises in the context of a genuine dispute relating to the legality of a decision refusing entry taken, pursuant to the Directive, by the Secretary of state against ZZ. Furthermore, although it is for Member States to take the appropriate measures to ensure that internal and external security, the mere fact that a decision concerns State security cannot result in European Union law being inapplicable (see, to this effect, C-387/05 *Commission v Italy [2009]ECR I-11831*, paragraph 45)."

31. It might be said that there is some degree of tension between the reasoning of Laws LJ in G1's appeal and the judgment of the ECJ in ZZ. The reasoning of Laws LJ was not centred on questions of state security, although that played a part, but it appears to me was centred on the proposition that competency as to national citizenship was reserved to the member state's national law, with European Union citizenship properly to be regarded as parasitic, and the requirements of European law only properly to be invoked within the narrower sphere where community rights or cross-border matters are in question. The approach of the European Court does not focus on that question. In the Court's rejection of the Italian Government's submissions there may be an implication adverse to the reasoning of Laws LJ, but that might be to overstate the case. The principle that concerns of state security cannot render EU law inapplicable, does not itself make EU law applicable. In short, it will be for the Court of Appeal in the resumed hearing in ZZ to rule on the question whether, in the ordinary case, SIAC procedure must conform to requirements laid down by the CJEU in ZZ.

32. The respondent's submission is that the existing process in SIAC would in any event satisfy the requirements set out by the CJEU in *Zambrano*. Indeed the respondent's submission is that the Court appears to have used the SIAC procedure as the model for the requirements. The respondent has also drawn attention to the guidance given by the ECJ in C-417/P *Council v Bamber [15th November 2012]*.

33. The implication of the submissions by the appellant is that fuller disclosure than is usual in SIAC will be required: see the written submissions of 2nd July 2013 paragraphs 23 and 21 (sic). It seems clear that both sides await guidance on SIAC's procedures, and indeed on the approach of the respondent, when the appeal in ZZ is heard.

Conclusions

34. For the reasons I have given, I reject the submissions of the appellant based on the case of *Zambrano* and on the engagement of procedural obligations by operation of Article 14, taken with Article 8 of the European Convention of Human Rights. At present, SIAC is bound by the authority of the Court of