Appeal No: SC/150/2018
Hearing Dates: 1st & 2nd November 2018
Date of Judgment: 7 December 2018

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

The Hon Mr Justice Garnham
Upper Tribunal Judge Rintoul
Mr H Warren-Gash

R3

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the Appellant:	Mr H Southey QC and Ms C Robinson, instructed by Duncan Lewis Solicitors
For the Respondent:	Mr R Palmer, instructed by the Government Legal Department

Introduction

1. R3 appeals against a decision of the Secretary of State for the Home Department ("SSHD"), dated 24 May 2017, made pursuant to s.40(2) of the British Nationality Act 1981 ("BNA"), to deprive the Appellant of his citizenship. On 27 June 2018, the Commission directed that the question whether the Appellant was a citizen of Pakistan at the date of the decision should be dealt with as a preliminary issue. The matter comes before us to resolve this issue.

2. This preliminary issue was conducted entirely in OPEN.

3. It is common ground that if the Appellant was not a Pakistani citizen at the date of the decision, he was rendered stateless as a result of it because there was no other nationality to which he might be entitled. If that were the case, the Secretary of State would not have been entitled to deprive him of his citizenship and accordingly his appeal would succeed. If, however, the Commission finds in the Secretary of State's favour on the preliminary issue, it would then have to go on to consider for itself, on a subsequent occasion, whether the deprivation of citizenship was conducive to the public good.

The History

4. The factual background to this case is not significantly in dispute.

5. The Appellant was born in the United Kingdom on 25 July 1979. His mother was born in Jhelum, Pakistan on 15 February 1959. His father was born on 20 December 1955 in Mirpur, Azad Jammu and Kashmir. The Appellant's father naturalised as a British citizen before 1983 and his mother naturalised on 23 November 1988. The Appellant's birth in the United Kingdom, prior to the entry into force of the British Nationality Act 1981, meant that he was a British national at birth.

6. The notice dated 24 May 2017 informed the Appellant that the Secretary of State intended to make an order depriving him of his British citizenship on grounds of conduciveness to the public good. This was based on an

assessment that the Appellant is "a British/Pakistani dual national who is assessed to have travelled to Syria and was aligned with an Al-Qaeda aligned group [and that he poses] a threat to the national security of the UK." It is against that notice that the Appellant appeals.

7. On 26 May 2017, the SSHD made an order depriving the Appellant of his citizenship, expressing the view that this decision would not render the Appellant stateless.

8. The Appellant is currently detained by the Turkish authorities in Turkey.

The Law as to Deprivation of Citizenship

9. Section 40 of the British Nationality Act 1981 provides as is material:

> "(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.
>
> …
>
> (4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.
>
> …
>
> (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."

10. Section 40A(1) provides for a right of appeal for a person who is given notice under section 40(5). Where the Secretary of State certifies that the decision was taken wholly or partly in reliance on information which, in his opinion, should not be made public in the interests of national security, the appeal lies

to the Commission under section 2B of the Special Immigration Appeals Commission Act 1997.

11. The reference to "stateless" in section 40(4) is to statelessness as defined in Article 1(1) of the Convention relating to the Status of Stateless Persons of 1954 ("the 1954 Convention").The issue therefore is whether R3 is "a person who is not considered as a national by any state under the operation of its law".

12. It is common ground that the leading case on the meaning of statelessness is that of the Supreme Court in *Pham v SSHD* [2015] UKSC 19. That was an appeal against a decision of the Court of Appeal which had concluded that the fact that Mr Pham was a *de jure* national of Vietnam meant that he was not stateless within the meaning of Article 1(1) of the 1954 Convention. Mr Pham argued that it was sufficient that he was *de facto* stateless, in circumstances where, following service of the deprivation of citizenship upon him, the Vietnamese Government had declined to accept him as a Vietnamese citizen.

13. The relevant analysis and the decision of the Supreme Court is set out in the judgments of Lord Carnwarth, Lord Mance and Lord Sumption JJSC. Lord Carnwath JSC noted at [21] that academic texts and international instruments had drawn a distinction between *de jure* and *de facto* statelessness: that is, between those persons who have no nationality under the laws of any state, and those who have such nationality but are denied the protection which should go with it. It was common ground that the definition in Article 1 corresponded broadly to the former category, but equally that it was the words of the article itself which were determinative, and that, under Article 31(1) of

the 1969 Vienna Convention on the Law of Treaties, those words were required to be read in good faith and in the light of the object and purpose of the Treaty.

14. At [27] Lord Carnwarth said that as regards states that generally respect the rule of law:

> "…where a finding of nationality in respect of an individual has been made by a competent body under the relevant law, his status under the article is not affected by the fact that the finding may be ignored by the state authorities. The position is different, as in the second case, where there is a "practice" of discriminating against a particular group, regardless of the strict legal position. Such a practice, it seems, should be treated as equivalent to the "operation of law" under the article."

15. Lord Mance JSC agreed, and emphasised two points at [66]-[67]. He said that the position under the terms of the relevant Vietnamese nationality law was clear: the claimant had Vietnamese nationality at the time of the deprivation decision. All that had happened was that the Vietnamese Government had, when subsequently informed by the British Government of its intention to deport the claimant, declined to accept that he was or is a Vietnamese national. No practice covering individuals in the claimant's position had been established. He said that SIAC had been wrong to consider that the Vietnamese Government's subsequent attitude could in some way feed back in time, to determine whether the claimant had Vietnamese citizenship as at the date of decision.

16. Lord Sumption JSC offered a "simpler" answer, which did not turn on whether any relevant practice had been proved at [101]. He emphasised that the issue was whether the claimant had Vietnamese nationality on the date that his British citizenship was withdrawn. Since he had unquestionably had such

citizenship at birth, he must still have had it on the date of decision unless something had happened to take it away – but no one suggested it had been taken away by the relevant date. There was no basis upon which subsequent statements by the Vietnamese Government could relate back to an earlier date when the Government knew nothing about him and had no position one way or the other about his status. It followed that if anyone had rendered him stateless, it was not the Home Secretary on the date of decision, but the Vietnamese Government thereafter.

17. It is agreed that the following propositions can be drawn from *Pham*:

i) The issue for the Commission is whether the Secretary of State's decision to withdraw British citizenship from R3 rendered him stateless as at that date.

ii) The starting point is to consider whether he had *de jure* nationality of Pakistan at that date.

iii) If he did, the Commission should also consider whether there is evidence that the Pakistani Government had at the relevant time a position or practice, either in his individual case or in cases of an identifiable category of which he is part, of ignoring the strict legal position, regardless of the position of judicial or other review bodies.

Burden of Proof

18. There was a dispute between the parties as to which party bore the burden of proof. In fact, it is argued by both sides that the outcome of this case is the same, whichever party bears the burden of proof. But it is right that we set out here our conclusions on this issue.

19. Mr Hugh Southey QC, for the Appellant, submits that the burden is on the Respondent to show that at the date of the order the Appellant was a citizen of Pakistan. In support of that submission, he relies on *G3 v SSHD* SC/140/2017 and *Al-Jedda v SSHD* [2014] AC 253. Mr Palmer, for the Secretary of State submits that the burden on the Secretary of State is limited to showing that *he was satisfied* that the order would not make R3 stateless. He submits that R3 is entitled to assert that the Secretary of State was wrong to be so satisfied but that on that question the Appellant had the relevant burden of proof.

20. In our judgment, we are bound on this issue by the decision of the Court of Appeal in *Hashi v SSHD* [2016] EWCA Civ 1136. At paragraph 23-24, Longmore LJ, with whom Underhill and Lindblom LJJ agreed, said this:

> "23. No doubt the SS has the burden of showing that she was satisfied that her order would not make Mr Hashi stateless. That is a comparatively easy burden to discharge and Mr Hashi does not challenge that she was so satisfied.
>
> 24. But Mr Hashi is entitled to and does assert that she was wrong to be so satisfied and on that question he must have the relevant burden of proof. If at the end of the day the court is left in genuine doubt whether a person who is to be deprived by his UK citizenship would be stateless, his claim to challenge the SS's decision will fail. Such cases will inevitably be rare since, if the challenge is a serious matter, there will have to be evidence of the relevant law as there was in this case. The court will then make up its mind on that evidence as SIAC did. In Al-Jedda v SSHD [2012] EWCA Civ 358 Richards LJ recorded (paras 122-3) that there was no dispute in that case that the burden of proof was on the appellant on the balance of probabilities. He expressed no surprise at that absence of dispute. Neither do I"

21. Mr Southey QC contends that that decision was reached per incuriam the Supreme Court's decision in *Al-Jedda* and paragraph 98 in *Pham*. We reject that submission. The passage in the judgment of Lord Wilson JSC upon

which Mr Southey relies does not address the burden of proof; it simply identifies the relevant issue. At paragraph 32, Lord Wilson said:

> "Section 40(4) does not permit, still less require, analysis of the relative potency of causative factors. In principle, at any rate, the inquiry is a straightforward exercise both for the Secretary of State and on appeal: it is whether the person holds another nationality at the date of the order."

22. In our judgment, that passage says nothing about the burden of proof.

23. Mr Southey QC submits the court in *Hashi* did not have shown to it the reasoning of Lord Carnworth in *Pham*, in particular, paragraph 31 of his judgment, which makes clear the questions to be addressed include the question of proportionality of the decision under challenge. However, in our judgment, that was a question subsequent to the question of burden of proof and there is nothing in Lord Carnworth's judgment that casts doubt on the analysis in *Hashi*.

24. Following the hearing in the present case, the Court of Appeal handed down judgment in *KV v SSHC* [2018] EWCA Civ 2483. Both parties filed additional written submissions on the impact of this decision for which we are grateful.

25. The burden of proof is addressed at [21] onwards in *KV*. Leggatt LJ, with whom the other members of the court agreed, said this:

> "21 Against this background, I turn to the first issue raised by the appellant, being whether the Upper Tribunal was correct to hold that the burden lay on the appellant to prove that, if deprived of his British citizenship, he would be made stateless.
>
> 22 For the appellant, Mr Southey QC relied on the following statement of the law in *G3 v Secretary of State for the Home*

> *Department* SC/140/2017, a decision of the Special Immigration Appeals Commission, at para 15:
>
> "Given that it is the respondent who is seeking to deprive a person of British citizenship, the burden lies on the respondent to show, on the balance of probabilities, that, on the facts of the particular case, that person will not be stateless, if deprived of British citizenship."
>
> 23 In the *G3* case, however, the respondent's decision was made under section 40(2) of the 1981 Act on the ground that deprivation of citizenship was conducive to the public good. In a section 40(2) case, the Secretary of State is prohibited by section 40(4) from making a deprivation order "if he is satisfied that the order would make a person stateless". In *Al-Jedda v Secretary of State for the Home Department [2013] UKSC 62* ; [2014] AC 253 the Supreme Court interpreted section 40(4) as requiring the Secretary of State, before making an order under section 40(2) , to identify whether or not the order would make the person concerned stateless, which in turn requires the Secretary of State to identify whether the person has another nationality at the date of the order: see paras 30 and 32. The effect therefore is that, in a section 40(2) case, establishing that the person would not be made stateless is a condition precedent to the making of a deprivation order.
>
> 24 There is no similar requirement to establish that the person concerned would not be made stateless before making a deprivation order under section 40(3) of the 1981 Act on the ground that naturalisation was obtained by fraud. Accordingly, the reasoning in the *G3* case does not apply to such a decision."

26. It is agreed that *Hashi* was drawn to the Court of Appeal's attention in *KV*. The Court of Appeal said nothing to indicate that it considered *Hashi* had been decided per incuriam. Certainly, in our view, it cannot be taken as having so decided.

27. The Court of Appeal confirms at paragraph 23 that when making a decision under section 40(2), the Secretary of State must first satisfy himself as a condition precedent of the exercise of the power – that a decision to deprive the person concerned of his British citizenship would not make him stateless.

That echoes what Longmore LJ said in *Hashi* at paragraph 23. As noted above, Longmore LJ then went on to explain at paragraph 24 that the burden shifts to the Appellant on an appeal. The court of appeal decision in *KV* does not mandate a different conclusion,

28. In our judgment, the law remains as stated by Longmore LJ in *Hashi*; should it matter, we would hold that the burden of proof, once the Secretary of State has shown, as she has in this case, that she was satisfied that the Appellant would not be made stateless by the decision, falls on the Appellant who must show that in fact he has been rendered stateless.

29. We add that had we reached the alternative conclusion on the burden of proof we would have concluded that that burden was satisfied for the reasons which follow.

Proof of Foreign Law

30. The parties were agreed as to the proper approach to the proof of foreign law in this case; foreign law must be proved as a fact. It may be proved by means of expert evidence and by reference to previous judicial decisions.

31. The traditional approach to expert evidence is set out in the Commission's decision in *G3* at paragraph 19:

> "19. The observations can be distilled as follows:-
>
> (a) The function of experts is to assist the Commission in deciding what the courts of the foreign state in question would decide if the issue arose for decision before them;
>
> (b) The Commission is not permitted to conduct its own researches into the foreign law;

> (c) But if different views are expressed on the issue, the Commission must look at the sources referred to by the experts in order to decide between their conflicting testimony;
>
> (d) The Commission is not entitled to reject agreed expert evidence
>
> unless –
>
> "… it is 'obviously false', 'obscure', 'extravagant', or 'patently absurd', or if '[the relevant expert] never applied his mind to the real point of law', or if 'the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning'; or if the relevant foreign court would not employ the reasoning of the expert even if it agreed with the conclusion. In such cases the court may reject the evidence and examine the foreign source so as to form its own conclusions as to their effect. Or, in other words, a court is not inhibited from "using its own intelligence as on any other question of evidence' ": Dicey, Morris & Collins, "*The conflict of laws",* 14th Ed., para. 9-015 [14];
>
> (e) To the extent that the experts failed to say what rules of construction the courts of the foreign state will apply to the legislative sources under consideration, the Commission must construe those sources in accordance with the English rules of statutory construction, since English law presumes that, in the absence of evidence to the contrary, the foreign rules of statutory construction are the same as the English rules ([14], citing Dicey, Morris & Collins para. 9-018)."

32. As Mr Palmer points out, paragraph 9-015 of the 14th ed. of Dicey should now be read as a reference to paragraph 9-016 of the 15th ed. That paragraph adds:

> "Similarly, the court may reject an expert's opinion as to the meaning of a foreign statute if it is inconsistent with the text or the English translation and is not justified by reference to any special rule of construction of the foreign law. It should, however, be noted in this connection that quite simple words may well be terms of art in a foreign statute."

33. Paragraph 9-017 of the 15th Ed continues:

> "If the evidence of different expert witnesses conflicts as to the effect of foreign sources, the court is entitled, and indeed bound, to look at those sources in order itself to decide between the conflicting testimony.—Similarly, where the evidence of expert witnesses as to the constitutionality or vires of foreign

> legislation conflicts, it seems that the court can determine the question, provided at any rate that it is one which, according to the foreign law, is determinable by ordinary judicial proceedings"

34. The correct approach to foreign law was also considered in *KV*. At [31], Leggett LJ said:

> "In English proceedings, matters of foreign law are treated as matters of fact which must be proved to the satisfaction of the court or tribunal. Traditionally, the general rule in court proceedings has been that this cannot be done simply by putting the text of a foreign enactment before the court or by citing foreign decisions or books of authority, but can only be done by adducing evidence from an expert witness. The reason generally given for this requirement is that, without the assistance of an expert witness, the court is not competent to interpret such materials: see e.g. Phipson on Evidence (18th Edn, 2013) para 33-75; Dicey Morris & Collins on The Conflict of Laws (15th Edn, 2012) vol 1, para 9-014. Sometimes this is undoubtedly true. When, for example, the foreign law in question derives from a system which does not share a common heritage with our own and is contained in sources written in a foreign language whose meaning and/or relationship to each other is not easy to understand, it would plainly be unsafe for an English judge to reach conclusions about the effect of the foreign law without expert assistance. But equally plainly, this is not always true. An English judge does not generally need expert assistance in order to understand and interpret an enactment or decision of a court of another English-speaking country whose law forms part of the common law. Decisions of such courts are frequently cited in the English courts and treated as persuasive authority on questions of English law with no suggestion that the court needs the aid of an expert witness in order to interpret such materials. There is no reason why the court should be any less competent to interpret such materials when they are relied on to prove the content of the foreign law concerned."

35. In the present case the Commission has considered the text of the Pakistan statutory provision and has had the benefit of expert reports from two Pakistani lawyers.

<u>The Pakistani Statutory Scheme</u>

36. The starting point is the Pakistan Citizenship Act 1951 ("the 1951 PCA"). Section 5 provides:

> Citizenship by descent
>
> S5. Subject to the provision of section 3, a person born after the commencement of this Act, shall be a citizen of Pakistan by descent if his parent is a citizen of Pakistan at the time of his birth:
>
> Provided that if the parent of such person is a citizen of Pakistan by descent only, that person shall not be a citizen of Pakistan by virtue of this section unless:-
>
> (a) that person's birth having occurred in a country outside Pakistan the birth is registered at Pakistan Consulate or Mission in that country, or where there is no Pakistan Consulate or Mission in that country at the prescribed Consulate or Mission or at a Pakistan Consulate or Mission in the country nearest to that country; or
>
> (b) That person's parent is, at the time of the birth, in the service of any Government in Pakistan.

37. Section 23 of the 1951 Act provides:

> Rules
>
> (1) The Federal Government may frame rules for carrying into effect the provisions of this Act.
>
> (2) No rules framed under this Act shall have effect unless published in the official Gazette.

38. The Pakistan Citizenship Rules 1952 ("the Rules") were produced by the Federal Government of Pakistan pursuant of that power. Rule 9 of the Rules states:

> "Citizenship by descent.
>
> (1) Any person claiming citizenship by descent under section 5 of the Act shall apply in Form B to the Provincial Government of the areas in which he has his domicile of origin as defined in Part II of the Succession Act, 1925" (emphasis added).

39. Rule 21 of the Rules states, so far is relevant, that:

> "Registration of birth in countries abroad.
>
> The birth of a child of a citizen of Pakistan occurring in a country outside Pakistan shall be registered at a Mission or Consulate in the manner following:-
>
> (a) Any parent or guardian of the child shall, within six months of the birth, report in writing in Form 'S' the fact of the birth to the Pakistan Mission or Consulate in that country, or where there is no such Mission or Consulate in that country, to a Pakistan Mission or Consulate in the country nearest to that country. Such report shall, among other things indicate the full name, parentage and addresses of the parents of the child, his date and place of birth and whether the parents, or if they are dead, the guardian is a servant of any Government in Pakistan or of an international organisation of which Pakistan has at any time during that period been a member.
>
> (aa) Where such report is made after the expiry of six months from the date of the birth of a child; the Mission or Consulate may register the birth on being satisfied as to the genuineness and sufficiency of the birth on being satisfied as to the genuineness and sufficiency of the reasons for not making the report within the said period:
>
> Provided that no birth shall be registered on a report made after the expiry of one year from the date of the birth, except with the previous approval in writing of the Federal Government" (emphasis added).

40. Also said to be relevant to this case are s.9, 10 and 12 of the National Database and Registration Authority Ordinance, 2000 (the "Ordinance"). Section 9 of those provisions provide as follows:

> "9. Registration of citizens
>
> (1) Every citizen in or out of Pakistan who has attained the age of eighteen years shall get himself and a parent or guardian of every citizen who has not attained that age shall, not later than one month after the birth of such citizen, get such citizen registered in accordance with the provisions of his Ordinance…"

41. Section 10 of the Ordinance provides for the issue of national identity cards to nationals of Pakistan. Section 12 of the Ordinance states:

> "12. Overseas Identity Cards
>
> The Authority shall issue or renew, or cause to be issued or renewed, in the prescribed manner and on prescribed criteria, terms and conditions, cards to such prescribed class of citizens resident abroad or such prescribed class of emigrants who have got themselves registered in the prescribed manner, in such form and with such periods of validity thereof and upon payment of such fee in such form and manner as may be prescribed, to be called Overseas Identity Cards and receive applications for registration therefore in the prescribed form."

The Expert Evidence as to Law of Nationality in Pakistan

42. The Appellant adduced an expert report from Mr Umer Gilani, a partner in the firm called "The Law and Policy Chambers" dated 6 September 2018. Mr Gilani gave evidence and was cross-examined on that report via video link from Islamabad.

43. The Respondent relied on the evidence of Amna Piracha, a partner in the firm of Khan & Piracha, also of Islamabad. She produced two reports. The first dated 24 July 2018, the second dated 20 September 2018. Ms Piracha was called to give evidence and was cross examined by Mr Southey QC. Both experts produced the relevant statutory material from Pakistan.

44. The qualification of the experts and the contents of their reports are neatly summarised in Mr Southey QC's skeleton argument:

> *"Umer Gilani*
> 29. Umer Gilani is a partner at The Law and Policy Chambers in Islamabad and a member of the Islamabad High Court and

District Bar Associations. He is also enrolled as a High Court Advocate by the Punjab Bar Council. He has a BA-LLB from Lahore University of Management Sciences (2005-2010). He undertook an LLM at the University of Washington School of Law as a Fulbright Scholar (2013-2014). From 2015 – 2016 he was Bertha Fellow at the Foundation for Fundamental Rights in Islamabad. From 2010 – 2013 he was law clerk to Justice Jawwad S Khawaja at the Supreme Court of Pakistan. He has undertaken a number of short-term research positions and is currently involved with legislative drafting. He regularly appears in cases before the High Court of Pakistan. He was instructed by the petitioner in the case of *Saeed Abdi Mohmood*.

30. … The key features of Mr Gilani's evidence in this case are as follows:

a. The Appellant is not a de jure citizen of Pakistan because he does not possess a certificate of registration issued pursuant to the 1951 Act read with the 1952 Rules:

> *While the Act identifies various pathways through which a claim to Pakistani citizenship may arise, the Act is not a self-executing instrument. Claims arising out of the Act are to be enforced in accordance with the Rules which the Federal Government is authorised to make…*

b. From the language of rule 9 of the 1952 Rules a number of conclusions follow:

> *Firstly, Section 5 is not understood as a provision which has already "conferred" citizenship upon anyone; instead, it is viewed as a legal provision which can only give rise to "claims" to citizenship. Secondly, every claimant to citizenship is obliged to make an application in the form prescribed in APPENDIX II, Form B; this requirement is obligatory because of the term "shall" used in the rules. Thirdly, the application can only be made to the Provincial government where the applicant is domiciled. Fourthly, the Rules confer substantial discretion upon the Provincial Government in the matter of handling claims arising under Section 5; they may allow such claims or deny them.*

c. The importance of completing the forms prescribed by the Rules is clear from the judgment in the *Saeed Abdi Mahmood* case.

d. Rule 9 of the Rules is enforceable law and all government bodies are bound to abide by it in matters of citizenship.

e. It could be argued that rule 9 is ultra vires. However, no court has declared rule 9 to be ultra vires.

f. The Appellant will experience problems applying under rule 9 or applying for a CNIC.

Amna Piracha

31. Amna Piracha obtained a law degree from Sindh Muslim Law College, University of Karachi in 1981 and was enrolled as an Advocate as the High Court at Rawalpindi, Pakistan in 1985. Since 1985 she has been a partner at the law firm Khan & Piracha. She is also a member of the International Bar Association. She has 34 years of experience in general legal practice and this has included advice on nationality laws … She gave expert evidence in *S1*. In *S1* Mitting J noted that Ms Piracha, did not claim to be a specialist practitioner in Pakistani nationality law.

32. The evidence of Ms Piracha is set out in reports dated 24 July 2018 and 20 September 2018. The key features of Ms Piracha's evidence in this case are as follows:

a. The 1951 Act confers citizenship on a person whose parent is a citizen of Pakistan at the time of his birth (section 5 of the 1951 Act).

b. In order to claim citizenship pursuant to section 5 of the 1951 Act an individual is required to apply in Form B (rules 8 and 9 of the 1952 Rules). No timeframe is prescribed in the 1952 Rules for making such an application.

c. In the absence of an application in Form B, R3 will be able to claim Pakistan citizenship but will not be able to assert his citizenship and exercise his rights as a citizen. A distinction is drawn between right/entitlement to citizenship and recognition/proof of citizenship.

d. NADRA is under an obligation to issue a CNIC or a National Identity Card for Overseas Pakistanis (NICOP) to a prescribed class of citizens' resident abroad and this includes non-resident Pakistanis who hold dual nationality. A non-resident citizen of Pakistan who holds dual nationality shall upon issuance of a NICOP have the right to enter Pakistan without a visa. However this route is likely to be closed to the Appellant as he no longer a dual national.

e. Failure to file Form B does not vitiate R3's entitlement to citizenship pursuant to section 5 of the 1951 Act.

f. Although the assertion of rights as citizens are to be enforced in accordance with Rules made from time to time, conferment of citizenship is not dependent on the Rules. The 1951 Act is the primary legislation. The 1951 Act should prevail. A statutory rule cannot enlarge the meaning of the section.

g. From informal discussions with NADRA, it appears that rules 8 and 9 of the Rules have become redundant in the case of sections 4 and 5 of the 1951 Act.

h. She disagrees with Mr Gilani's interpretation of *Saeed Abdi Mahmood."*

45. As noted above, the evidence of both experts was tested in cross-examination. We deal below with matters of substance. But it is right that we set out at this stage our views as to the quality of the analysis of the two experts.

46. We say immediately that we found Ms Piracha an impressive witness. Although not a practitioner, she was well qualified to give her opinion. It was apparent from her reports and from her oral evidence that she had a detailed understanding of the Pakistani Constitution and legal system and of the underlying principles of Pakistani nationality law. Furthermore, it was clear she had properly researched the issues arising in this case. In addition, she gave her evidence in a considered and careful manner, making concessions where appropriate.

47. Mr Gilani was a less impressive witness. He had been the advocate in the Islamabad High Court case of *Saeed Abdi Mahmood v NADRA*, 3030/2017, the case upon which much of the Appellant's argument turned. He was well able to speak to the particular issues that arose in that case but was much less assured when asked entirely proper and relevant questions as to related issues

of Pakistani nationality law. We were left with the clear impression that his expertise was of a very narrow focus.

48. We were particularly troubled by Mr Gilani's evidence when asked to compare the wording of the principal part of s.5 of the 1951 Act with the proviso to that section. The principal part provides a person born after the commencement of the Act "…shall be a citizen of Pakistan by descent if his father is a citizen of Pakistan at the time of his birth". That is subject to the proviso that if "the father of such a person is a citizen by descent only, that person shall not be a citizen of Pakistan by virtue of this section unless that person's birth having occurred in a country outside Pakistan, the birth is registered..."

49. Mr Gilani seemed unwilling even to contemplate that the proviso implies that where the father obtained citizenship by birth there is no requirement for registration.

50. Mr Gilani had similar difficulties when asked to compare the proviso to s.5 with s.4, which deals with citizenship by birth and does not, on its face, require registration; and when dealing with the two sub-sections of s.10 in relation to married women, the latter of which requires registration; the former of which does not. We return to the substantive question of Pakistani law in the discussion part of this judgment; our concern here was as to Mr Gilani's apparently limited ability to understand the question being put.

51. In addition, we regret to say that on occasions, in our view, Mr Gilani's evidence moved from being that of an expert to that of an advocate.

52. It follows that where the experts differ, we prefer the evidence of Ms Piracha.

Case Law

53. The decision of the Commission in *S1 v SSHD* addressed very similar issues to the ones raised before use. The following parts of the analysis of the Commission in *S1* are particularly material:

> "13. Pakistani citizenship law is statutory. Sections 3 – 6 and 8 – 11 of the *Pakistan Citizenship Act 1951* identify seven categories of Pakistani citizen: those who were citizens at the date of commencement of the Act (13th April 1951) (section 3); (with two exceptions) anyone born in Pakistan after commencement of the Act (section 4); by descent (section 5); by migration (section 6); by registration (sections 8 and 11); by naturalisation (section 9); by marriage in the case of a woman (section 10)…By the *Pakistan Citizenship (Amendment) Ordinance 2000 (Ordinance XIII of 2000)*, issued and gazetted on 18th April 2000, President Musharraf amended section 5, by substituting "*parent*" for "*father*", so that a person born after 13th April 1951 "*shall be a citizen of Pakistan by descent if his parent is a citizen of Pakistan at the time of his birth*". The continuing effectiveness of this Ordinance is in issue.
>
> 14. On the undisputed facts, it is common ground that, by virtue of the opening sentence of paragraph 5, S1 has always been and is a Pakistani citizen by descent from his father. Mr. Fransman concedes that he is an "*ex lege*" citizen of Pakistan. He submits, however, that that is not enough to establish that, in the language of Article 1.1 of the 1954 Convention, he is a person "*considered as a national*" by Pakistan "*under the operation of its law*"….
>
> 17. Dr. Wasti was and remained of the opinion that S1 could only establish his right to citizenship by descent from his father by producing a certificate of citizenship of Pakistan granted to his father. As he could not do this, he could not establish his right to Pakistani citizenship. We understood him to accept that, as a matter of Pakistani law, rules made under the enabling section (section 23) could not cut down rights granted by the primary legislation, including S1's right to citizenship under section 5. Ms. Piracha was certainly of that view. We are satisfied that it is correct…Accordingly, under the registration policy for NICOP, the Pakistani authorities should register S1 as a Pakistani citizen.

> 18. If, at official level, the Pakistani authorities refuse to do so, Ms. Piracha's evidence is that he could challenge that decision in the Pakistani High Court…."

54. Against that background the Commission were satisfied in S1 that:

> "At least on balance of probabilities…S1 is a Pakistani national, by descent from his father, and that, under the law of Pakistan, as it would be applied by Pakistani courts is considered to be a Pakistani national by descent from his father"

55. Very properly acknowledging the principles identified by the Court of Appeal in *AA (Somalia) v SSHD* [2008] INLR 1 as to the circumstances in which factual finding of immigration proceedings can be re-opened, Mr Southey QC submits that *S1* does not need to be followed in the present case. First, the Appellant was not a party to *S1* and second, there is recent material in the form of the judgment of the Islamabad High Court in *Sayeed Abdi Mahmood* which postdates that decision in *AA (Somalia)*. Much of the hearing in this matter was devoted to a close analysis of the judgment in *Sayeed Abdi Mahmood*.

56. *Sayeed Abdi Mahmood* was a decision of Judge Kayani, dated 7 May 2018. It is necessary to set out lengthy extracts from that judgment.

57. The essential facts of the case were as follows: The petitioner was born on 09.09.1997 in Pakistan and claimed to be a citizen of Pakistan. On 21.08.2017 he visited office of NADRA (The National Database and Registration Authority), the first respondent to obtain a Computerized National Identity Card but NADRA officials refused him the card on the ground that his parents were not Pakistani and for that reason he could not be considered a Pakistan Citizen. The relief he sought was as follows:

> "That in view of the foregoing facts and circumstances it is most respectfully prayed that this Hon'ble Court may be pleased to:
> a)directed NADRA to issue the Petitioner a Computerized National ID Card in accordance with NADRA's duty under Section 10 of NADRA Ordinance read with Section 4 of the Citizenship Act, 1951;
> b)declare that the Respondents' policy of denying citizenship status and consequential rights of children born in Pakistan to foreigner parents is ultra vires section 4 of the Pakistan Citizenship Act, 1951 and amounts to a gross violation of fundamental rights guaranteed in the Constitution of the Islamic Republic of Pakistan, 1973; and
> c)grant such other remedy as my be available under the law and the Constitution."

58. The competing contentions of the parties are significant. Counsel for the petitioner, Mr Gilani, argued that:

> "In terms of section 4 of The Pakistan Citizenship Act, 1951 every person born in Pakistan after promulgation of the Act shall be citizen of Pakistan by birth and as such petitioner falls within purview of section 4 and he is entitled for citizenship as well as CNIC; that U/S 10 of NADRA Ordinance, 2002, NADRA is legally bound to issue CNIC to every citizen, who has obtained proper birth certificate and attained age of 18 years, therefore, refusal on part of NADRA is contrary to law; that citizenship in terms of section 2 of The Pakistan Citizenship Act, 1951, citizen means the person, who is or is deemed to be citizen of Pakistan under the said Act and it is fundamental right of the petitioner to be treated in accordance with law and once a right has been accrued , it cannot be denied/taken back."

59. The Deputy Attorney General, a Law Officer from NADRA, the Director for Immigration & Passports at NADRA and a Section Officer (Passport & Citizenship) in the Ministry of Interior contended that:

> "Section 4 of the Pakistan Citizenship Act, 1951 deals with citizenship by birth and every person born in Pakistan is citizen by birth, however, Section Officer (Passport & Citizenship) Ministry of Interior has produced the application APPENDIX-II FORM 'B' (Vide Rules 8, 9 & 10) and certificate of registration APPENDIX-XVI FORM 'R-1' and contended that case of the petitioner as well as any other person for citizenship by birth will be treated under the said rules in the prescribed

> manner, even the Section Officer has explained the entire mechanism before this Court on 27.03.2017, which is reflected from the order sheet of that date."

60. At paragraph 8 of his judgment, the Judge said:

> "The above referred section 4 of the Act clearly describes that every person born in Pakistan shall be citizen of Pakistan by birth, however, there are two exceptions i.e. when his father possesses such immunity, whereby he has not been declared citizen of Pakistan being envoy of an external sovereign power, second father is an enemy alien and birth of child occurs in place of enemy. In case of the petitioner, he does not fall under the above referred exceptions as his father is neither diplomat nor enemy alien. "

61. The court reviewed the official reports of Constituent Assembly of Pakistan, at the time of the adoption of the 1951 Act and considered the history of the law of citizenship by birth and citizenship by descent. It considered a decision of the Pakistan courts in *Ghulam Sanai vs. The Assistant Director, National Registration Office, Peshawar and another* where claims by Afghan refugees were considered. Then at paragraph 16 the Court said:

> "16. This Court has great respect to the view rendered by Division Bench of the Peshawar High Court but this Court further confirms the said view on an additional reason on the point that any person, who born in Pakistan becomes citizen of Pakistan on plain reading of section 4 of The Pakistan Citizenship Act, 1951 except the refugees, who have already taken up refuge temporarily in Pakistan and as such their stay is recognized under UNHCR."

62. The Judge continued at paragraph 19:

> "19. Except the refugees (especially Afghan refugees) any other person who born in Pakistan shall be considered citizen of Pakistan in terms of section 4 of the act and his case has to be considered under rule 8 of The Pakistan Citizenship Rules, 1952…"
>
> 20. In view of section 4 of The Pakistan Citizenship Act, 1951 read with Rule 8 The Pakistan Citizenship Rules, 1952, I am of

the confirmed view that the meanings of the said provision of law are simple and straight and in such like situation, the literal rule of statutory interpretation is applicable, which means the statue words and phrases used therein should be read keeping in view their plain meaning…

21. It is also settled law that where the plain language of a statute admits of no other interpretation then the intention of the legislature conveyed through such language is to be given its full effect. ….

22. I have gone through section 4 of The Pakistan Citizenship Act, 1951, which deals with citizenship by birth as well Rule 8 of The Pakistan Citizenship Rules, 1952 from all diverse angles but could not find any other meanings except the straight meanings, which favour interpretation that any person born in Pakistan has to be considered citizen of Pakistan under the law as the words used in the said section are plain and unambiguous, therefore, their natural and ordinary sense has to be considered for all intents and purposes. …

23. I have asked Section Officer (Passports & Citizenship) Ministry of Interior, who has drawn attention of this Court towards two different documents, through which any person can apply for the certificate of citizenship of Pakistan in terms of The Pakistan Citizenship Act, 1951 as provided in APPENDIX-II FORM 'B' and APPENDIX-XVI FORM 'R-A'.

24. In view of above background, this Court is fully convinced that there is no restriction on any individual, who born in Pakistan despite the fact that his parents are not citizen of Pakistan can apply for grant of citizen by birth in terms of section 4 of The Pakistan Citizenship Act, 1951 and Ministry of Interior Government of Pakistan being competent authority has to process the case by virtue of the abovementioned application forms in prescribed manner and the applicant has to submit the details as required in the said documents.

25. Besides the above referred concept of citizenship, CNIC has only been issued to citizen of Pakistan under NADRA Ordinance in terms of section 10 in such a manner and on terms and conditions subject to every citizen, who has attained the age of 18 years and got himself registered under section 9 of the Ordinance and he is issued card, which is called National Identity Card with such period of validity upon payment of such fee in such manner as prescribed, therefore, after issuance of certificate of registration as citizen of Pakistan, NADRA is

> bound to issue CNIC to every person in Pakistan, if he claims citizenship in terms of section 4 of The Pakistan Citizenship Act, 1951.
>
> 26. It is also trite law that every individual has to be given protection of law in terms of Article 4 of the Constitution of Islamic Republic of Pakistan, whether he is citizen or not … [the] High Court … has to ensure the protection of Article 4 of the Constitution to any foreign subject (person/citizen) with equal protection of law and his rights have to be dealt in similar manner, therefore, there is no cavil to the proposition that any foreigner non-citizen of Pakistan or person from any other state born in Pakistan, except a refugee, is entitled to be dealt under the Pakistan Citizenship Act, 1951 subject to his claim, if it falls within five concepts provided under The Pakistan Citizenship Act, 1951 for seeking citizenship of Pakistan.
>
> 27. In view of above background, the instant writ petition is allowed. The petitioner is directed to approach the Ministry of Interior Government of Pakistan along with application forms duly filled in, where-after Ministry of Interior Government of Pakistan/respondent No.2 shall decide the application of the petitioner within a period of 03 months in accordance with law."

Discussion

63. The critical question on this preliminary issue is whether, under Pakistani law, it is a pre-condition for the establishment of citizenship by descent that the person concerned has made an application for the same.

64. On the face of s.5 of the 1951 Act, there is no such pre-condition. The wording of s.5 is plain, as Judge Kayani in *Sayeed Abdi Mahmood* recognised, and as Mr Southey QC concedes. In our judgment, that construction of the section is powerfully supported by comparison with the other statutory routes

by which citizenship can be established. In contradistinction with s.5, there are some such routes, like those provided by s.6, s.9 and s.10(2), which require an application and in each such case that requirement is express. In those cases, citizenship commences at the time of registration: there is no such delay in the case of s.5 (or s.4).

65. The question therefore is whether the Citizenship Rules have changed the position. Mr Southey QC contends that they do. He says that they bind the Pakistani executive and have the effect that citizenship can only be gained by someone claiming the status on the basis of descent by their making an application under Rule 9. As noted above, Rule 9 provides that "any person claiming citizenship by descent under s.5 of the Act shall apply (on) form B to the Provincial government of the area in which he has his domicile of origin…" Mr Southey QC emphasises the use of the expression "claiming citizenship". He submits that it is clear that s.5 of the 1951 Act is not "self-executing" and that citizenship can only be obtained by claiming if by legal application under Rule 9.

66. Mr Southey QC acknowledges that the rule making power in s.21 does not, on its face, empower the Executive to make rules which have the effect of cutting down the scope and effect of the enabling statute, as, on his interpretation, they do. He concedes that, as a result, the Rules might be ultra vires that power. But, he argues, until the Rules are set aside by order of the Pakistan Court, the rule remains in force and binds the government. That being so, he says, because at the time of the Secretary of State's decision no such

application under Rule 9 had been made by the Appellant, he had not achieved citizenship of Pakistan.

67. That, in our judgment, is a remarkable submission. As Mr Southey QC was compelled to concede it would apply with equal force to a person born in Pakistan, of Pakistani parents, who lived in Pakistan "claiming" citizenship under s.4. Unless he or she had made an application under the Rules, they would not be citizens of Pakistan. That might come as something of a surprise to the millions of residents of Pakistan affected today.

68. Mr Southey QC accepts that if the Rule could be read in a manner that was compatible with the 1951 Act, it should be so read. But that, he says, is impossible: the expression "claim" is clear.

69. The difficulty with that argument is that Mr Gilani, the Appellant's expert, expressly accepted in his oral evidence, not only that the Rule *should* be construed in a manner that was compatible with the enabling Act if that were possible, but that they *could* be so construed. Ms Piracha was of the same view. Given that we must decide the case on the evidence as to foreign law, and given that that interpretation is consistent with the natural meaning of the statute, that seems to us an almost insurmountable obstacle.

70. Undeterred, Mr Southey QC contended that, even if that is right, the evidence of how the Act and the Rules were in fact construed by the Pakistani courts provides a complete answer. The only Pakistani authority on the point to which we were referred, was *Sayeed Abdi Mahmood* and, accordingly, Mr Southey QC subjected the judgment of Judge Kayani to close analysis.

71. He pointed in particular to paragraphs 23-25, and to paragraph 27 and the final outcome of the case. In this he was supported by Mr Gilani in his evidence to the Commission. Mr Southey QC argues that *Sayeed Abdi Mahmood* demonstrated that the Pakistani government were keen to avoid a literal interpretation of s.4 (and s.5) because, were they to be constructed, it would benefit the children of the many hundreds of thousands of Afghani refugees living in Pakistan.

72. Certainly, we accept that Judge Kayani appeared to be at pains to exclude refugees and descendants from much of his analysis. It may be (although we are in no position to reach a conclusion on the point) that there would be some force in a submission that, in respect of the children of Afghan refugees living in Pakistan, there has been a practice of ignoring the strict legal position under the 1951 Act. However, there is nothing in the judgement in *Sayeed Abdi Mahmood,* or anywhere else, to lead us to conclude that that might apply to those in the position of the Claimant with an apparently sound entitlement to citizenship by descent.

73. Mr Southey QC contended that the whole structure of the judgment pointed to a conclusion that the Court was accepting that it was only by making an application under the Rules that a person could achieve citizenship of Pakistan. And the same, he said, must apply to someone claiming citizenship by descent. He says paragraph 22 of the judgment is qualified by paragraph 23 and paragraph 23 refers to the form used for applications under the Rules. He observes that paragraph 24 describes how there is no restriction on a

person born in Pakistan from applying "for grants of citizen(ship) by birth…" He says it is plain that paragraph 25 is referring to s.9 of the Ordinance.

74. In paragraph 25, argues Mr Southey QC, the Judge concludes that it is possible to attain a computerised national identity card ("CNIC") only after obtaining a certificate of registration. Accordingly, he says, citizenship is dependent on the making of an application. According to Mr Southey QC, that explains Judge Kayani's conclusions in paragraph 27. If citizenship was automatic, he says, the Judge would simply have granted the first form of relief sought, namely a direction to NADRA to issue a CNIC for the petitioner. But he did not do that; instead he required Mr Mahmood to make the necessary application.

75. We have no hesitation in rejecting that argument.

76. First, Mr Southey QC's analysis ignores repeated assertions in the judgment that s.5 gives citizenship without more. That was the express submission of the deputy Attorney General and all the other respondents, as noted in paragraph 4 of Judge Kayani's judgment. Furthermore, that was precisely what the Judge said in paragraph 16 and 22 was the plain effect of the 1951 Act and the Rules.

77. Second, Mr Southey QC's argument involves treating the judgment as if it were a statute and teasing out of it a particular meaning consistent with his argument. In our view, that is to place much greater weight on Judge Kayani's judgment than its terms will bear. He was resolving a particular case on its particular facts; he was not purporting to lay down general rules as to the construction of the Citizenship Act and the Rules.

78. Third, much stress is placed on the reference in paragraph 24 to the ability to apply for a grant of citizenship. But in our judgment, this argument is to ignore the obvious distinction between acquiring the status of citizen and acquiring proof of that status. We accept Mr Palmer's submission that reference in Rule 9 to "any person claiming citizenship by descent shall apply" on a particular form is a reference to a person who claims he or she is within the scope of a section and who seeks proof of that status.

79. Fourth, in our view read as a whole, the judgment of Judge Kayani is consistent with that approach. It is impossible to read the passages such as those we have cited in which the Judge confirms the literal meaning of s.5 without concluding that the Judge accepted that the Rules *could* be construed consistently with that interpretation of the Act. In our view, the effect of Judge Kayani's judgment is to re-affirm that the Act automatically conferred citizenship on the relevant classes of person and the Rules provided a route by which that citizenship could be proven.

80. Finally, in our view, the effect of the latter part of Judge Kayani's judgment, and in particular paragraph 27, was to allow the petition on the basis that the petitioner filed with the Ministry of the Interior the appropriate application forms, upon receipt of which the Ministry would decide whether to issue the relevant proof of citizenship.

81. For those reasons we reject Mr Southey QC's analysis of the impact of the decision in *Sayeed Abdi Mahmood.* It follows that we respectfully endorse the analysis of the Pakistan Citizenship Act and the Citizenship Rules in *S1 v SSHD.*

Conclusion

82. In those circumstances, we resolve this preliminary issue before us by declaring that the Appellant was a citizen of Pakistan at the date of the decision under challenge in this appeal.