

Case Note

Secretary of State for the Home Department v David Hicks [2006] EWCA Civ 400 (England and Wales Court of Appeal)

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Secretary of State v Hicks came before the court on appeal from a decision of Collins J in the Queen's Bench Division — Administrative Court.¹ The cases concerned an application for British citizenship by David Hicks, an Australian citizen who was then being detained by the United States in Guantánamo Bay.² Both cases considered important questions as to the rights and responsibilities of citizens both prior to and post a grant of citizenship, and conversely, as to what extent the State owed a reciprocal responsibility to grant citizenship and to exercise diplomatic protection on that person's behalf.³ It was the view of the Australian Government at the time that they would not seek repatriation of Hicks to Australia on the basis that he faced serious terrorism charges that warranted a trial before a Military Commission and that there was no comparable law in Australia under which he could be prosecuted.⁴ This was in stark contrast to the citizens and residents of Britain held at Guantánamo Bay whose release had been sought and secured by the British Government.⁵ When a chance remark about the cricket led Hicks' US appointed attorney, Major Mori to discover that Hicks' mother

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1 *R (Hicks) and Secretary of State for the Home Department* [2005] EWHC 2818.

2 Hicks was originally held in Guantánamo Bay as an 'enemy combatant', on the basis that he had traveled to Pakistan in 1999 and joined the Lashkar-e-Tayyiba or 'Army of the Righteous', then traveled on to Afghanistan where he attended Al Qaeda training camps before eventually being captured by Northern Alliance forces: see Combatant Status Review Board, 'Summary of Evidence for Combatant Status Review Tribunal. HICKS — David Mathew', 7 September 2004 <http://www.dod.mil/pubs/foi/detainees/crst_arb/000001-000100.pdf#1> accessed 18 May 2006. US Military Commission (2004) *United States v David Mathew Hicks* <www.defenselink.mil/news/Jun2004/d20040610cs.pdf> accessed 18 May 2006.

3 See for instance Natalie Klein & Lise Barry, 'A Human Rights Perspective on Diplomatic Protection: David Hicks and his Dual Nationality' (2007) 13 *Australian Journal of Human Rights* 1.

4 The Hon Phillip Ruddock MP, 'David Hicks Frequently Asked Questions' <<http://www.ag.gov.au/agd/WWW/ministerruddockhome.nsf/Page/RWP7546CD03855E60ABCA2570640080F973>> accessed 17 May 2006; but compare Devika Hovell, 'Hicks Can and Should be Tried Here', *The Age* (Melbourne), 27 September 2004. In 2006 David Hicks sought an order of habeas corpus and judicial review of the decision by the Australian Federal Government not to request his release from internment in the United States of America on the basis that any consideration by the Executive of whether he could be prosecuted in Australia was 'irrelevant' and of 'improper purpose'; see *Hicks v Ruddock* [2007] FCA 299 (8 March 2007). Whilst the Court refused the request of the Government to strike out the matter, subsequent events and the repatriation of Mr Hicks to Australia meant that this action was not pursued.

5 Raymond Bonner, 'Britain Asks U.S. to Free 5 Guantánamo prisoners', *International Herald Tribune* <<http://www.iht.com/articles/2007/08/07/europe/gitmo.php>> accessed 22 February 2008.

was born in Britain, it set in train a series of legal manoeuvres to ensure recognition of Hicks' British nationality and potentially secure for him comparable treatment to the other British nationals who had been held at Guantánamo Bay. Hicks was able to claim a right to British citizenship by virtue of a new section 4C inserted into the *British Nationality Act 1981* (United Kingdom). That section extended citizenship by descent to those persons born between 1961 and 1983 of mothers with British citizenship at the time of birth, a right previously granted only to those whose fathers had citizenship. Born in 1975 to a British mother, Hicks fell into this timeframe, entitling him to British nationality. The United Kingdom strongly resisted any entitlement that Hicks had to British citizenship. Although Hicks' solicitors were informed that the United Kingdom Secretary of State intended to accede to the application for citizenship, an order was simultaneously to be sought 'for the deprivation of citizenship under section 40 of the *British Nationality Act* on the grounds that (their) client has done things seriously prejudicial to the vital interests of the UK'.⁶ Under the *Nationality, Immigration and Asylum Act 2002* (United Kingdom) and the *British Nationality Act*, the United Kingdom Home Secretary has the power to deprive a person of their British citizenship if they have been 'disloyal or disaffected' towards the Queen or assisted an enemy.⁷ Much of the argument before the courts hinged on the wording of section 40(3) of the Act:

(3) Subject to the provisions of this section, the Secretary of State may by order deprive any British citizen to whom this subsection applies of his British citizenship if the Secretary of State is satisfied that that citizen —

(a) has shown himself by act or speech to be disloyal or disaffected towards Her Majesty; ...

In outlining the factors deemed prejudicial to the interests of the United Kingdom, the Secretary of State relied on Hicks receiving terrorist training in Pakistan and Afghanistan and training with Islamic extremists, allegations that Hicks attended a Lashkar Teyyaba training camp in Kashmir in around 2000, attended camps linked to Al Qaeda in Afghanistan in 2000, received various guerilla warfare training in Afghanistan and met and trained with British nationals known to be Islamist extremists as well as with Abu Hafs, an Al Qaeda terrorist.⁸ In the decision at first instance, Collins J held that there was no legal basis for denying Hicks' application for registration, as the registration was of right. Collins J distinguished between registration and naturalisation, finding that there was discretion to permit deprivation of citizenship based on fraud, false representation and concealment of material facts or imprisonment, but that these grounds applied to post-registration conduct.⁹ Importantly, Collins J held that, 'disloyalty... must relate to a time when the person concerned owed some allegiance'.¹⁰

6 *Secretary of State for the Home Department and David Hicks* [2006] EWCA Civ 400at [3].

7 Section 40(3) of the 1981 Act reads: 'Subject to the provisions of this section, the Secretary of State may by order deprive any British citizen to whom this subsection applies of his British citizenship if the Secretary of State is satisfied that the person has done anything seriously prejudicial to the vital interests of — (a) the United Kingdom, or (b) a British overseas territory'.

8 Above n6 at [5].

9 Above n1 at [27].

Similarly, the Court of Appeal decision turned on whether the Secretary of State could rely on pre-registration conduct to deny British citizenship to Hicks.¹¹ The Secretary of State argued that current disaffection (at the time of registration) could be inferred from past behaviour, namely Hicks' conduct in Afghanistan in 2000 and 2001.¹² The Secretary of State conceded that Hicks' conduct did not amount to 'disloyalty', but submitted that Hicks was 'disaffected', arguing that this was a term broader in meaning.¹³ The submission on behalf of Mr Hicks was that the words 'disaffected' and 'disloyal' were linked and that both forms of conduct related to the actions of a citizen with a proven requirement for allegiance.¹⁴ In considering the meaning of the word 'disaffected', the court gave consideration to the High Court of Australia's decision in *Burns v Ransley* [1949] 79 CLR 101.¹⁵ Lord Justice Pill, with whom Lord Justices Rix and Hooper agreed, cited Chief Justice Latham's decision at page 109 where he stated that "disaffection" in the context in which it is used means more ... than political opposition'. Pill LJ went on to state:

In my judgment the word "disaffected" as well as the word "disloyal" requires an attitude of mind towards an entity to which allegiance is owed, or at least to which the person belongs or is attached ... to be disaffected is to be estranged in affection towards an entity to which one owed allegiance or with which one has at least a relationship.¹⁶

The Secretary of State had sought to rely on the judgment in *Joyce v DPP* [1946] AC 347 ('Joyce').¹⁷ In that case a conviction of treason was upheld against Mr Joyce, an American citizen who held a British passport and had broadcast talks hostile to Great Britain from within German territory during World War II. The court distinguished the decision in *Joyce* because that decision was a consequence of Joyce holding a British passport: 'While Joyce was not a British citizen, he was asserting a relationship, and thereby pledging fidelity and claiming the protection of the Crown'.¹⁸ In Pill LJ's view, '[t]hat is, however, entirely different from the conduct of a person such as the respondent owing no allegiance to Her Majesty ... and claiming no protection from her.' In a strongly worded statement, Pill LJ held:

What none of these propositions establish ... or come close to establishing, is that conduct of an Australian in Afghanistan in 2000 and 2001 is capable of constituting

¹⁰ Id at [25].

¹¹ Above n6 at [6].

¹² Id at [12].

¹³ Id at [24]. 'The Secretary of State's central submission is that disaffection, within the meaning of Section 40(3), is shown when an individual has by word or deed displayed active hostility to Her Majesty ... by showing himself unfriendly to the Government of the United Kingdom or hostile to its vital interests.'

¹⁴ Id at [26].

¹⁵ Id at [30].

¹⁶ Id at [32].

¹⁷ Id at [22].

¹⁸ Id at [34].

disloyalty or disaffection toward the United Kingdom, a state of which he was not a citizen, to which he owed no duty and upon which he made no claims.¹⁹

This statement of the court goes to the heart of the decision. David Hicks was being held in Guantánamo Bay on the basis of actions that took place four to five years before he first contemplated the possibility of applying for British citizenship. At the time of those actions, he had made no application, did not hold a British passport and could therefore not have been expected to demonstrate any allegiance toward Britain.

The court also rejected an alternative argument of the Secretary of State to the effect that acts that could not be described as disaffected at the time they were committed but could nevertheless be relied upon to show a disaffected state of mind at the time of registration without a need for a fresh assessment.²⁰ Pill LJ averted to the wording of section 40(3)(a) of the *British Nationality Act* stating that wording in the present tense would be required in the paragraph before the words ‘to be disaffected’ so as to argue that past conduct could be relied on to establish a current state of mind. He held therefore that a fresh analysis of the person’s position would need to be conducted once he was granted citizenship, although he acknowledged that such an analysis could take into account any statements made by the person about their pre-citizenship conduct.²¹

Rix LJ, though in agreement with Pill LJ on the argument that Hicks could not be found to be disaffected at a time he owed no allegiance to Her Majesty, was less equivocal on whether the conduct to be relied upon to deny a grant of citizenship was confined to post-citizenship conduct.²² Rix LJ suggested that conduct that takes place ‘shortly before’ registration or grant may be relevant evidence of disaffection or disloyalty.²³ Rix LJ also left open the question of pre-registration disloyalty or disaffection of the type in *Joyce*, where the person is not a citizen yet owes some allegiance in another ‘extended sense’.²⁴ Rix LJ however, left these matters to one side, determining that they were not relevant issues in this instance.

The court therefore held that the proposal by the Secretary of State to revoke Hicks’ citizenship following a grant by right was unlawful without a fresh examination of his attitude towards the State and the right to make representations.²⁵ The court noted, however, that this approach could lead to procedural difficulties (which had also been averted to in the original decision of Collins J),²⁶ because a dual citizen may choose to divest themselves of their original citizenship, thereby thwarting an attempt to revoke their British citizenship on the grounds that such revocation would render them stateless.²⁷ As a further ground of appeal, it was submitted on behalf of Hicks that the

19 Id at [37].

20 Id at [39].

21 Id at [43].

22 Id at [58].

23 Id at [60].

24 Id at [60].

25 Id at [44].

26 Above n1 at [16] (Collins J).

stated reasons for seeking deprivation of his citizenship were insufficiently detailed.²⁸ The Court of Appeal agreed with the original decision of Collins J, that ‘the reasons given by the Secretary of State in the letter of 9 November 2005 were sufficient to comply with the statutory obligation’.²⁹ Collins J had described the reasons outlined by the Secretary of State as ‘exiguous in the extreme’³⁰ yet despite citing Lord Morris of Borth-y-Gest in *Geok v Minister of the Interior*,³¹ who had said that ‘the giving of particulars in a notice whenever it is thought sensible to give them should not be discouraged’, went on to state that ‘security considerations’ meant that particulars would not be disclosed to Hicks.³² Collins J had held that ‘it is not necessary to give detailed and elaborate particulars’.³³ This was a sentiment agreed to by the majority on appeal,³⁴ however Pill LJ stated that were an appeal to follow a deprivation then ‘detailed consideration of the conduct relied on’ would be required.³⁵ Finally Pill LJ turned to the issue of whether the Secretary of State was entitled to exercise discretion in acting to deprive Hicks of his citizenship when the government had not taken similar action to deprive the other dual nationals held in Guantánamo Bay of their British nationality.³⁶ Both in first instance and on appeal, the court held that this was a lawful exercise of discretion taking into account the lack of familial ties possessed by Hicks, the fact that he was not a British citizen at the time of his incarceration and because Australia, his birth state, had already exercised diplomatic protection on his behalf.³⁷ This statement endorses the view expressed by the International Court of Justice in *Barcelona Traction*:

27 The right to renounce Australian citizenship is contained within section 33 of the *Australian Citizenship Act 2007* (Commonwealth of Australia). The protections against statelessness are enshrined in the *Convention on the Reduction of Statelessness*, opened for signature on 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975; *Convention Relating to the Status of Stateless Persons*, opened for signature on 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960)); *European Convention on Nationality*, 1 March 2000, ETS 166–1997; *Universal Declaration on Human Rights*, GA Res 217A (III), UN Doc A/810 (1948). Major Mori, David Hicks’ US legal counsel, denied that Hicks had any intention to renounce his citizenship; see Australian Broadcasting Corporation, ‘Court Dismisses British Govt’s Appeal Against Hicks’ Citizenship’, *7.30 Report*, 12 April 2006 <<http://www.abc.net.au/7.30/content/2006/s1615227.htm>> accessed 22 February 2008.

28 Section 40 of the 1981 Act provides:

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 Appeals Commission Act 1997.

29 Above n1 at 33. The details provided by the Secretary of State in the letter dated 9 November 2005 were based on information provided by Hicks to the UK Security Service on 26 April 2003 and were in similar terms to the allegations outlined in the US Military Commission charges. Paragraph 33 of Collins J’s decision quotes the following:

... the matters which mean [the Secretary of State] is minded to reach the conclusion that your client has done things seriously prejudicial to the vital interests of the U.K. include the following.

- 1. Your client has received extensive terrorist training in Pakistan and Afghanistan including training at an Al-Qaeda camp in Afghanistan
- 2. Your client has trained with known Islamic extremists in this camp.

30 Id at [34].

31 [1964] 1 WLR 554.

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.³⁸

At first instance however, Collins J indicated his views that '[o]nce he is a British Citizen, he should be entitled to all assistance which can be given to a British citizen'.³⁹ Whilst recognising that any assistance was discretionary, Collins J stated, 'in my view it would be improper to fail to give assistance which would otherwise have been given simply because the claimant was believed to be involved in terrorism and has not had any previous connection with this country'.⁴⁰ This optimistic approach to the position of Hicks were he to be granted citizenship would likely have been challenged by the traditional view on diplomatic protection as asserted by the International Court of Justice in the *Nottebohm* decision, that a genuine connection between the state and individual needed to be established for the state to exercise its right of diplomatic protection.⁴¹ Whilst not necessarily a legal barrier, the fact that Australia had already rendered some assistance to Hicks may have created some diplomatic tension were Britain to intervene on his behalf.⁴² Moreover, contemporaneous cases involving claims for diplomatic protection from British residents had led the courts to note that the United Kingdom's approach was to advocate for the complete closure of the prison at Guantánamo Bay, rather than expend political capital for the sake of a smaller number of inmates.⁴³

The Secretary of State announced that they would appeal the decision that Hicks should be granted the opportunity to swear an oath of allegiance. However the application to appeal to the House of Lords was refused in May 2006. In June 2006, the British Parliament passed new legislation, regarded by some commentators as being drafted specifically to deprive Hicks of his citizenship and thus avoid any potential diplomatic embarrassment that might arise from a claim for diplomatic protection from

32 Above n1 at [34].

33 Ibid.

34 Above n6 at [49].

35 Ibid.

36 Id at [50]–[52].

37 Above n1 at 35 and 36. Above n5 at [50].

38 *Barcelona Traction (Belgium v. Spain)* [1970] ICJ Rep 3 at [79].

39 Above n1 at [39].

40 Ibid. There is little doubt that the exercise of diplomatic protection is discretionary. See for instance article 2 of the *International Law Commission Draft Articles on Diplomatic Protection with Commentaries* UN Doc A/61/10.

41 *Nottebohm [Second Phase]* (1955) ICJ Reports 4 at 23. But see also the commentaries to article 4, *International Law Commission Draft Articles on Diplomatic Protection with Commentaries* UN Doc A/61/10 and Klein & Barry, above n3 at 12–13 (noting the change in position by the ILC on this particular point).

42 Klein & Barry, above n3 at 13–14.

43 *Al Rawi & Ors, R (on the application of) v Secretary of State for Foreign & Commonwealth Affairs & Anor* [2006] EWCA Civ 1279 at [37]–[41] (*'Al Rawi'*). Notably the British Government later adopted a different policy in which they advocated for British residents to be released. See Carl Dinnen, 'Britain Wants Guantánamo Detainees', *Channel 4 News*, 7 August 2007 <www.channel4.com/news/articles/politics/international_politics/britain+wants+guantanamo+detainees/658467> accessed 22 February 2008.

the United Kingdom.⁴⁴ The new *Immigration, Asylum and Nationality Act* amended section 40 of the *British Nationality Act* to grant the Secretary of State broader powers of deprivation where the Secretary of State 'is satisfied that deprivation is conducive to the public good.'⁴⁵

David Hicks was finally registered as a British citizen on 5 July 2006,⁴⁶ only to be stripped of his citizenship within hours by Secretary of State, John Reid.⁴⁷ Hicks' legal team signalled appeals to the Special Immigration Appeals Commission and the High Court.⁴⁸ However subsequent events meant that these actions did not need to be pursued and it remains conjecture as to what may have happened if Hicks had maintained his status as a British citizen. Under a plea bargain struck with US authorities in March 2007, Hicks agreed to a guilty plea to a single charge of providing material support for terrorism.⁴⁹ He received a seven-year suspended sentence and served his final months in Australia before being released from Yatala prison in December 2007.⁵⁰

44 Annabel Crabb, 'Hicks Cast Out After Day as British Citizen', *The Age*, 28 August 2006 <www.theage.com.au/articles/2006/08/06/1156012790201.html?from=top5> accessed 28 August 2006.

45 *Immigration, Asylum and Nationality Act 2006* (UK) section 56 (1).

46 Hicks' legal team alleged in the High Court that the US had delayed his registration by denying him consular access; see Stephanie Kennedy, 'US Denies Britain Consular Access to Hicks', *ABC News Online*, 15 June 2006 <<http://www.abc.net.au/news/newsitems/200606/s1663299.htm>> accessed 22 April 2008.

47 Annabel Crabb, 'Law Strips Hicks of UK citizenship in Hours', *Sydney Morning Herald*, 20 August 2006 <www.smh.com.au/news/world/law-strips-hicks-of-uk-citizenship-in-hours/2006/08/19/1155408075077.html> accessed 28 August 2006.

48 Ibid.

49 'Hicks Pre-Trial Agreement (Full Transcript)', *The Australian*, 2 April 2007 <www.theaustralian.news.com.au/story/0,20876,21486066-17281,00.html> accessed 22 April 2008.

50 He is currently subject to a control order: see *Jabbour v Hicks* [2008] FMCA 178.