SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/163/2019
Hearing Dates: 22-25 October 2019
Date of Judgment: 7th February 2020

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING
UPPER TRIBUNAL JUDGE BLUM
MR ROGER GOLLAND

Between

Shamima Begum

Appellant

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

Mr T Hickman QC and Ms Jones (instructed by **Birnberg Pierce & Solicitors**) appeared on behalf of the Appellant

Mr J Glasson QC & Mr Blundell (instructed by **the Government Legal Department**) appeared on Behalf of the Secretary of State

Mr A McCullough QC & Mr Straw (instructed by **Special Advocates' Support Office**) appeared as Special Advocates

OPEN judgment

Introduction

1. The Appellant ('A') has appealed against a decision of the Secretary of State dated 19 February 2019 to make an order depriving her of her British citizenship ('Decision 1'). That appeal is governed by section 2B of the Special Immigration Appeals Commission Act 1997 ('the 1997 Act'). She has also appealed against the Secretary of State's decision dated 13 June 2019 to refuse her application for leave to enter ('LTE') outside the Immigration Rules (HC 395 as amended) ('the Rules') in order to enable her to pursue her appeal effectively ('Decision 2'). That appeal is governed by section 2 of the 1997 Act.

2. This is our decision after a preliminary issues hearing in this case. If we decide any one of the preliminary issues in favour of A, her appeal will, potentially, succeed. We have nonetheless considered and decided each of the preliminary issues.

3. There are three issues. We will consider them in what seems to us to be the most logical order.

    a. Did Decision 1 make A stateless?

    b. If not, did Decision 1 or Decision 2 breach the Secretary of State's extra-territorial human rights policy ('the Policy') by exposing her to a risk of death or of inhuman or degrading treatment?

    c. If not, can A have a fair and effective appeal from Syria; and if she cannot, should we allow her appeal on that ground alone?

4. As A's counsel explain in their skeleton argument, A applied for LTE and challenged Decision 2 because of Court of Appeal authority which we consider in detail below. As they further explain, however, their contention is that such an application is not necessary, because, they argue, the appeal against Decision 1 should be allowed if A cannot fairly or effectively exercise her statutory right of appeal.

5. A was represented by Mr Hickman QC and Ms Jones. The Special Advocates were Mr McCullough QC and Mr Straw. The Secretary of State was represented by Mr Glasson QC and Mr Blundell. We are grateful to all the advocates for the help they have given us in writing and orally. We are also grateful to their instructing solicitors and other members of their teams for the impressive and diligent work which they have all done outside court.

6. Before the hearing, A applied for two of her witnesses to be anonymised, in short, because of fears about what might happen if they could be identified as having given evidence in this case. That application was served on the media in accordance with the Commission's relevant Practice Note. The media did not object to the application. A applied at the same time, in the case of the witness who was to give evidence by video link, for the video apparatus to be screened from the public, and for the other witness to give evidence in private. The Commission considered that it was not physically possible for the video apparatus to be screened from the public during the hearing while being adequately visible to the Commission and parties. The Commission therefore decided that both witnesses (Witness A and Witness B) should give their evidence in private.

7. A called her expert, Witness A. He was cross-examined. A was ready to call two witnesses of fact, her solicitor, Mr Daniel Furner, who had made three OPEN witness statements and one confidential witness statement, and Witness B. The Secretary of State did not wish to cross-examine either of those witnesses, so there was, in the event, no need for a private hearing of the evidence of Witness B. We have read all the witness statements. The Secretary of State called her expert, Dr Hoque. He, too, was cross-examined.

8. We have decided that, despite the fact that Witness A gave evidence in a private hearing, we can consider his evidence fully in this OPEN judgment. There is nothing in our summary of his evidence which could identify him.

The facts in outline

9. For the purposes of this hearing, we do not need to say very much about the facts.

10. According to the expert report of Witness A, A's father was born in Sylhet, in what is now Bangladesh, on 13 September 1958. He came to the United Kingdom in

November 1975. It appears from paragraph 43 of Dr Hoque's report that A's father was given indefinite leave to remain ('ILR') on 22 June 1993. He is said to have a Bangladeshi passport with some form of leave to remain in the United Kingdom endorsed in it; presumably that leave is ILR. It is not clear how much time he has spent in the United Kingdom since 1975. He went back to Bangladesh for a time in 1980. It appears that he has now returned to Bangladesh.

11. A's mother was born on 7 March 1964 in Sylhet, in what is now Bangladesh. A's parents married there on 17 March 1980. A's mother came to the United Kingdom on 24 November 1981. She became naturalised as a British citizen on 19 November 2011.

12. A is 20 years old. She was born on 25 August 1999 in the United Kingdom and brought up in the United Kingdom. Both her parents were citizens of Bangladesh when she was born. A's counsel contend in their skeleton argument that there is no evidence that she has ever been to Bangladesh, or that she speaks Bengali. She is a British citizen by birth, because, at the time of her birth, one of her parents (her father) had ILR.

13. In February 2015, when she was 15, she left the United Kingdom with two friends and went to Syria. She is now detained by the Syrian Democratic Forces ('the SDF') in the Al-Roj camp in northern Syria.

14. According to media reports, no-one knew where she was until she was found by journalists in February 2019 in the Al-Hawl camp. That camp is in north-east Syria and is also run by the SDF. While she was detained there, she gave birth to a baby boy. He was her third child. Her two elder children had died before she reached that camp. A spoke to a journalist and said that she wanted to go back to the United Kingdom. There was a report of an interview between her and a journalist in the Times on 13 February 2019.

15. At some point in late February 2019 she was moved to the Al-Roj camp. Her son died on about 7 March 2019. It was reported that he had died of pneumonia. Conditions in the Al-Roj camp are said to be 'squalid' and 'wretched'.

16. On 19 February 2019, the Secretary of State sent written notice of Decision 1 to A's family in the United Kingdom. The ground for the Decision 1 was that 'The Security

Service (MI5) assesses that [A] travelled to Syria and aligned with ISIL... The Security Service considers that an individual assessed to have travelled to Syria and to have aligned with ISIL poses a threat to national security'. The order depriving A of her nationality was made on the same day. The decision was based on a submission to the Secretary of State. We consider one facet of that submission below.

17. On 19 March 2019, A lodged a notice of appeal against Decision 1. The grounds of appeal were amended on 10 May and on 31 July 2019.

18. On 3 May 2019, A applied for LTE outside the Rules to enable her to take part in her appeal in the United Kingdom. On 13 June 2019, the Secretary of State refused that application on the grounds that A had not supplied biometric data (the Secretary of State insisted on the provision of such data as a condition for granting LTE), and that there was no breach of the European Convention on Human Rights ('the ECHR'). On 23 July 2019, A issued an application for judicial review to challenge that decision on common law grounds. She did so because an appeal to the Special Immigration Appeals Commission ('the Commission') is on human rights grounds only.

19. On 9 August 2019, Edis J ordered that on 22 October 2019 (the first date listed for this hearing in the Commission) there should be a ''rolled up' hearing of the application for permission to apply for judicial review, and, if granted, of the application for judicial review. There will be a separate judgment in the application for judicial review.

A. Is A stateless?

The legal context of the arguments about statelessness

20. Section 40(2) of the British Nationality Act 1981 ('the BNA') gives the Secretary of State power, by order, to deprive a person of citizenship status (defined in section 40(1)) if the Secretary of State is satisfied that deprivation is conducive to the public good. Section 40(4) prevents the Secretary of State from depriving a person of his citizenship if 'he is satisfied that the order would make [the] person stateless'. Section 40(4A) makes clear that section 40(4) does not prevent the Secretary of State from depriving a person of citizenship which results from naturalisation, so long as the test in section 40(4A)(b) is met, and if the Secretary of State has reasonable grounds for believing that the person is, under the laws of another state or territory, able to

become a national of that state or territory. Section 40A of the BNA confers a right of appeal on a person who has been deprived of his British citizenship.

21. In *Pham v Secretary of State for the Home Department* [2017] UKSC 42, [2017] 1 WLR 2380 a seven-person constitution of the Supreme Court considered a preliminary issue about statelessness on an appeal from the Commission. The appellant in the Supreme Court was a citizen of Vietnam. The Secretary of State decided to deprive him of his British nationality. The authorities in Vietnam then refused to accept that he was a citizen of Vietnam.

22. The three main judgments were given by Carnwath, Mance and Sumption SCJJ. Lord Reed also gave a short judgment. The three other members of the Court agreed with all three longer judgments. The three longer judgments record that it was common ground that the word 'stateless' in section 40(4) of the BNA was intended to give effect to article 1(1) of the 1954 Convention relating to the Status of Stateless Persons ('the Convention'), and that 'stateless' therefore means 'not considered as a national by any state under the operation of its law'. The appeal from the decision of the Court of Appeal (reversing the Commission's decision that the Secretary of State's decision had made the appellant stateless) was dismissed on the grounds that whether or not state practice was relevant to the question posed by article 1(1) of the Convention (and also posed by section 40(4) of the BNA), the appellant was not, on any view, stateless on the date when the Secretary of State made the relevant order under section 40(2).

23. No member of the Court held in terms that state practice was relevant to that question. The judgments either express no concluded view, or (in one case) scepticism, about that (see paragraphs 29, 38, 66 and 101 of the judgment). The Court decided the appeal on a different point; see paragraph 38 of the judgment of Lord Carnwath SCJ. That was that there was no evidence of a decision or practice of the Vietnamese Government which treated the appellant as stateless by operation of its law which was effective as at the date of the Secretary of State's decision. The decision of the Supreme Court, therefore, gives us no direct help on what is meant by the key phrase in article 1(1), and, in particular, whether state practice is relevant to the interpretation of that phrase.

24. Jackson LJ gave the judgment of the Court of Appeal in *Pham* (*B2 v Secretary of State for the Home Department* [2013] EWCA Civ 616). The Court of Appeal decided the appeal squarely on the question whether the Secretary of State's decision to deprive the respondent of his British citizenship made him stateless *de facto* or *de iure*. Jackson LJ recorded (judgment, paragraph 70) that the expert evidence, accepted by the Commission, was that the executive in Vietnam acted as they wished and that it was the function of the courts to uphold the actions and decisions of the executive. He held that although article 15 of the Nationality Law 1988 (cited in paragraph 19 of the judgment) was ambiguous, and gave the executive an apparently unfettered discretion to decide whether or not a person was a Vietnamese national, the position under Vietnamese nationality law was 'tolerably clear'. B2 was, according to Vietnamese nationality law, a citizen of Vietnam. 'The fact that in practice the Vietnamese Government may ride roughshod over its own laws does not, in my view, constitute "the operation of its law" within the meaning of the 1954 Convention. I accept that the executive controls the courts and that the courts will not strike down unlawful acts of the executive. This does not mean, however, that those acts become lawful' (judgment, paragraph 88).

25. Jackson LJ did not accept that a decision of the Vietnamese Government to treat the respondent as having lost his Vietnamese nationality without going through any of the relevant legal procedures could be characterised as the "position under domestic law" (judgment, paragraph 91). He added that 'If the relevant facts are known, and on the basis of those facts and the expert evidence it is clear that under the law of a foreign state an individual is a national of that state, then he is not *de iure* stateless. If the Government of the foreign state choses to act contrary to its own law, it may render the individual *de facto* stateless. Our own courts, however, must respect the rule of law and cannot characterise the individual as *de iure* stateless.' If that was unsatisfactory, the remedy was to amend the Convention, or the BNA. 'The remedy is not to subvert the rule of law. The rule of law is now a universal concept. It is the essence of the judicial function to uphold it'.

26. The Court of Appeal handed down its decision in *Secretary of State for the Home Department v E3 and N3* [2019] EWCA Civ 2020 after the hearing in this case. It concerns the burden of proof in deprivation appeals. Neither side suggested that it was relevant to the issues in this appeal, and we say no more about it.

Did Decision 1 make A stateless?

Introduction to the arguments on statelessness

27. It is clear from the reasoning of the Supreme Court in *Pham* that the question whether Decision 1 made A stateless depends on whether she was, at the time of Decision 1, a citizen of another state. The Secretary of State argues that she was, at that date, a citizen of Bangladesh. In short, the Secretary of State's argument is that it is clear from provisions of Bangladeshi legislation that A, who is not yet 21, is a citizen of Bangladesh by descent.

28. A's primary submission is that she is not considered a national of Bangladesh under the operation of its law. She puts this argument in two ways, which she refers to as 'the judicial interpretation argument' and the 'government practice argument'.

29. Those arguments are about foreign law. The courts of England and Wales resolve such arguments by hearing the evidence of experts in foreign law. The court's decision on a question of foreign law, because it depends on the expert evidence which parties happen to have called in that case, is a decision of fact, not law. It follows that decisions of other courts of England and Wales on the same question of foreign law are not binding.

30. A's expert was Witness A, who gave evidence by video link. The Secretary of State's expert was Dr Hoque. He also gave evidence by video link. Both witnesses produced written reports and were cross-examined. Before we consider the expert evidence in this case, and the arguments based on that evidence, it is convenient, first, to set out the relevant legal instruments.

The relevant legal instruments

31. The state of Bangladesh is the product of a civil war, in effect, between what were two geographically separate parts of the state of Pakistan, East and West Pakistan. Bangladesh declared its independence from Pakistan on 26 March 1971. There was then a civil war which lasted nine months, ending on 16 December 1971. A presidential order (the Provisional Constitution of Bangladesh Order 1972) gave effect to a provisional constitution. The Constitution of Bangladesh ('the Constitution') was drawn up and ratified on 4 December 1972. It came into force on 16 December 1972.

The President's Orders

32. Three President's Orders are relevant. They were made before the Constitution came into force.

33. The first is the Laws Continuance and Enforcement Order ('the LCAE Order') which provided that all laws which were in force on 25 March 1971 in the territory of what is now Bangladesh should continue to be in force subject to necessary consequential changes.

34. The second is the Bangladesh (Adaptation of Existing Laws) Order 1972 ('the AEL Order') (which we understand to have been President's Order No 48 of 1972 – see footnote 8 on page 1145 of the bundle). It came into force on 26 March 1971. It was made by the President. Its recitals referred to the LCAE Order. 'Existing law' is comprehensively defined in paragraph 2. Article 3 provided that all existing laws should be (unless later repealed or amended) subject to the adaptation directed in the AEL Order.

35. The Third is the Bangladesh Citizenship (Temporary Provisions) Order 1972 (President's Order No 149 of 1972) ('the BCTP Order'). It was made on 15 December 1972, but deemed to have come into effect on 26 March 1971 (article 1(2)).

36. By article 2, on commencement and 'notwithstanding anything contained in any other law' various classes of people were 'deemed to be a citizen of Bangladesh'. They included any person

    a. who, or whose father or grandfather was born in the territory of Bangladesh and who was a permanent resident there on 25 March 1971 and who continued to be so resident; and

    b. who was a permanent resident of Bangladesh on 25 March 1971 and continued to be so resident and was not otherwise disqualified from being a citizen (with a proviso which is not relevant for current purposes).

37. Article 2A provides that a person to whom article 2 would ordinarily have applied but for his residence in the United Kingdom shall be deemed to continue to be a permanent resident in Bangladesh within the meaning of that article. Article 2A is

subject to a proviso that the Government can notify, in the official Gazette, any person or categories of person to whom Article 2A should not apply.

38. Article 2B(1) provides 'Notwithstanding anything contained in Article 2 or in any other law for the time being in force, a person shall not, except as provided in clause (2), qualify himself to be a citizen of Bangladesh if he owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state, or is notified under the proviso to article 2A'.

39. There is then a further proviso, referred to in some of the materials as 'the 1978 proviso': 'Provided that a citizen of Bangladesh shall not, merely by reason of being a citizen, or acquiring citizenship of a state specified in or under clause (2), cease to be a citizen of Bangladesh'. The states specified in article 2B(2) are 'any state of Europe or North America, or …any other state which the Government may, by notification in the official Gazette, specify'.

40. Article 2B(2) provides that 'The Government may grant citizenship of Bangladesh to any person who is a citizen of any state of Europe or North America or of any other state which the Government may, by notification in the official Gazette, specify in this behalf'.

41. Article 3 provides that in any case of doubt whether a person is deemed to be a citizen of Bangladesh under article 2 of the BCTP Order, the question shall be decided by the Government, and the decision of the Government shall be final.

42. Article 4 provides that the Government may 'upon application made to it in this behalf in the manner prescribed, grant citizenship to any person'.

The relevant provisions of the Constitution

43. Article 6(1) of the Constitution provides that the citizenship of Bangladesh shall be determined by law.

44. Article 102 of the Constitution confers wide powers of judicial review on the High Court Division. In particular, it can declare that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic has been done or taken without lawful authority and is of no legal effect (article 102(2)(a)(ii)). In paragraph 9 of his judgment in *Bangladesh v Professor Golam Azam* (Civil Appeal

No 58 of 1993), MH Rahman J said 'All actions or decisions, administrative or quasi-judicial are amenable to judicial review under Article 102 of the Constitution subject to the limitations provided in that Article'. See also paragraphs 67-72 of the concurring judgment of ATM Afzal J, which expound well-known principles of the public law of England and Wales.

45. Article 122(2)(b) of the Constitution changed the age at which citizens of Bangladesh could vote from 21 to 'not less than eighteen years of age'.

46. The side notes to articles 149 and 150 are 'Saving for Existing Laws' and 'Transitional and Temporary Provisions', respectively. Article 149 of the Constitution provides that 'Subject to the provisions of this Constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution'. 'Existing law' is defined in article 152(1) of the Constitution as 'any law in force in, or in any part of, the territory of Bangladesh immediately before the commencement of this Constitution, whether or not it has been brought into operation'. The effect of article 149, among other things, was to give continuing effect to the three President's Orders to which we have referred, and to the extent that any laws of the state of Pakistan which applied to the territory of what is now Bangladesh were not already law in the state of Bangladesh by virtue of the three President's Orders, to make them law in the territory of Bangladesh.

47. Article 150(1) provides that 'The provisions set out in the Fourth Schedule of the Constitution at the time of the commencement of this Constitution on the 16th day of December, 1972, shall have effect as transitional and temporary provision notwithstanding anything contained in any other provisions of this Constitution'.

48. Paragraph 3(1) of the Fourth Schedule to the Constitution provides that 'All laws made or purported to have been made in the period between the 26th day of March, 1971, and the commencement of this Constitution, all powers exercised and all things done during that period, under authority derived, or purported to have been derived from the Proclamation of Independence, or any law, are hereby ratified and confirmed and are declared to have been duly made, exercised and done according to law.' This provision appears to gives the status of law to the three President's Orders we refer to above.

49. The effect of paragraph 3(2) of Schedule 4 is that during the period before Parliament first meets under the Constitution, the executive and legislative powers of the Republic of Bangladesh, including the President's power to legislate by order, might be exercised, notwithstanding the repeal of the Provisional Constitution of Bangladesh Order 1972, in all respects in the way in which they had been exercised immediately before the commencement of the Constitution.

50. Paragraph 3(3) of Schedule 4 provides that 'Any provision of this Constitution enabling or requiring Parliament to legislate shall, until the day when Parliament first meets as aforesaid, be construed as enabling the President to legislate by order and any order made under this paragraph shall have effect as if the provisions thereof had been enacted by Parliament'. This provision gives that status of Parliamentary legislation to President's Orders made between the date when the Constitution came into force and the date when Parliament first met under the Constitution.

51. The President's Orders (to which we have referred above) pre-dated the coming into force of the Constitution. They therefore were not, and could not have been, made under paragraph 3(3) of Schedule 4 to the Constitution. The effect of paragraph 3(3), it therefore appears, is not to give any of the three President's Orders the status of Parliamentary enactments; nor does paragraph 3(1) do so.

52. In paragraph 12 of *E3 and N3 v Secretary of State for the Home Department* (SC/138 and SC/146/2017), the Commission said that the BCTP Order has the status of primary legislation. This is said to be because 'it was enacted at a time when the President had such powers'. That statement is not further explained in the judgment. Witness A also asserted that the effect of Schedule 4 to the Constitution was to give the BCTP Order the status of primary legislation but he was unable to explain, by reference to the text of paragraph 3 of Schedule 4, how he reached that result. We consider that the obvious inference from the drafting of paragraph 3 is that legislation made in the period covered by paragraph 3(1) does not have the status of primary legislation, because paragraph 3(1) does not say so, whereas paragraph 3(3) attaches such status to President's Orders made during the period described in that sub-paragraph.

Instruments enacted by the state of Pakistan

53. Some of the legislation governing citizenship in Bangladesh was originally enacted by the state of Pakistan; in particular, the Citizenship Act 1951 ('the 1951 Act') and the Citizenship Rules 1952 ('the 1952 Rules'). The mechanism by which that legislation is now law in Bangladesh is the LCAE Order, the AEL Order, articles 149 and 150 of the Constitution, and paragraph 3(1) of Schedule 4 to the Constitution. We accept Mr Hickman's submission that while the 1951 Act was primary legislation when first enacted (and still is primary legislation in Pakistan) that mechanism means that the 1951 Act is not primary legislation in Bangladesh. Professor Hoque accepted this in cross-examination.

The 1951 Act (as amended)

54. Section 3 of the 1951 Act makes provision for citizenship at the date of the commencement of the 1951 Act (13 April 1951). The effect of the relevant provisions is that every person is deemed to be a citizen of Bangladesh who or any of whose parents or grandparents was born in the territory now included in Bangladesh, and who has not been permanently resident in any country outside Bangladesh after 14 August 1947.

55. Sections 5 and 14 of the 1951 Act provide:

> *'5. Citizenship by descent*
>
> *Subject to the provisions of section 3 a person born after the commencement of this Act shall be a citizen of Bangladesh by descent if his father or mother is a citizen of Bangladesh at the time of his birth:*
>
> *Provided that if the father or the mother of such person is a citizen of Bangladesh by descent only, that person shall not be a citizen of Bangladesh by virtue of this section unless –*
>
> > *(a) that person's birth having occurred in a country outside Bangladesh the birth is registered at a Bangladesh Consulate or Mission in that country, or where there is no Bangladesh Consulate or Mission in that country, at the prescribed Consulate or Mission or at a Bangladesh Consulate or Mission in the country nearest to that country; or*
> >
> > *(b) that person's father or mother is, at the time of the birth, in the service of any Government in Bangladesh.*
>
> *14. Dual citizenship or nationality not permitted*
>
> *(1) Subject to the provisions of this section if any person is a citizen of Bangladesh under the provisions of this Act, and is at the same time a*

citizen or national of any other country, he shall, unless he makes a declaration according to the laws of that country renouncing his status as a citizen or national thereof, cease to be a citizen of Bangladesh.

(1A) Nothing in subsection (1) applies to a person who has not attained twenty-one years of age…'

The 1952 Rules

56. Rule (1) of the 1952 Rules provides that anyone claiming citizenship by descent under section 5 of the 1951 Act must apply on Form B to the Provincial Government of the area in which he has his domicile of origin (as defined in Part II of the Succession Act 1925). Article 9(2) provides for the evidence which must accompany such an application. Article 9(3) (with an irrelevant exception) gives the Provincial Government, after making such inquiries as it deems fit, a discretion to 'pass orders in regard to such applications'.

Instruments enacted by the state of Bangladesh

57. There are two other potentially relevant instruments, both made after the coming into force of the Constitution. They are

    i. the Bangladesh (Temporary Provisions) Rules 1978 ('the 1978 Rules').

    ii. the 2008 Instruction, SRO No 69, Law/2008, made under article 2(2) of the 1972 Order ('the 2008 Instruction').

The 1978 Rules

58. Rules 3 and 4 of the 1978 Rules provide a procedure for 'a person seeking citizenship' of Bangladesh under articles 2B(2) and 4 of the BCTP Order, respectively. Article 7 gives the Government power, if satisfied that information provided is correct, and that the applicant is 'not disqualified for being a citizen of Bangladesh by or under any law for the time being in force', to grant citizenship to the applicant. Article 8 confers a right of appeal to the Government to 'Any person aggrieved by an order made under the [BCTP] Order'. Article 9 enables the Government to cancel citizenship in certain circumstances. Article 12 confers on the Government and any of its officers an immunity from suit in respect of anything done under the BCTP Order.

The 2008 Instruction

59. As we understand Dr Hoque's report, the text of this instrument is only available in Bangla, although an English text is quoted in A's skeleton argument. He summarises its effect in paragraph 47 of his report. His conclusion is that although the 2008 Instruction does not use the word 'naturalisation' it is clear from its terms that it only applies to people who have become British citizens by naturalisation. The Commission agreed with that conclusion in paragraph 79 of *E3 and N3*. We see no reason to depart from the Commission's reasoning or its conclusion on this point. Neither party invited us to do so. In this case, A was a British citizen by birth. It follows that the 2008 Instruction does not apply to her case. We say no more about it.

The decision in Bangladesh v Professor Golam Azam

60. The Supreme Court of Bangladesh (Appellate Division) considered the effect of the BCTP Order in *Bangladesh v Professor Golam Azam*. The main judgment was given by MH Rahman J. Each of the other members of the court (ATM Afzal, Mustafa Kamal and Latifur Rahman JJ) agreed with the judgment of MH Rahman J and added some observations of his own. The question for the Court was whether a notification issued by the Government under article 3 of the BCTP Order was valid. Professor Azam was the respondent to the appeal. The Court held that the notification was not valid.

61. In paragraph 8 of his judgment, MH Rahman J said that 'at present [sic] law of citizenship is governed by two legislations the Citizenship Act 1951, continued as an existing law by President's Order No 48 of 1972, but not yet revised for printing in the statute book, and the [BCTP Order]. The instant case is governed by the [BCTP Order]' (see also paragraph 173, per Latifur Rahman J). At paragraph 181, Latifur Rahman also said that the 1951 Act 'is very much in existence in our country as a valid law by the [AEL Order], effective from the 26th day of March 1971'. It provides for the acquisition and deprivation of citizenship after the commencement of the BCTP Order.

62. In paragraph 74 of his concurring judgment, ATM Afzal J made clear that article 3 authorises the Government to decide the question whether a person is deemed to be a citizen of Bangladesh under article 2 of the BCTP Order 'in case of doubt'. It was not, he continued, 'the conferment of a plenary power, but a power hedged with a

condition. It is not a power for disqualifying persons if he otherwise qualified under the law'.

63. The approach of the court to the avowedly 'political' case of the Government that the notification was valid was summed up by ATM Afzal J in paragraph 78 of the judgment as follows 'Professor Ghulam Azam submits that the impugned Government order is bad in law, the Government says in reply – 'but your political conduct was equally bad'. That is no answer to the objection of the respondent. A point of law cannot be matched by alleging political mis-demeanour' (see also paragraph 79). There are passages to similar effect in the judgment of MH Rahman J at paragraphs 51 and 64.

64. ATM Afzal J added, in paragraph 83, that the power conferred by article 3 was only exercisable 'in case of doubt'. It did not give the Government a power to disqualify a person from being a citizen.

65. In paragraph 94 of his concurring judgment, Mustafa Kamal J said that the BCTP Order 'did not completely replace or repeal' the 1951 Act. He also explained, in paragraph 102, the relationship between the two clauses of article 1(2). That is, 'If a person fulfils or does not fulfil the aforesaid three conditions in article 2(1) on 15 December 1972, that fulfilment or non-fulfilment "shall be deemed to have taken effect on the 26th day of March 1971" '. He explains the meaning of the proviso to article 2 in paragraph 105. The fact that the respondent did not fall within the terms of the proviso was not fatal to his case; he was still able to claim that his absence from Bangladesh in Pakistan did not amount to abandoning his permanent residence in Bangladesh.

66. In paragraphs 109 and 119, he contrasted the effects of article 2 and of article 2B. Article 2 'prescribes for initial citizenship'. Article 2B 'prescribes a disqualification for becoming a citizen of Bangladesh'. Article 2 conferred citizenship by a legal fiction. That is a legislative act, not an act of the executive. Article 2B(1) is a 'separate and independent power to determine whether a person qualifies himself as a citizen of Bangladesh'. He continued, 'When the authority…exercises its power under clause (1) of Article 2B, the legal fiction created by the legislature under Article 2 gives way to the authority's determination. Clause (1) of Article 2B prevails over Article 2.'

67. Article 3 'is not concerned at all with clause (1) of Article 2B…It is a doubt-resolving mechanism in respect of matters falling within article 2 only' (paragraph 113). Article 3 is not a government power to 'cancel' a person's citizenship under article 2. Article 2 is an act of the legislature which confers citizenship on a group of people by a legal fiction. It is not an act of the executive. The power conferred by article 3 can only be exercised when there is a genuine doubt about whether a person meets any of the conditions by which he is deemed by article 2 to be a citizen (paragraph 115). In paragraph 118, he gave his reasons for deciding that 'the legislative conferment of citizenship' (by article 2) 'is not verifiable by any Magistrate or executive and that the conferment need not be reinforced by an issuance of a certificate'.

68. In paragraph 180, Rahman J said that the BCTP Order 'only declares certain categories of persons who shall be citizens of Bangladesh at the commencement of this Order, ie on 15.12.72'. Article 2 deals with an ad hoc situation, 'where rights of citizenship were conferred on persons at commencement of the Order with certain qualifications and reservations'.

69. He said in paragraph 181 that the 1951 Act 'is very much in existence today in our country as a valid law…This Act provides for the mode of acquisition and deprivation of citizenship subsequent to the commencement of The Order'. After that date, both 'the Order' (in the context of paragraphs 180 and 181, we take him to mean the BCTP Order) and the 1951 Act are 'governing the field of citizenship in Bangladesh'. He said that section 4 'speaks of citizenship by birth and the same is referable to a person born after the commencement of this Act'. The deprivation power in section 16 of the 1951 Act is nothing to do with deprivation of a person who is deemed to be a citizen by article 2(1) of the BCTP Order. A person who is deemed to be a citizen under article 2(1) can be disqualified to be a citizen under article 3 or article 2B, as the case may be. He said that the provisions of the BCTP Order and of the 1951 Act 'supplement each other and have to be read together to disqualify or deprive a citizen of Bangladesh either under Articles 3 and 2B of the [BCTP Order] or under section 16 of the [1951 Act] as the case may be. The provisions of the [1951 Act] and of the [BCTP Order] are to be read as whole to get a complete picture of the law Citizenship of Bangladesh'.

The view expressed by Mr Farhad

70. Witness A refers in his report to an article dated 14 February 2019 by Mr Shah Ali Farhad, a Special Assistant to the Prime Minister (report, paragraph 64, bundle J 404-405). It is convenient to summarise that view here. Mr Farhad is a lawyer and an aide to the Prime Minister. He says that the Secretary of State has deprived A on the basis that she 'is able to become a national of Bangladesh'. Mr Farhad accepts that the provisions of the relevant instruments are to be read together 'to get a complete picture of the laws of citizenship in Bangladesh'. He asserts that dual citizenship is not recognised by the 1951 Act, but that it is dealt with in the BCTP Order and the 1978 Rules. He says that the BCTP Order gives the Government power to grant citizenship on application and that in cases of doubt whether a person is qualified to be a citizen under article 2 ('which would be applicable to dual citizens'), article 3 provides that that question is to be decided by the Government, whose decision is final. Article 4 gives the Government power to grant citizenship to any person.

71. His view 'therefore' is that the Bangladeshi government cannot be compelled to grant citizenship to anyone. The authorities have a discretion. Rule 9 of the 1952 Rules requires a person who claims citizenship by descent to apply to the government, which, after making inquiries, 'can pass such orders…as it sees fit'. This implies that the government 'is not compelled to recognise that a person is a Bangladesh citizen and that authorities have a discretion to refuse to recognise that a person is a Bangladeshi citizen'. He continues, 'Thus dual citizenship or citizenship by descent is not an automatic right, it needs to be granted by the government…'. He says that one of the factors the government looks at 'when granting dual citizenship' is an applicant's ties to Bangladesh. A has never travelled to Bangladesh, or applied for Bangladeshi citizenship. She cannot be considered a Bangladeshi citizen. 'Additionally it is presumable that the government of Bangladesh would also look at the fact that [A] has been a part of a dangerous terror organisation for a substantial period of time'. It was arguable that granting her Bangladeshi citizenship would put Bangladeshi national security at risk.

72. Mr Farhad concluded that it is 'arguable' that the Secretary of State's belief that 'she would be able to obtain Bangladeshi citizenship' if she were deprived of her UK citizenship 'is clearly misplaced under the laws of Bangladesh'.

The experts' evidence

Witness A's report

73. As we have said, Witness A refers to Mr Farhad's view in his report. He summarises the relevant provisions of Bangladesh law in paragraphs 70-76.

74. In paragraph 75, he summarises section 14 of the 1951 Act without comment. In paragraph 76, he summarises both the primary rule article 2B(1) of the BCTP Order and the 1978 proviso in two sentences which are linked by the word 'However'. He does not comment, again. The structure of paragraph 76 gives the impression that Witness A considered, when he was writing his report, that the 1978 proviso qualifies the apparently wide primary rule stated in article 2B(1).

75. He opines in paragraph 80 that whether or not A had been deprived of her British citizenship, the Bangladesh Government would have 'held the same strong stance it holds now denying [A's] alleged citizenship in light of her alleged activities'. He asserts in paragraph 83 that the courts in Bangladesh would uphold 'the decision taken by the government against [A] and hold that [A] is not a citizen of Bangladesh'. The Government, he says, 'would have denied [A's] Bangladeshi citizenship, irrespective of the UK's decision to deprive'.

76. In paragraph 82, he says that throughout the tenure of the Awami League, 'the judiciary has arguably fulfilled the government's political agenda, whenever matters of grave significance have been brought to it'. He contradicts that generalisation in the next sentence by referring to the 'forced exile' of Chief Justice Sinha 'arising from a judgment striking down a constitutional amendment last year…' It was 'nearly impossible' that any court in Bangladesh would rule against the Government on this issue. He does not, however, cite, in support of his generalisations about judicial independence, a single decision of the High Court in which he suggests that the legal reasoning was corrupted by political considerations.

77. He says that it is notable that Mr Farhad's views are based on provisions of law (paragraph 84). 'He is not simply denying [A's] citizenship status on policy grounds…Since the [BCTP Order] provides for the deeming of citizenship "notwithstanding anything contained in any other law" (for example, [the 1951 Act]) it at least arguably could apply to [A]. Article 4 of the [BCTP Order] provides that the Government "may grant" citizenship to a person who makes an application claiming to be a deemed citizen. Although this has not been tested to my knowledge in the

courts, it would provide at least a potential avenue of the Government to argue that recognition of citizenship is discretionary and could be refused, which in my opinion would be particularly likely in a national security related case such as [A's].'

78. Mr Farhad's interpretation 'would probably not be accepted in an independent court of law'. But in Witness A's opinion 'it is nearly certain that it would be accepted in a Bangladeshi court…' In cross-examination, Witness A rather retreated from the former statement. On further consideration his position seemed to be that a legal interpretation which he regarded, when he wrote his report, as unlikely to be accepted by an independent court, was not only tenable, but correct. He accepted that he had contradicted himself in that regard.

79. In the last section of his report, Witness A was asked to assume that A is a citizen of Bangladesh, and, on that assumption, whether there was a state practice by which people who were suspected of posing a risk to national security were, in reality, not treated as citizens of Bangladesh. He accepted that there were no reported similar cases. 'Without any precedent, there is no established state practice'. He assumes that Mr Farhad's views are those of the Prime Minister of Bangladesh, and that A 'would not be treated as a citizen of Bangladesh'.

80. Witness A was asked some written questions by the Secretary of State. He prefaced his answers to those by quoting article 111 of the Constitution, which declares that decisions of the Appellate Division bind the High Court, and that the law declared by either division of the Supreme Court binds subordinate courts. He said that the provisions of the 1951 Act cannot be read in isolation from the BCTP Order. He repeated his view that a Bangladeshi court would be likely to decide in favour of government action denying citizenship to A. The court would be most likely to accept an argument that a question of citizenship is to be decided by the government and the government's decision is final. Such a decision would be binding under article 111 of the Constitution.

Professor Hoque's report

81. Dr Hoque opined in his report (paragraphs 39-43) that section 5 of the 1951 Act applies to the facts of A's case and that A, at birth, was a Bangladeshi citizen by descent. We did not understand that reasoning to be challenged per se.

82. His view was that that the combined effect of sections 5 and 14 of the 1951 Act is that A is a citizen of Bangladesh by descent, and that section 14(1) of the 1951 Act does not apply to A. 'Until the age of 21, therefore, a Bangladeshi citizen continues to remain a citizen alongside being a foreign citizen' (paragraphs 30 and 31). He said that article 2B(2) relaxed the prohibition on dual citizenship without mentioning the term as such. This gives the Government a wide power to grant citizenship to citizens of any state of Europe etc. In paragraph 34, he said that the 1978 proviso might seem to contradict section 14 of the 1951 Act. He emphasised the passage 'not merely by reason of being a citizen …of a state'. Such a person loses such citizenship not 'merely by being' a citizen of another state, but by the operation of section 14 of the 1951 Act. The 1978 proviso is attached to article 2B(1) (not 2B(2)). The proviso did not affect section 14.

83. Article 2B(2) is a standalone clause. Professor Hoque says that the 1978 proviso is 'an unusual style of legislative drafting'. He opines that paragraphs 110 and 113 of the reasoning in *Azam* show that article 2B(1) is a 'separate and independent provision, giving power to the authorities to determine whether a person qualifies himself to be an initial citizen of Bangladesh and clause 2B(1) prevails over article 2. 'As such, [the 1978 proviso] does not affect article 2B(2) of [the BCTP Order] or s 14 of the 1951 Act'.

84. Article 2B(2) allows the acquisition of dual citizenship. Section 14 imposes a general prohibition on dual citizenship. On a plain reading of section 14(1A), a Bangladeshi citizen of another state can hold both citizenships. A question which might arise was whether article 2B(2) had impliedly repealed section 14, with the effect that a person (whatever his age) could not hold foreign citizenship and Bangladeshi citizenship at the same time unless dual Bangladeshi citizenship had been acquired by means of an application under article 2B(2). Both statutes had to be read together harmoniously (see paragraph 181 of *Azam*).

85. He relies on paragraph 118 of *Golam Azam* to argue that the 1951 Act and the BCTP Order have to be read together and that the provision for dual citizenship in article 2B of the BCTP Order has not made section 14(1A) of the 1951 Act redundant. Since section 14(1A) applies to A's case, she is not covered by article 2B(2) of the BCTP Order.

The dispute between the experts

86. The experts had a conversation on 15 October 2018. The parties were not able to agree a joint agenda for that discussion. They produced two agendas. The experts helpfully recorded their different views on each item in each agenda, in two documents. There are two essential issues on which they differ.

    i. Do dual nationals retain their Bangladesh citizenship until the age of 21?

    ii. Would the Supreme Court of Bangladesh fail properly to apply the law of Bangladesh because of political pressure from the Government of Bangladesh in cases about terrorist suspects?

87. The first dispute turns on the experts' differing views about the legal relationship between the 1951 Act and the BCTP Order, and about the correct interpretation of the BCTP Order. That dispute is further explained as follows.

    i. Witness A considers that article 2B(2) of the BCTP Order and article 2B(1) are 'inseparably integrated' with one another and should be read together.

    ii. Dr Hoque, on the other hand, considers that article 2B(2) provides for dual citizenship and is distinct from article 2B(1). Article 2B(1) lays down a disqualification from becoming an original citizen under article 2 (which provides for Bangladeshi citizenship by operation of law on 26 March 1971). Article 2B(1) and the proviso to article 2B(1) do not affect article 2B(2).

88. The second dispute turns on their disagreement about the extent to which the Supreme Court of Bangladesh is influenced by political considerations. Even Dr Hoque accepts that the Bangladeshi courts are 'not fully independent of political influences. In recent times, the lower courts have shown more a tendency [sic] to be influenced by political factors'. Witness A says that 'While lower courts are almost fully under government control and whim, the Supreme Court suffers the same curtailment of independence when it comes to politically sensitive cases as will appear from all recent politically significant cases but one. The only recent case where the SC has ruled against the government's wishes in a politically sensitive case was punished by forced

resignation and exile of CJ Sinha. Courts are not only influenced by political factors, but are susceptible to following direct instructions of the government in politically sensitive cases'.

The cross-examination of the experts

Witness A

89. When Witness A gave evidence, he was asked by Mr Hickman QC whether he agreed with a suggestion by Professor Islam (in footnote 58 of an article which was annexed to Dr Hoque's report) that the reference to the age of 21 in section 14(1A) of the 1951 Act should be read as a reference to the age of 18, in line with article 122(2)(b) of the Constitution, which changed the voting age from 21 to 18. He disagreed vigorously with that suggestion. Dr Hoque also disagreed with that suggestion in paragraph 51 of his written report and in a further report dated 21 October 2019. We say no more about that suggestion. The parties' experts agree that it is wrong.

90. In cross-examination, Witness A accepted that sections 5 and 14(1A) of the 1951 Act applied to A 'if read in isolation'. In isolation, section 14 was a bar to dual nationality with an exception for those under the age of 21. He did not agree that no other provision of the law of Bangladesh dealt with the position of those under 21; he asserted that article 2B deals with dual citizenship and applies to everyone. By general rules of statutory interpretation, the BCTP Order, as a later law, overrides earlier statutes to the extent that it is inconsistent with them. He understood article 2B to be a far stricter bar on dual citizenship than section 14. There was no exception for those under 21: it applies to everyone. The only exception to article 2B was its proviso. Article 2B and section 14(1A) were 'at loggerheads' in relation to people under the age of 21. The effect of article 2B, as the later provision, was to create a blanket ban on dual citizenship which applied to everyone, including people younger than 21.

91. He agreed that the BCTP Order did not repeal the 1951 Act. The 1951 Act deals with a range of issues not covered by the BCTP Order. He did not accept that paragraphs 180 and 181 of *Golam Azam* would govern the approach of the Supreme Court to the relationship between the BCTP Order and the 1951 Act in this case. The situation of A was not in issue in that case. He did not accept that article 2B was confined to people who were alive at the commencement of the BCTP Order. Nothing in article 2B(1) said that. The fact that article 2 said so is irrelevant, as article 2 and article 2B

are distinct provisions. The language introducing article 2 is absent from articles 2A and 2B.

92. He agreed that article 3 was only concerned with doubts about the application of article 2. But article 2 contained a reference to those 'not otherwise disqualified'. The Government was the final arbiter of who was qualified and article 2B was a disqualifying law. It was suggested that article 2 could not apply to A. Witness A said that she could use article 2(i). His understanding was that article 2B(1) overrides article 2. The qualifications in article 2 were subject to the disqualifications in article 2B. He did not agree with paragraph 113 of *Golam Azam*. He did not accept that article 3 only applied to doubts arising about the application of article 2, and that it could not apply in any way to article 2B(1). He accepted that he had not referred to article 2B in the relevant paragraph of his report, paragraph 73. He was still saying that article 3 would allow the Government to decide qualification under article 2. He accepted that whether article 3 applied to this case was a question of law.

93. He did not accept that article 2 did not apply to A. He asserted that she could rely on article 2(i). He accepted that article 4 was confined to people who apply for naturalisation.

94. He considered that the approach of the Supreme Court had changed significantly since the decision in *Golam Azam*. It was no longer a liberal approach to birthright citizenship. If the Court were dealing with the citizenship of A's father, he assumed that they would not adopt a liberal approach. They would be as strict as possible and do anything to deny it. They would 'not necessarily' apply the law, but would follow the Government's agenda.

95. He accepted that any decision by the Government was amenable, under the Constitution, to judicial review. The Supreme Court would be the final arbiter; but it would find in favour of whatever the Government had decided. They would only intervene if the decision was 'very flawed': not signed, or vitiated by fraud, for example. Even if the facts were not in dispute, the Government 'would have the discretion to do anything it wants to'. The Government would not only decide an article 3 question on the facts. He accepted that whether article 3 applied was a question of law.

96. The Constitution provided for appointments to the Supreme Court to be made in consultation with the Chief Justice. That had not been followed in practice. Two very recent appointees to the Supreme Court had been appointed in breach of seniority as a reward for their role in convicting the leader of the opposition, and for their political loyalty. All judges are politically appointed.

97. In re-examination he said that it was very clear to him that the Supreme Court would definitely rule in favour of the Government whatever the Government had decided was correct, regardless of what the law is.

98. In answer to questions from the Commission, he was unable to help with what the 1978 proviso meant, a topic which is not considered in his report (apart from the summary in paragraph 76). He was unable to comment on whether it was a provision specifically introduced to deal with the situation of the Biharis. He said that the drafting of the proviso was 'not very helpful'. It might seem that article 2B did not have a connection with the previous proviso. If article 2B(2) was a standalone provision, it would replicate article 4. The logical conclusion, he said, was that article 2 supported the continuation of what was said in the proviso to article 2B(1).

99. In cross-examination, Professor Hoque did not accept that just because the BCTP Order was a later law than the 1951 Act, it would necessarily repeal it, in so far as they are inconsistent with each other. He said it would depend on the circumstances. He considered that, as a special rule about the position of dual nationals under the age of 21, section 14(1A) survived the BCTP Order (if and to the extent that they are inconsistent with each other). He also observed that, on the basis of the reasoning in the *Azam* case, the 1951 Act and the BCTP Order had to be read together.

100. He accepted that children born to Rohinga parents in Bangladesh were not in practice treated as citizens of Bangladesh, despite the terms of section 4 of the 1951 Act. There had been no judicial decision to that effect. It could not be said for sure that the Supreme Court would so hold; there has been no decision to that effect, and it was, as of now, just a practice. The Government's practice was not as good as law until it had been approved by the courts.

101. The 1951 Act and the BCTP Order had to be interpreted harmoniously. The whole purpose of the BCTP Order was to deal with citizenship at the time of independence and with the people who opposed the independence of Bangladesh,

including the Biharis. It was suggested a person to whom article 2 applied would not acquire Bangladeshi citizenship if he was a dual citizen. Professor Hoque disagreed. He said that article 2B(1) was for something else. It was inserted by a later amendment. The Bihari people opposed the independence of Bangladesh and opted to be repatriated to Pakistan and to be Pakistanis. That came to the notice of the Government and the Government enacted that provision for that purpose. It did not have any relationship with the law of citizenship. The law had to be understood in that context. It dealt with people who had collaborated with the Pakistani forces. It dealt with the Bihari people. Professor Azam came to Bangladesh with a Pakistani passport, but that was not a bar to citizenship under article 2. He was a citizen of Bangladesh under article 2. Professor Hoque returned to that theme more than once in his cross-examination.

102. He did not accept that article 2B(1) was not directed at original citizens. Its purpose was to deal with original citizens in a difficult situation. The 'citizens' referred to in article 2B(1) are article 2 citizens. There are other citizens, for example under section 4 of the 1951 Act. He accepted that there were passages in *Azam* which suggest that clause 2B(1) was a separate and independent power. The non obstante clause in article 2B(1) would only touch another law which was relevant to the same subject matter. It was suggested that anyone who got citizenship after 1972 would be barred from being a citizen if they owed allegiance to another state. Professor Hoque stuck to his position that this was a law about original citizenship.

103. Articles 2 and 2B(1) were independent of each other but related. He referred to a decision of the Supreme Court in 2008 which declared that, despite article 2B(1), Biharis were citizens of Bangladesh by virtue of article 2 of the BCTP Order and section 4 of the 1951 Act. The provision about owing allegiance was held not to apply to the Biharis. He did not accept that it was reasonable to argue that article 2B precluded dual nationality in general. The non obstante clause could not overrule section 4 of the 1951 Act. He referred to drafting convention according to which, if a law is to have an absolutely overriding effect, a separate clause must say so expressly. A non obstante clause did not have that effect. The Government's position that A did not have Bangladeshi citizenship because she was a British citizen 'legally speaking' was 'not supported by law'.

104. No decision of the Bangladeshi courts answered the question in this case. He did not consider that that meant that there was a lack of clarity on this point; rather that there was no authoritative decision. His firm belief was that a court would take his interpretation and his understanding, but he accepted that a court might adopt a different argument.

105. He also accepted that 'the scenario of independence' of the courts was different from the days when *Azam* had been decided. Generally speaking it was correct that judges were susceptible to political pressure which could influence their judgments. Some were able to overcome that pressure. It had always been the case that judges were appointed on the basis of their loyalty to the ruling party, but the question was whether they conformed to their ideology. Some were appointed for their quality not their loyalty. Generally appointments were influenced by political considerations. The view of the Supreme Court would depend on the constitution of the panel (there are two Benches). A's case and the case of the Rohinga were completely different. The law was completely clear in her case. It would be very difficult, despite political pressure, for the court to overcome the argument for retention of Bangladeshi citizenship for those under 21. He could not say that the court would inevitably yield to Government pressure about terrorism. There would be pressure; whether it would be ordinary or enormous pressure, he could not say. Witness A as a practising lawyer had more experience of assessing the chances of success in litigation than he did, but Witness A definitely was not the last word.

What meaning would the Supreme Court of Bangladesh give to the relevant provisions, if it correctly applied the law of Bangladesh to the question of A's citizenship?

106. The task of an expert is 'to convey to the English Court the meaning and effect which a Court of the foreign country would attribute to it [ie the document embodying the foreign law, as translated] if it applied correctly the law of that country to the question under investigation' (*A/S Tallinna Laevauhisus v Estonian Steamship Steamship Line* (1947) 80 Ll L Repp 99 at page 107). The Court also said, 'The degree of freedom which the English Court has in putting its own construction on the written translation of foreign statutes before it, arises out of, and is measured by its right and duty to criticise the oral evidence of witnesses' (per Scott LJ).

107. We will consider, first, on the basis of the experts' evidence, what view a Bangladeshi court would take if it correctly applied the law of Bangladesh to the question whether or not A was a citizen of Bangladesh at the date of the Decision. The fundamental dispute between the experts, as we see it, having listened to them being cross-examined, remained the relationship between the 1951 Act and article 2B(1) of the BCTP Order. We consider that we have an advantage a court dealing with foreign law does not always have. First, the relevant law is in English. Second, the legal system from which it comes is a system based on the common law. It is therefore easier for us to decide what approach the Supreme Court of Bangladesh ought to take to the question in this case than it might be in a less familiar legal system.

108. The experts agree that the BCTP Order is an operating law along with the other laws of citizenship. They agree that the non obstante clause in article 2B(1) does not apply to the whole of the BCTP Order and that it does not make other laws on citizenship void or redundant. Witness A contends that the non obstante clause in article 2B(1) overrides and takes precedence over article 2 of the BCTP Order, and over any other citizenship law for the time being in force, including sections 5 and 14 of the 1951 Act.

109. We accept Professor Hoque's evidence that if the draftsman had intended article 2B(1) to override section 14, he would have inserted a clause to make that clear. We accept his evidence that the non obstante clause does not have that clear effect. We also accept his evidence, that, in any event, section 14(1A) enacts a special rule about dual citizens under the age of 21, so that, if we are wrong about the general effect of the non obstante clause, clause 2B(1), being a more general provision, could not override that special rule, even though that special rule was enacted before clause 2B(1).

110. We further accept his evidence that clause 2B(1) was enacted to cater for a particular situation (the case of the Biharis) and was not intended to have any wider application. Witness A did not dispute that view. That view is not undermined by his evidence that, in 2008, the Supreme Court held that clause 2B(1) did not have the effect it was initially intended to have, and did not, in law, deprive of their Bangladeshi citizenship Biharis who were citizens of Bangladesh under section 4 of

the 1951 Act or under article 2 of the BCTP Order. We were not shown that decision by either party, but we do not consider, unless that decision specifically says so, that we can assume that its effect is that article 2B(1), instead, has the wide effect for which Witness A contends. If that were so, we would have expected Witness A to have relied on it.

111. We are surprised that Witness A simply did not deal with the 1978 proviso in his report, other than in paragraph 86, in the way we have described. That bland way of describing article 2B(1) suggests that Witness A did consider that the 1978 proviso qualifies the broad primary rule laid down by article 2B(1); but Witness A did not confront that difficulty at all. When we asked him about the 1978 proviso at the end of his evidence, he was not able to comment on Professor Hoque's view that it dealt with the Bihari people, and we found it difficult to understand the answer he did give. His failure to deal with that obstacle to his interpretation (or even to realise that it was an obstacle) undermines our confidence in his analysis.

112. That confidence was also undermined by his approach to Mr Farhad's view. First, in his oral evidence he changed his assessment of that view from an assessment that an independent court would not accept that view, to an assessment that it was a tenable view. Second, we do not consider that it is a remotely tenable view.

113. The article describing Mr Farhad's view refers both to deprivation under section 40(2) of the BNA and under section 40(4A) (which deals with naturalised citizens). The test for the two types of case is different. In the case of naturalised citizens, the question is not whether the decision makes the person stateless, but whether the Secretary of State has reasonable grounds for believing that the person is able, under the laws of another country, to become a citizen of that country. A was not a British citizen by naturalisation. It is clear from Decision 1 that the Secretary of State did not think that she was. Mr Farhad's article, therefore, is based on a misunderstanding of Decision 1. This leads him to ask (principally) whether the Bangladesh Government could be compelled to grant citizenship to A. That is the wrong question. The question, rather, is whether she already is a citizen of Bangladesh. That is the first flaw in his reasoning.

114. The second flaw in his reasoning is his suggestion that dual citizenship is not recognised by the 1951 Act. Section 14(1A) does recognise that people under the age of 21 can be citizens of Bangladesh and of another state.

115. The third flaw is the suggestion that (if article 3 is relevant) it gives the Government an absolute discretion to decide that a person is or is not a citizen. That reasoning is contradicted by the analysis of the judges in the *Azam* case (see, for example, paragraph 67, above). Article 3 only applies in cases of genuine doubt, and, in Bangladesh, just as in England and Wales, there is no such thing as an unreviewable discretion.

116. The fourth flaw is that, in any event, article 3, in terms, only refers to doubts about whether a person is qualified to be deemed to be a citizen under article 2 of the BCTP Order. It is not relevant to A's case, because her claim to citizenship is under section 4 of the 1951 Act, not under article 2 of the BCTP Order.

117. Our third criticism undermines both his apparent assertion that Rule 9 of the 1952 Rules (legislation adopted from Pakistan) confers an unfettered discretion to refuse an application for registration as a citizen by descent, and his suggestion that, rather than being compelled to recognise an otherwise valid legal claim to be recognised as a citizen by descent, the Bangladesh Government could refuse to register a person on the basis of irrelevant considerations. That approach to rule 9 is the fifth flaw in his reasoning.

118. In our judgment, article 2B(1) of the BCTP Order enacts a rule that a person shall not 'qualify himself' to be a citizen of Bangladesh, except as provided in article 2B(2), if he owes allegiance to a foreign state, or is notified under the proviso to article 2A. Article 2B(2) gives the Bangladesh Government power to grant citizenship to citizens of some states. Generally, a proviso is added to a statement to qualify that statement. The apparent purpose of inserting a proviso to article 2B(1) would be to qualify the general rule enacted by article 2B(1). But the 1978 proviso does something different. It declares that a person who *is* otherwise a citizen of Bangladesh does not, merely by *being a citizen*, or by *acquiring the citizenship*, of a state specified in or under a 2B(2), *cease to be a citizen of Bangladesh.*

119. Section 14(1) of the 1951 Act outlaws dual citizenship, in short, for those over 21 years old. The proviso to article 2B(1), rather than qualifying article 2B(1), appears

to some extent to mitigate the effect of section 14(1) of the 1951 Act, by providing that if a person is a citizen of Bangladesh, the mere fact of being or becoming a citizen of a country specified by or under article 2B(2) does not cause that person to cease to be a citizen of Bangladesh. As we have noted, Dr Hoque explains, however, (report, paragraph 34) that that is not the effect of the proviso: the phrase 'merely by' does not exclude the operation of section 14(1) of the 1951 Act because such a person does not lose Bangladeshi citizenship merely by being, or becoming, a citizen of one of the listed states, but by the operation of section 14(1) of the 1951 Act.

120. It seems to us that, on its face, the 1978 proviso, far from outlawing dual citizenship, in fact appears to permit dual citizenship in a way which qualifies the general prohibition on dual citizenship enacted by section 14(1) of the 1951 Act. As we have said, however, we accept Professor Hoque's evidence that article 2B(1) was simply inserted in order to deal with the position of the Bihari people, and does not have the far-reaching effect which, on its face, it appears to have.

121. Our conclusion, based on the evidence which we have accepted, is that article 2B(1) of the BCTP Order does not override section 14(1A) of the 1951 Act. When Decision 1 was made, A was a citizen of Bangladesh by descent, by virtue of section 5 of the 1951 Act. She held that citizenship as of right. That citizenship was not in the gift of the Government, and could not be denied by the Government in any circumstances. As she was under 21, and by virtue of section 14(1A) of the 1951 Act, her Bangladeshi citizenship was not affected by section 14(1) of the 1951 Act.

122. It follows that that is the meaning and effect which the Supreme Court of Bangladesh would give the relevant provisions, if it correctly applied the law of Bangladesh.

Is A not considered a national of Bangladesh under the operation of its law?

123. We have just held that A is not *de iure* stateless. If the approach of the Court of Appeal in *B2 v Secretary of State for the Home Department* were binding on us, we would be obliged to hold that the Decision did not make A stateless for the purposes of the BNA. The Court of Appeal in terms rejected an argument the courts of England and Wales could hold that a person was stateless unless he was stateless *de iure*. The Supreme Court did not overrule the decision of the Court of Appeal; it dismissed the appeal from the decision of the Court of Appeal, but on the basis of different

reasoning. No member of the Supreme Court held in terms that state practice was relevant to the question of statelessness.

124. Mr Hickman submitted that he was not relying on state practice to argue that A was stateless *de facto*, but, rather, was arguing that she was stateless *de iure* because, as a result of political pressure, the Supreme Court of Bangladesh would decide any case involving A in favour of the Government (his 'judicial interpretation argument').

125. We reject that argument. First, there is no secure support for it in the evidence of Witness A. He made general assertions about the lack of independence of the Supreme Court of Bangladesh, and the trend of recent decisions of the Supreme Court, but did not in his report, or in his oral evidence, refer to a single decision to make good that assertion. We had no evidence of a case in which the Supreme Court had accepted a patently wrong argument put forward by the Government. Indeed, he referred to a recent case in which the Supreme Court had struck down an amendment to the Constitution. Second, there is no support for it in any of the authorities to which he referred. The question of what foreign law is is a different question from the question which arises in some cases about service out of the jurisdiction, when the question, sometimes, is whether the claimant will get justice in a foreign jurisdiction. The reasoning of the Court of Appeal in *B2* is not, we think, binding on us, but it is persuasive; and Mr Hickman's submission is inconsistent with it. Third, and irrespective of authority, we in any event consider that it would be wrong for a court in England and Wales to accept that the provisions of the law of a foreign state, with a written constitution containing provisions like articles 6 and 102 and a common law tradition, do not mean what they appear to mean, because the Government might argue, wrongly, that they mean something else. Such an approach is arbitrary and undermines legal certainty.

126. We turn to Mr Hickman's 'government' or 'state' practice argument (it is labelled differently in paragraph 29 of the skeleton argument and in the heading above paragraph 79). This argument was that, whatever the courts in Bangladesh might decide, the Government would not treat A as a national of Bangladesh and she would not be able to challenge that in court. He refers to the relevant Home Office Guidance

(skeleton argument, paragraph 80). He attempts to distinguish the reasoning in *Pham* in paragraph 82 of his skeleton argument.

127. We found those distinctions unpersuasive. What Mr Hickman cannot do is to show that, at the date of Decision 1, the Government of Bangladesh had any position, either in relation to A, or in relation to people in her situation. Whether or not, therefore, state practice is relevant to the question of statelessness, A is in a relevantly similar position to the appellant in *Pham*. Whether or not we are bound by the reasoning in *Pham* (Mr Hickman suggested that some of it was obiter) it is highly persuasive on this issue. We therefore reject his government/state practice argument.

128. For those reasons, we conclude that Decision 1 A did not make A stateless.

B. Did Decision 1 breach the Secretary of State's extra-territorial human rights policy by exposing the Appellant to a risk of death or of inhuman and degrading treatment?

Introduction

129. The relevant legal background to this argument is that this is not a case in which articles 2 and 3 of the ECHR have extra-territorial effect. They have effect only by analogy, because the Secretary of State has adopted the Policy. The Policy was interpreted by this Commission in *X2 v Secretary of State for the Home Department* SC/132/2016. This Commission held that the effect of the Policy is that the Secretary of State is only obliged to consider risks which are foreseeable and which are a direct consequence of the decision to deprive a person of his nationality.

130. We pay tribute to the industry of A's legal team in amassing the evidence which they have on this issue. We accept that conditions in the Al Roj camp would breach A's rights under article 3, if article 3 applied to her case. We are also prepared to accept, for the sake of the argument, but without deciding, that, at the date of Decision 1, conditions in the Al Hawl camp would also have breached A's article 3 rights had article 3 applied. That makes it unnecessary for us to consider article 2 risks.

The submission to the Secretary of State

131. Annex C to the written submission made to the Secretary of State by officials is a 'risk statement' about A. Paragraph 1 refers to the Policy. Annex C is said to

provide information for the Home Office to consider when deciding 'whether there are substantial grounds for believing' that A 'would be exposed to a real risk of mistreatment or loss of life as a result of being deprived of her British nationality'. Paragraph 3 of Annex C accurately summarises the Commission's decision in *X2* (see above).

132. The risk is then considered under two headings: Syria and Bangladesh. Paragraph 5 refers to an 'Updated Mistreatment Risk for Syria and Iraq' dated 28 January 2019. That statement is Annex D to the submission. Paragraph 5 of Annex A says, 'A UK-linked individual who has been deprived of his/her British nationality is likely to receive broadly the same treatment (for better or worse) as an individual who retains British nationality; although speculative, it is possible that at some point in the future, British nationals may be treated differently, in so far as arrangements may be made to return some individuals to the United Kingdom'. This statement is an accurate summary of the more detailed material in paragraphs 20 onwards of Annex D.

133. Paragraph 6 says that it was not possible to speculate what would happen to women in refugee and IDP camps, whether or not they were suspected of being linked to ISIL. It was not considered that repatriation to Bangladesh was a foreseeable outcome of deprivation, and 'as such' the Secretary of State 'may consider that there is no real risk of return – let alone of mistreatment on return…'. The risks were, nevertheless, examined, in paragraph 7. Open-source reporting indicates that there is a risk that people in Bangladesh could be subject to conditions which do not comply with the ECHR.

134. Paragraph 10 of Annex D says that the Government is aware of some people linked to ISIL who had been returned to their country of origin, and that some people detained by non-state actors could be transferred to Iraq. However the Government's view was that it was not possible to speculate about what might happen to such people. Any removal would depend on the relationship between the detaining group and the third country to which it wanted to remove the person. The assessment was that arrangements to return a British person to the United Kingdom 'would most probably be exceptional and unlikely to arise in the foreseeable future'. Three 'complex problems' which would have to be solved before any such arrangements

could be made are then listed. Paragraph 12 makes the point that it is difficult to speculate about the many possible combinations of facts which might arise as a result of people's choices to travel or to stay put. Paragraphs 15 and 16 describe the risks in Iraq of detention breaching the standards of the ECHR, and the fact that the death penalty is applied in terrorist cases.

The parties' submissions

135. Mr Hickman relied on paragraph 50 of *X2*. In paragraph 50, the Commission summarised the argument of Ms Giovannetti QC, counsel for the Secretary of State. She gave two practical examples of cases in which the Policy would prevent the Secretary of State from depriving a person of her nationality. Mr Hickman drew our attention to the second example; a person who was detained in a second state which, if he were deprived of his nationality, would deport him, not to the United Kingdom, but to a third country, in which he would be at risk of torture. He submitted that A's was a stronger case because, when the Decision 1 was taken, A was at risk of removal to Iraq and to Bangladesh. Moreover, the conditions in the camp breached articles 2 and 3, and Decision 1 meant that A would be likely to be exposed to those risks for longer than if the Decision 1 had not been made.

136. The SDF was appealing for foreign detainees to be repatriated. It was foreseeable that A would be sent back to Bangladesh. The evidence suggested that if A were sent to Bangladesh she could face the death penalty or detention in conditions breaching article 3. The evidence showed that more than 40 women who were suspected of being terrorists had been sentenced to death in Baghdad after hearings lasting ten minutes. That evidence had been disclosed to A by the Secretary of State. There was also a risk that A could be sent to Guantanamo Bay. In the case of Iraq and of Guantanamo Bay, there was a foreseeable risk of a breach of article 2 or 3. It was '100% likely' that A 'was going somewhere'. A only had to show that there was a real risk. In reply, he submitted that Decision 1 removed a potential escape route, and therefore continued her exposure to article 2 and article 3 risks.

137. Mr Glasson submitted that the Secretary of State had been correctly directed about the effect of the Policy, and had taken the advice of expert advisors. The question was whether the Secretary of State had complied with the Policy or not, and the answer was that he had.

Discussion

138. The question which the Policy posed for the Secretary of State was whether it was a foreseeable and a direct consequence of Decision 1 that there were substantial grounds for believing that A would be exposed to a real risk of ill treatment breaching the ECHR. We consider that Mr Hickman's submissions tended to conflate those two separate requirements of the Policy, and to treat them as interchangeable. The question for us is whether the Secretary of State was entitled, on the material before him, to decide that it was not. We remind ourselves that we are not deciding this question on its merits. We must approach it, rather, by applying the principles of judicial review.

139. The material before the Secretary of State did not suggest that A, as a person who had been deprived of her British nationality, would be treated any differently from a British woman who had not been deprived of her British nationality, but was, in other respects, in the same situation; that is, a woman who was associated with ISIL and detained by the SDF. A was in that situation as a result of her own choices, and of the actions of others, but not because of anything the Secretary of State had done. It is crucial that the only material which the Secretary of State had which was relevant to the Policy was the material in, and annexed to, the submission. In our judgment, the Secretary of State was reasonably entitled to rely on that material. The Secretary of State's assessment of the material reasonably entitled the Secretary of State to decide that, as respects A's circumstances at the time of Decision 1, Decision 1 would not breach the Policy, because a change in the relevant risks was not a foreseeable and direct consequence of Decision 1. We also consider that, on the material in Annex C and Annex D, the Secretary of State was not required to speculate about the future; for example, the possibility that A might be removed from Syria to Bangladesh or to Iraq. Nor was he required to speculate about the possibility that, at some point in the future, British or British-linked adults might be returned to the United Kingdom. Those conclusions mean that, despite their apparent attractions, we must dismiss Mr Hickman's arguments.

C. Can A have an effective appeal? If not, should we allow her appeals on that ground alone?

Submissions

140. The parties agree, consistently with previous decisions of this Commission, that the appeal against Decision 1 is a merits appeal. Mr Hickman submits, relying on *Kiarie v Secretary of State for the Home Department* [2017] UKSC 42; [2017] 1 WLR 2380 that where Parliament has conferred a right of appeal, it should be effective. He submitted that the Secretary of State knew when he made Decision 1 that A was outside the United Kingdom and would not be able to have a fair and effective appeal (see the OPEN summary of the deprivation submission). A was not able to communicate fully and confidentially with her advisors, or they with her. She had been able to give instructions for the appeal to be brought, but had not been able to give instructions beyond that.

141. He drew our attention to authorities on natural justice, such as *Ridge v Baldwin* [1964] AC 40. He did, however, accept that in this context, the Secretary of State was not obliged to hear from A before he made Decision 1. He relied on *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115 for the proposition that where the facts are in dispute, natural justice can require the decision-maker to hold an oral hearing. He also submitted that it was implicit in the statutory scheme that, precisely because the Secretary of State had no duty to consult before making Decision 1, the appeal had to be fair and effective to remedy the absence of an opportunity to make representations before a decision was made.

142. 'It must be right' he submitted, 'that Parliament intends the appeal to be effective'. He also submitted that if the Secretary of State knows that a person will not be able to exercise her right of appeal, the Secretary of State is barred from making a decision to deprive her of her nationality, while accepting that there was no authority which supported that argument. He also relied on four authorities or groups of authorities to support his contention that, if A could not have an effective appeal, the Commission would be obliged to allow it. Those were

i. the authorities about natural justice to which he had referred,

ii. a principle said to be derived from *Kiarie*,

iii. *AN v Secretary of State for the Home Department* [2010] EWCA Civ 869 and

iv. *R (W2) v Secretary of State for the Home Department* [2017] EWCA Civ 2146, [2018] 1 WLR 2380.

Discussion

143. We accept that, in her current circumstances, A cannot play any meaningful part in her appeal, and that, to that extent, the appeal will not be fair and effective. This preliminary issue, as ordered, does not deal with the legal consequences of that finding. But we cannot avoid deciding what those legal consequences are. We cannot accept, without investigation, the assumption, apparently made by A's representatives, that if she cannot have a fair and effective appeal, her appeal must succeed.

144. The difficulty at the heart of Mr Hickman's submissions is that, if they are right, the fact that a person who has been deprived of her nationality on grounds of national security outside the United Kingdom and is unable, for whatever reason, to instruct lawyers and/or to take part in her appeal by video link, entails, in and of itself, that her appeal should succeed, without any examination of its merits, and, in particular, without any consideration of the national security case against her. Mr Glasson made this point with some force. Mr Glasson also emphasised that it is highly significant that A had left the United Kingdom, apparently of her own free will, some years before Decision 1, and that she was not outside the United Kingdom as a result of Decision 1. Our clear view is that we could only accept Mr Hickman's submission if there is binding authority to that effect. In order to decide whether that is so, it is necessary for us to review the relevant authorities in some detail. But first, we consider whether there is any support for this submission in the legislative framework.

145. In our judgment, Mr Hickman's submissions were, at least in part, an attempt to derive from uncontroversial points about the general characteristics of a statutory right of appeal a universal rule that every deprivation appeal has to be effective. We readily accept that Parliament can be taken to have intended, that, where possible, appeals against deprivation decisions should be fair and effective. We do not consider that there is any warrant for a universal rule of this character in this statutory scheme, however. As we have indicated above, the effect of such a rule would be to convert a right of appeal on the merits into an automatic means of overturning a deprivation

decision, regardless of its merits, if, for whatever reason, an appellant is unable to take part in her appeal.

146. Parliament can be taken to have known that a subset of appellants are appellants, like A, who have been deprived of their nationality for reasons of national security (see section 40(2) and section 40(5)(c) of the BNA). A murderer who poses a risk to national security and is in solitary confinement in a third country is not able to have a fair and effective appeal. Such a rule would ensure that his appeal succeeded. Similar reasoning would apply, as Mr Glasson pointed out, to an extremist and terrorist who was in hiding and had put deliberately put himself beyond the reach of modern means of communication.

147. An intention to enact such an (implied) universal rule cannot sensibly be imputed to Parliament. Once that is accepted, we consider that it is impossible to craft an implied rule which is sufficiently granular to apply to some people with whom the court might have sympathy, while not protecting those with whom the court does not sympathise (cf the reasons given by the Court of Appeal in *R (BAPIO Action Limited) v Secretary of State for the Home Department* [2007] EWCA Civ 119 for rejecting an argument that the court can imply a duty to consult in a statutory scheme which does not impose an express duty to consult). The design of such a rule is a job for the legislator, Parliament, and not for the court.

148. We consider that that view is supported both by the legislative scheme and by three decisions of the Court of Appeal.

149. Parliament's intention is to be gathered, primarily, from the language it has enacted (see *Wilson v First County Trust* [2003] UKHL 40; [2004] 1 AC 816). This right of appeal was suspensive, but that is no longer so, since the repeal of section 40A(6). Section 40A(6) prevented the Secretary of State from making a deprivation order while an appeal could be brought against the notice of intention to deprive, and if an appeal was brought, until the appeal had been decided. Parliament's intention about the effect of an appeal has, therefore, changed. It follows that Parliament intends that the Secretary of State should be free to make a deprivation order immediately after giving notice of her intention to deprive the person concerned of her citizenship, whether or not the person concerned wishes to, or later does, appeal against the notice.

150. Moreover, section 78 of the Immigration Nationality and Asylum Act 2002 ('the 2002 Act'), which prevents the removal of an appellant from the United Kingdom while his appeal is 'pending' (as defined), and section 92 of the 2002 Act (which provides for some rights of appeal to be exercisable in-country) do not apply to appeals under section 40A of the BNA. It is thus not Parliament's intention that such an appeal is, either, only exercisable in-country, or that that it should exercisable in-country in specified types of case. Nor does Parliament intend that such an appeal, once brought, should be a bar to removal. In these respects, Parliament's intentions about this type of appeal differ significantly from Parliament's intentions about an appeal under section 82 of the 2002 Act against a decision refusing a protection claim. The default position about such appeals is, with express exceptions, that they must be brought from inside the United Kingdom (see section 92(2) of the 2002 Act). Further, the exercise of that right of appeal is a bar to removal (see section 78).

151. There is therefore a significant contrast between the procedural safeguards which apply to an appeal against the refusal of a protection claim and the lack of such safeguards in the case of an appeal against a deprivation decision. We consider that this contrast tells us something about Parliament's intentions with respect to the two types of appeal. An appeal against a deprivation decision is not suspensive, is not required in any case to be brought from inside the United Kingdom, and is not a bar to removal. This structure shows that Parliament clearly anticipated that such appeals would often, if not regularly, be brought from outside the United Kingdom. Once that is recognised, it seems to us to follow that Parliament must also be taken to have recognised that such appeals would be brought by appellants whose circumstances outside the United Kingdom would vary in many different respects, and that some, at least, would, or might, face significant restrictions, depending on where they are when they appeal, on their ability to take part in their appeals (as we think Mr Hickman accepted). It is striking, we consider, that Parliament has not stipulated that the Secretary of State should take any steps to make it easier for such appellants to exercise their right of appeal. Nor has Parliament stipulated that the ability of an appellant effectively to exercise her right of appeal should have any bearing on the fate of the appeal.

152. This structure supports the view we have expressed above that it is not possible, still less, necessary, to imply in this legislative scheme a rule that if a person

(or some people, undefined) who is or are outside the United Kingdom cannot effectively exercise her or their right or rights of appeal, the appeal should succeed. To imply such a consequence would, in our judgment, subvert two clear intentions of the legislative scheme.

i. The appeal is not suspensive.

ii. Unless the appellant happens to be in the United Kingdom when the decision is made, and is not thereafter removed, the right of appeal is to be exercised, in the general run of cases, from abroad. Once an appellant is abroad, the Secretary of State has no control over the appellant's circumstances, or, it follows, over the way in which she can exercise, or might be inhibited, or prevented, from exercising, her right of appeal.

Three decisions of the Court of Appeal

G1

153. In *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867, [2013] QB 1008, the Secretary of State deprived the appellant of his nationality, and made an exclusion order, when the appellant was in Sudan. He appealed to the Commission against the deprivation decision and applied for judicial review of the exclusion order.

154. As Laws LJ put it, giving the judgment of the court, the effect of the exclusion decision was that the appellant could only conduct his appeal from abroad. The appellant's main argument was that that was 'legally impermissible' (judgment, paragraph 4). Laws LJ held that after the repeal of section 40A(6) of the BNA the statutory scheme did not impinge on the prerogative power to exclude. He rejected an argument that there was any legislative intention that the deprivation appeal should be conducted from the United Kingdom (judgment, paragraph 15), and an argument that the Secretary of State owed the appellant a duty, outside the Rules, to facilitate his return to the United Kingdom to conduct his appeal (judgment, paragraph 16). Laws LJ held that there is no general common law right to be present at an appeal, and that an in-country appeal can only be guaranteed by legislation (judgment, paragraph 22). He then considered whether that general rule was displaced in this type of case or on

the facts. He did not clearly decide that question of legal principle, but upheld Mitting J's decisions that the appellant had not shown that he could not effectively exercise his rights of appeal and that on the facts, the Secretary of State could not be criticised for not allowing the appellant to return to the United Kingdom to prosecute his appeal as, if the appellant were held on the appeal to be a risk to national security, that would be liable to frustrate the decisions to exclude him and to deprive him of his nationality.

155. While it is true that the Court of Appeal did not clearly decide the issue of principle which we describe in the above paragraph, we consider that *G1* supports our construction of the statutory scheme. The Court did not need to decide that issue, because, even if the general rule described in paragraph 22 did not apply for some reason, G1 lost on the facts. Our view, based on the statutory scheme, is that the general rule in paragraph 22 of *G1* should not be displaced in this case or in this class of cases, for the reasons we give in paragraphs 143-145 and 147-150, above.

L1

156. In *L1 v Secretary of State for the Home Department* [2015] EWCA Civ 410 the appellant appealed to the Commission against a decision to deprive him of his nationality on the grounds that he was a threat to national security. He travelled regularly between the United Kingdom and Sudan. Officials asked the Secretary of State to decide in principle that she would deprive the appellant of his nationality the next time he was in Sudan, and exclude him from the United Kingdom. The operational objective of depriving him of his nationality when he was in Sudan was to mitigate that type of risk (judgment, paragraph 9). The Secretary of State made such a decision. A little later, the appellant went to Sudan, and the Secretary of State made the deprivation decision.

157. The issue was whether this was lawful, or an abuse of power, because it deprived the appellant of an in-country right of appeal to which it was said he was entitled (judgment, paragraph 5). Laws LJ said, referring to sections 82 and 78 of the 2002 Act, that 'There is no doubt that a person who is notified of a decision by the Secretary of State to deprive him of his British nationality enjoys an in-country right of appeal' (judgment, paragraph 15). We do not think that that statement is correct, for the reasons given above. Laws LJ held that the Secretary of State had not

disregarded any express provision of the legislation (judgment, paragraph 20). The argument, instead, was that the Secretary of State had frustrated the policy or purpose of the measures conferring the right of appeal. The Secretary of State would have done so if the deprivation decision had been taken in order to get an advantage in the litigation. That would be an improper motive, and would make the decision unlawful. But the Commission had accepted that the timing of the decision was based on considerations of national security. Laws LJ held that the Secretary of State was not prevented by the legislative scheme from taking steps which hamper the exercise of a right of appeal in-country if that would or might damage national security. The scheme did not guarantee an in-country right of appeal. The legislation provided for an in-country right of appeal if the appellant was in the United Kingdom, but not otherwise (judgment, paragraphs 24 and 25). Laws LJ did not refer to his decision in *G1*.

158. We consider that our construction of the statutory scheme is also supported by the reasoning in *L1*. Indeed, *L1* is a fortiori, because the Court of Appeal accepted (incorrectly in our view) that sections 78 and 92 of the 2002 Act would have applied to L1 had he been in the United Kingdom when the deprivation decision was made. What *L1* clearly shows is that the Secretary of State is entitled to deprive a person while he is outside the United Kingdom, if she does so for reasons of national security, even if that will deprive him of an in-country right of appeal. The Court did not suggest that difficulties in exercising the right of appeal from abroad made the decision unlawful.

S1

159. The appellants in *S1 v Secretary of State for the Home Department* [2016] EWCA Civ 560, [2016] 3 CMLR 37 were deprived of their nationality when they were in Pakistan, where they had moved in 2009. They appealed to the Commission. One of their arguments was that they had not been allowed to return to the United Kingdom to take part in their appeals. The second preliminary issue, which the Commission decided against the appellants, was whether the appeals should be allowed because it was impossible to decide them fairly as the appellants were in Pakistan. The appellants also issued an application for judicial review, challenging the

refusal of the Secretary of State to allow them to return to conduct their appeals (judgment of Burnett LJ (as he then was), paragraph 6).

160. The appellants submitted that they were inhibited from giving full instructions to their solicitors, who had visited Pakistan three times. They were, nevertheless, able to put in written statements of their evidence. They submitted that their appeals could not be fair unless they were allowed to return to the United Kingdom (judgment, paragraphs 52-54). The Secretary of State pointed out that they had not engaged with the substance of the OPEN national security case against them. The appellants submitted (judgment, paragraph 59) that the Commission should either have allowed the appeals or that in the application for judicial review, the Court of Appeal should quash the deprivation orders and make orders which would enable the appeals to be heard again with the appellants enabled to return to the United Kingdom to pursue them.

161. At paragraph 61, Burnett LJ summarised the Commission's 'simple answer' to the appellants' argument that the timing of the deprivation order made it impossible for the appellants to return to the United Kingdom, 'where they would be entitled to remain pending the resolution of their appeal' was that the Commission had no jurisdiction to consider the timing of the deprivation order. Burnett LJ noted that there are two stages in the statutory process (a decision followed by an order), and that the Commission had no power to consider an appeal against an order, still less against its timing.

162. Burnett LJ repeated, with apparent approval, the statement of Laws LJ at paragraph 15 of *L1*, and his conclusion (see above). Burnett LJ noted that orders were made when they were so as to prevent the appellants from travelling to the United Kingdom, but that their timing 'had nothing to do with potential appeals'. As in *L1*, the orders in *S1* had been made to safeguard national security. That was a proper purpose and was not inconsistent with the legislation or with the common law. The contention that 'her decision might give rise to difficulties in any subsequent appeal cannot…affect the question whether her earlier decisions to deprive or the subsequent deprivations were unlawful. Indeed, it was not even clear that there would be any appeals and if so from which of the eventual appellants. One only has to contemplate the possibility that some, but not all, appealed, to expose the difficulty'. All the

decisions were taken at the same time and on the same material, but if only one person appealed, it could be said that the decision in his case was unlawful (judgment, paragraph 69).

163. In order to show that the Secretary of State was obliged to let the appellants return to conduct their appeals, they would have to show that the Commission should have taken some step, within its powers, which would have achieved that, or that the Commission should summarily have allowed the appeals (judgment, paragraph 70). *L1* was consistent with *G1*. Burnett LJ considered the appellants' evidence at paragraphs 76-79. The evidence was 'superficial and without particularity'. The appellants' problems were 'self-inflicted to some extent' (judgment, paragraph 80). The Commission had declined to decide what it would or could have done if it had accepted the appellants' argument that they were genuinely inhibited from engaging with the appeals because of fears for their safety.

164. The appellants submitted, on appeal, that if the Commission had found that that was so, it would have been obliged to allow their appeals. Burnett LJ considered that submission in paragraphs 83-85 of the judgment. There was nothing in the Special Immigration Appeals Commission (Procedure) Rules 2003 ('the Procedure Rules') which showed that the Commission had a 'disciplinary power' to require the Secretary of State to facilitate entry to the United Kingdom to take part in an appeal (judgment, paragraph 84). His conclusion was that he was not persuaded that, even if the appellants 'had made good their concerns, there was anything in the power of [the Commission] to help them' (judgment, paragraph 85).

165. The appropriate course was for the appellants to apply for entry clearance outside the Rules to take part in their appeals, and to challenge any refusal by an application for judicial review. The Court of Appeal had recognised in *G1* that that course was open to an appellant. It was clear that the circumstances in which such an application would succeed would be 'rare and would require clear and compelling evidence to support the proposition that, absent physical presence in the United Kingdom the person concerned could take no meaningful part in the …appeal. Even then, the decision would have to be reviewed in the light of public law principles…'. The Court of Appeal dismissed the appeal from the Commission and while granting permission to apply for judicial review of the refusal to facilitate the appellants' return

to the United Kingdom, dismissed the substantive application (judgment, paragraph 86).

166. We consider that our understanding of the statutory scheme is also supported by *SI*. First, later difficulties with an appeal cannot affect the lawfulness of the decision to make a deprivation order (paragraph 69). Second, even if the appellants had made good their concerns about the effectiveness of their appeals, the Commission had no power to do anything about that. Burnett LJ specifically rejected the submission that the Commission was obliged to allow the appeal (paragraph 85). Third, the correct course was for the appellants to apply for entry clearance and challenge any refusal of entry clearance. The circumstances in which the court would review a refusal of entry clearance would be rare and exceptional, and even if the person concerned could take no meaningful part in the appeal, the decision would have to be reviewed in the light of public law principles. Importantly, Burnett LJ did not decide that the fact that an appellant could take no meaningful part in his appeal meant that his challenge to a refusal of entry clearance should succeed.

167. We consider, next, whether our views about the statutory scheme, and about the effect of those three decisions of the Court of Appeal, are displaced either by the decision of the Supreme Court in *Kiarie*, or by the decisions of the Court of Appeal in *AN*, or in *W2*.

Kiarie

168. Mr Hickman accepted that A cannot rely on article 8 as she is outside the territorial scope of the Human Rights Act 1998. It follows that A cannot rely on the procedural requirements of article 8. Mr Hickman therefore acknowledged that *Kiarie* is not (at least directly) on point.

169. More fundamentally (perhaps), this is a different type of appeal from the right of appeal which was at issue in *Kiarie*. The appellants in *Kiarie* were appealing on article 8 grounds against decisions to make deportation orders. The default position is that such appeals are to be heard in-country and are a bar to removal. The Secretary of State had certified each appeal under section 94B of the 2002 Act. That certificate changed the default position, and the Secretary of State sought to remove each appellant before his appeal could be heard. But the Secretary of State had not certified either appeal as clearly unfounded under section 94(1) of the 2002 Act. The Supreme

Court therefore inferred that the Secretary of State accepted that each appeal was arguable (see paragraphs 35 and 54 of the judgment of Lord Wilson).

170. The appellants in *Kiarie* challenged the lawfulness of the section 94B certificates. The Supreme Court held that the certificates were not lawful because (1) article 8 required an appeal on article 8 grounds against a deportation order to be effective and (2), for a range of reasons (described in paragraphs 75-77 of Lord Wilson's judgment), the deportation of the appellants before the hearing of their appeals would breach those rights. Deportation was an interference with the appellants' article 8 rights, and the Secretary of State had not shown in their cases that its effect was proportionate (paragraph 78 of the judgment).

171. There are therefore three reasons why *Kiarie* is not relevant to this case. First, it concerns a different statutory appeal regime. Second, unlike A, the appellants were able to invoke the procedural protections attached to article 8. Third, the appellants argued successfully that in issuing the section 94B certificates, the Secretary of State breached section 6 of the HRA; the appeals succeeded because the certificates were unlawful and not because of any general principle of statutory construction. It follows that *Kiarie* is not authority for a universal rule that every appeal must be fair and effective. Rather, it decides that the section 94B certificates in that case were unlawful because the requirement to appeal from outside the United Kingdom was a disproportionate interference with the procedural component of the appellants' article 8 rights.

AN

172. The issue in *AN* was whether, in the wake of the decision of the House of Lords in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 a non-derogating control order ('an NCO') (which had been made without the disclosure which *AF* required) should be quashed ex tunc or ex nunc. Mr Hickman submitted that this decision shows that if an appeal is not fair, then the appeal succeeds, and that is a fortiori if the Secretary of State knows, when he makes the impugned decision, that the appeal will not be fair.

173. Section 2(1) of the Prevention of Terrorism Act 2005 ('the 2005 Act) gave the Secretary of State power to make an NCO if he had reasonable grounds for suspecting that a person was or had been involved in terrorism-related activity and considered

that it was necessary to protect the public by making a NCO. Schedule 1 to the 2005 Act conferred a power to make rules providing for an outline CLOSED material procedure. The Secretary of State did not at any stage disclose to AN the basis for making the NCO, or any gist. The statutory procedure required the Secretary of State to get the court's permission before making the order. There was then a directions hearing. The court's role at the permission stage was to consider whether the decision to make the NCO was 'obviously flawed'; and, at the directions stage, to consider whether it was 'flawed'. Maurice Kay LJ, giving the judgment of the court, held, that by not disclosing any of the grounds for making the NCO, the Secretary of State had disabled the court from considering whether the decision to make the NCO was obviously flawed, or flawed. He could not, therefore, satisfy the court on appeal that the NCO was valid when it was made. The NCO was therefore void ab initio.

174. We do not consider that *AN* supports A's argument. The Court of Appeal did not decide that the decision to make the NCO was unlawful on the broad ground that the Secretary of State knew that, in the absence of disclosure, AN would not be able to challenge it. Rather, the Court of Appeal allowed the appeal against Mitting J's decision not to quash the NCO ab initio on the ground that the Secretary of State was not able to satisfy the court that the statutory test for making the NCO was met, and (see paragraph 31) because it was unlawful for the Secretary of State to take steps to make an NCO if he knew that, in order to justify it later on in the procedure, he would have to rely on material which he was unwilling at any stage to disclose. In any event, even if Mr Hickman's submission about what *AN* decides is right, the statutory scheme in *AN* was completely different from the statutory scheme here. We do not consider that *AN* is authority for any principle which binds us in this statutory scheme.

W2

175. The appellant in *W2* was deprived of his nationality when he had travelled outside the United Kingdom. He appealed to the Commission against the decision to make the deprivation order. He also applied for judicial review of the deprivation order. He argued that he was entitled to challenge the deprivation order by judicial review, and asked, by way of interim relief, for an order requiring the Secretary of State to return him to the United Kingdom to prosecute his appeal to the Commission. The Administrative Court refused permission and interim relief, holding that his

grounds were either unarguable, or should be raised in his appeal to the Commission, which was a suitable alternative remedy. The Judge's approach, as summarised by the Court of Appeal, was to ask which of the issues raised in the application for judicial review could and therefore should be considered by the Commission, and to refuse permission to apply for judicial review in respect of such issues (judgment, paragraph 22). She considered that although the notice of intention to deprive and the deprivation order are legally distinct steps, they are closely linked and are not in substance different decisions (judgment, paragraph 23). W2's submissions sought artificially to distinguish the two, based on the decision in *S1* that the Commission did not have jurisdiction to consider arguments about the timing of the order. That lack of jurisdiction did not mean that the Administrative Court should entertain arguments about the order, if, in substance, they were a collateral attack on the decision to make the order (judgment, paragraph 24). She also held that the submission that W2 could not play a meaningful part in his appeal was not a ground for challenging the deprivation order, but a potential ground for challenging another decision (a refusal to grant LTE outside the Rules) (judgment, paragraph 28).

176. W2 appealed to the Court of Appeal. One of W2's arguments was that the deprivation order was unlawful because it was made while W2 was outside the United Kingdom and, among other things, he could not, therefore, play a 'meaningful part' in his appeal. One of the issues considered by the Court of Appeal was whether the Commission had jurisdiction to address that argument, and, if so, what relief the Commission could give. The Secretary of State is recorded as having argued that the Commission could address the underlying question whether W2's return should be facilitated, either as a preliminary issue in the appeal, or, if W2 applied for it, and the Secretary of State refused it, in an expedited appeal against a refusal of entry clearance.

177. W2 also argued that the decision to make the deprivation order when W2 was abroad violated his article 8 rights, by compromising his ability to take part in his appeal, and was an abuse of power, because had the decision been taken when W2 was in the country, the risk of a violation of his article 3 rights in his home country would have made him irremovable. Counsel accepted (judgment, paragraph 47) that if the Court of Appeal decided that the Commission could consider all the legal issues and give a practical and effective remedy, the appeal to the Commission would be a

suitable alternative remedy. W2 submitted, however, that *S1* decided that the Commission did not have jurisdiction to consider an argument about the timing of the deprivation order (ie whether it was unlawful because it was made when the appellant was outside the United Kingdom) and, because the Commission could not grant interim relief, the appeal was not, at the interlocutory stage, a suitable alternative remedy. Justice required W2 to be returned to the United Kingdom to take part in his appeal, but the appeal could not be a forum for deciding whether it was necessary for him to be in the United Kingdom. An appeal against a refusal of LTE was not a suitable alternative remedy, either.

178. Beatson LJ, giving the judgment of the court, decided that the Commission would be able to decide whether it was necessary in the circumstances for W2 to be in the United Kingdom for his appeal to be effective, both in a challenge to the Secretary of State's refusal to grant entry clearance, and as a preliminary issue in the deprivation appeal (judgment, paragraph 11).

179. He considered, first, whether the Commission had jurisdiction to consider whether the order was unlawful because it was made when W2 was outside the United Kingdom (see the heading above paragraph 55). He treated paragraph 61 of *S1* as critical. He summarised *G1* and *L1*. He observed, cryptically (in our view), that Burnett LJ's statement in paragraph 85 of *S1* that there was nothing that the Commission could do if the appellants made good their concerns 'does not reflect the statutory scheme'. He said that there was 'undoubtedly a tension' between paragraph 61 of *S1* and *L1* (judgment, paragraph 62). It was clear that the interval between the notice and the order could be short. Moreover, if the decision to make the order is lawful, the timing of the order cannot make the decision to deprive unlawful (paragraph 63). There was no inconsistency between *L1* and paragraph 61 of *S1*. The timing points were different; one concerned the timing of the decision to deprive, the other, the timing of the making of the order (paragraph 64). In many cases the interval between the two steps in the process could be short, and if a challenge to the order was no more than a collateral attack on the decision to make the order, the Commission could consider that challenge (paragraphs 67 and 68).

180. Beatson LJ then considered whether the fact that the Commission could not grant interim relief meant that the Commission was not able to decide whether, in

order for his appeal to be effective, W2 had to be in the United Kingdom (see the heading above paragraph 69). He said that the question was how to decide whether or not an out-of-country appeal would be 'effective'. He asked whether the Commission was able to decide this is as preliminary issue in the appeal. It was common ground that interim relief would be the equivalent of substantive relief because once W2 was in the United Kingdom, it would not be possible to remove him. W2 submitted that the Commission had no power to order his presence in the United Kingdom, and that the Commission's power to consider the issue was not a suitable alternative remedy to judicial review.

181. Beatson LJ said that the views of the Court of Appeal on this issue in *G1* and *S1* had to be re-assessed in the light of *Kiarie*, especially the statement that a person had to provide clear and compelling evidence that he could not take an effective part in his appeal. Beatson LJ then considered the decision in *Kiarie* (judgment, paragraphs 74-79).

182. He referred to the decision of the European Court of Human Rights ('the ECtHR') in *K2 v United Kingdom* (2017) 64 EHRR SE 18. He said that neither that case, nor the decisions of the Court of Appeal in *G1*, *L1* or *S1* appeared to have been cited to the Supreme Court. K2 was the appellant in *G1*. The ECtHR held that G1's application was inadmissible. K2's case was that if he gave evidence from Sudan, that would expose him to risks from the Sudanese authorities. The ECtHR approved the approach of the Commission in *G1* (judgment, paragraph 57). The ECtHR was not in a position to question the Commission's findings that G1 would be able to pursue his appeal from Sudan. There was no clear objective evidence to contradict the Secretary of State's case. The ECtHR could not ignore the fact that the procedural difficulties of which K2 complained were not a natural consequence of the simultaneous decisions to deprive and to exclude, but rather of his decision to flee the country while he was on bail. The ECtHR held that K2's complaint that the decision to deprive him of his citizenship breached his article 8 rights was manifestly ill-founded. It therefore appeared to have taken a different approach from the Supreme Court in *Kiarie* (judgment paragraph 82).

183. Beatson LJ noted that Lord Wilson had recognised, in paragraph 7 of his judgment, that those who appealed a refusal of entry clearance from abroad were in a

different position from the appellants in *Kiarie*. He also referred to the decision of the Court of Appeal in *Ahsan v Secretary of State for the Home Department* [2017] EWCA Civ 2009, [2018] Imm AR 531. Neither side in this appeal relied on *Ahsan*, and we say no more about it.

184. W2 submitted that article 8 applied to his case, even though he was outside the United Kingdom. He accepted that while depriving him of his nationality while he was outside the United Kingdom was not unlawful per se, the result was to give the Secretary of State a litigation advantage. In paragraph 85 of the judgment, Beatson LJ said that the question was whether an appeal to the Commission would be 'a practical and effective remedy for determining whether an out-of-country appeal against the decision to make the deprivation order would be "effective"'. Beatson LJ distinguished the circumstances considered in paragraph 65 of *Kiarie*. W2 would be appealing against a decision of the Secretary of State. 'If he is successful in that and [the Commission] considers that his presence in the United Kingdom is necessary in order for his appeal to succeed, it will allow the appeal'. That decision would bind the Secretary of State (judgment, paragraph 85). That meant that an effective remedy would be available in the Commission. The Commission would be able to consider *Kiarie* and *Ahsan*. It would consider the evidence submitted by him in support of his argument that an out-of-country appeal would not be effective for him. The Commission would then be able to see what was necessary to secure an effective remedy (judgment, paragraph 87). It could consider his litigation difficulties, and the extent to which oral evidence was necessary, and decide, in the light of *Kiarie*, whether the refusal of entry clearance was unlawful. It could consider whether there 'is a Convention-compliant system' for the conduct of the appeal from abroad in (judgment, paragraph 87).

185. In the second half of paragraph 88, he summarised the Secretary of State's submissions distinguishing an appeal to the Commission from the facts in *Kiarie*. He said, 'I express no views on these matters because in this appeal, the role of this court is to consider whether [the Commission] is able to decide these matters and give a practical and effective remedy in respect of them'.

186. Beatson LJ's conclusion (judgment, paragraph 89) was that there was no reason why the Commission 'in the course of a section 2 appeal of a refusal of LTE

could not decide and 'give a practical and effective remedy to the question whether it is necessary for W2 to be in this country for his appeal to be effective and to do so before the hearing of the substantive appeal. This could be done by hearing the appeal against a decision to refuse LTE..., together with its consideration of this issue as a preliminary issue in the appeal'.

187. Unsurprisingly, Mr Hickman QC relied heavily on Beatson LJ's statements that W2 could rely on his effective appeal argument both in the appeal against the deprivation order, and in an appeal against a refusal of entry clearance, and on his statement that if the Commission felt that his presence in the United Kingdom was necessary to enable his appeal to be effective, it would allow the appeal.

188. Are we bound by these statements? Mr Hickman accepted that W2 was an article 8 case, and that, therefore, W2 was not, strictly, binding on us; his submission, rather, as we understand it, was that the Court's approach chimed with analogous common law principles. That concession is important. Further, the overall question for the Court of Appeal in *W2* was whether the judge was right to refuse permission to apply for judicial review and interim relief. We consider that the detailed reasoning of the Court of Appeal about what the Commission could or should do on the appeal(s) was, therefore, obiter.

189. However, in deference to the detailed reasoning of the Court of Appeal, we must explain why we do not consider that we can follow those two statements in this case. There are four potential difficulties with the approach of the Court of Appeal in *W2*, which mean that, as we are not bound by it, we decline to follow it in this different context.

i. If and in so far as the statements in paragraph 85 relate to W2's deprivation appeal, they are inconsistent (without explanation) with the express reasoning in paragraphs 83-85 of *S1*.

ii. If the statements relate to the LTE appeal, they go further, without explanation, than paragraph 86 of *S1*. They assume that the fact that an applicant can play no meaningful part in his appeal imposes, either, a duty on the Secretary of State to grant entry clearance, or a duty on the court, if entry clearance is refused, to order the Secretary of State to grant entry clearance. That cannot be right, as the Secretary of State

will have to balance, when considering whether to grant entry clearance, the appellant's procedural difficulties against the public interest in keeping him out of the United Kingdom because of the threat he poses to national security, as will the court on any appeal (in an article 8 case) or application for judicial review (in a non-article 8 case).

iii. The definite terms of paragraph 85 are not consistent with the last sentence of paragraph 88 of the judgment, which appears to recognise that the Commission might have to consider a range of issues before it could allow an appeal.

iv. The Court of Appeal may have been led by the submission from Mr Fordham QC, recorded at the start of paragraph 85 of the judgment, to think that it could not hold that an appeal or appeals to the Commission were a suitable alternative remedy to judicial review unless it decided that the Commission would be bound to grant a remedy on the facts. We consider that the question was whether the Commission had jurisdiction to consider the issues raised by the appellant, rather than whether the Commission was bound to grant him the remedy he sought.

190. Nor do we consider that the approach of the Court of Appeal in *W2* expresses any common law principles which we should follow. The two statements are, in our view, inconsistent with our understanding of this statutory scheme and with the Court of Appeal's approach to it in *G1*, *L1* and *S1*.

191. This means that we reject A's submission that her appeal must succeed because she cannot have a fair and effective appeal. We must emphasise that that does not, of course, mean that her appeal fails. It will be for A, in consultation with her advisers, to decide what to do next. There are at least three possibilities. First, she could continue with the appeal. Second, she could ask for a stay of the appeal, in the hope that, at some point in the future, she will be in a better position to take part in it. Third, if she does not ask for a stay, a possible consequence is that she might, in due course, fail to comply with a further direction of the Commission pursuant to rule 40 of the Procedure Rules. We accept that that could lead the Commission, after

complying with rule 40, to strike out the appeal. But, if A's circumstances were to change in the future, it might be open to her to apply to reinstate her appeal under rule 40(3), if the Commission were satisfied that A had not complied with the direction because circumstances outside her control made it impracticable for her to comply with it.

Conclusion

192. For those reasons, we have reached three conclusions on the preliminary issues.

i. Decision 1 did not make A stateless.

ii. The Secretary of State did not breach the Policy when he made Decision 1.

iii. We accept that A cannot have an effective appeal in her current circumstances, but it does not follow that her appeal succeeds.

193. We had two short CLOSED hearings on 22 and 25 October 2019. The Special Advocates and the Secretary of State agreed that it was possible for the Commission to decide the preliminary issues on the OPEN evidence and submissions alone. That is what we have done.