SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No: SC/169/2020
Hearing Date: 3rd July 2020

Before:

THE HONOURABLE MR JUSTICE CHAMBERLAIN

Between:

C5

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr H Southey QC and Ms L Smyth BL instructed by Phoenix Law Solicitors
Special Advocate:	Mr A Straw instructed by the Special Advocates Support Office
For the Respondent:	Mr R Tam QC instructed by the Government Legal Department

Introduction

1 A remote hearing was listed on 3 July 2020 to determine two issues:

(a) whether to lift the stay imposed by the Chairman, Elisabeth Laing J, pending the making and determination of an application by the Appellant for registration as a British citizen; and

(b) whether, in the light of s. 6(3) of the Special Immigration Appeal Commission Act 1997 ("the 1997 Act"), Mr David Scoffield QC (who is a member of the Bar of Northern Ireland but does not have audience rights in England and Wales) can be lawfully appointed as lead special advocate.

2 Issue (a) is no longer contentious. On the evening before the hearing, the Government Legal Department indicated in an email that, in the light of the Appellant's position, the Secretary of State did not oppose the lifting of the stay. I indicated that I would lift the stay and gave consequential directions for the determination of ground 1 as a preliminary issue. As I am lifting a stay imposed by the Chairman (albeit without a hearing), I have recorded my reasons briefly at the end of this ruling.

3 The hearing was therefore almost entirely occupied with argument on issue (b). At the outset, I invited the parties to address me on whether the Commission had jurisdiction to determine that issue. The appointment of special advocates is not a function of the Commission. It is a matter for the relevant law officer. Nonetheless, Mr Hugh Southey QC (for the Appellant) invited me to deal with it and Mr Robin Tam QC (for the Secretary of State) observed that, if not determined now, it would likely become necessary to deal with it later, because the Commission ought not to hear to hear a special advocate who was not lawfully appointed. In my judgment, that is correct. It would be wasteful of time and resources if the matter were left to the relevant law officer, whose decision would in principle be subject to judicial review. It is much preferable that the issue be determined by the Commission in advance. To my mind, the issue can be determined under r. 39(1), which confers a power to give directions relating to the conduct of any proceedings. Whilst the appointment of a special advocate is not itself a matter relating to the conduct of proceedings, the question whether the Commission would be entitled to decline to hear a special advocate is. That question in turn requires an examination of the provisions governing appointment.

4 Before turning to the issue in more detail, I should make clear, as Mr Tam has, that the Secretary of State's objections to the appointment of Mr Scoffield are legal objections. There is no suggestion from Mr Tam, or from the Commission, that he would be unsuitable for appointment if

these were proceedings in Northern Ireland or if he were qualified in England and Wales.

Background

5 The Appellant lives in Dundalk, County Louth, in the Republic of Ireland, about 5 to 10 minutes' drive from the border with Northern Ireland. On 12 September 2019, the Secretary of State decided to exclude her from the United Kingdom under regulation 23(5) of the Immigration (European Economic Area) Regulations 2016. That provision confers power to make an exclusion order in respect of an EEA national or the family member of an EEA national. "EEA national" is defined in regulation 2. The definition excludes British citizens.

6 The decision to make the exclusion order was served on 31 December 2019. The notice of appeal was lodged on 27 January 2020 by Phoenix Law, a firm of solicitors based in Belfast and regulated by the Law Society of Northern Ireland ("PL"). There were three grounds of appeal: (1) that the decision was unlawful because the Appellant is a dual British and Irish citizen (or, in the alternative, entitled to be treated as one) and so not an EEA national for the purposes of the 2016 Regulations; (2) that the decision violates her rights under Article 8 of the European Convention on Human Rights ("ECHR") because it is not in accordance with domestic law and/or is disproportionate; (3) that the decision violates her EU law rights because there is no sufficient factual basis for the denial of free movement rights and/or because that denial is disproportionate.

7 The Secretary of State took the view that these particulars were inadequate and sought an order requiring fuller ones. Some limited additional particulars were given in a letter from PL dated 21 February 2020. In the last paragraph of that letter, PL raised what they described as a "logistical issue". They pointed out that the legislation expressly provides for SIAC to sit in Northern Ireland. They went on:

> "Given the ties to this jurisdiction in the instant application, we would ask that consideration be given to the Commission making contact with the Northern Ireland Courts and Tribunals Services at an early stage to ensure that the appropriate arrangements and hearing dates can be arranged as soon as practically possible upon the finalising of the directions in due course."

8 On 25 February 2020, the Chairman ordered the Appellant to file and serve amended grounds of appeal including an explanation of her factual case for contending that she is a British citizen and of any further arguments in that regard. The Secretary of State was ordered to serve the

documents required by paragraph 1 to the Practice Note within 21 days of service of the amended grounds.

9 Amended grounds of appeal were filed on 20 March 2020, signed by Mr Southey (who is qualified to practise in both England and Wales and Northern Ireland) and Lara Smyth BL (who is qualified to practise in Northern Ireland only). So far as ground 1 is concerned, these indicated that the Appellant was born on 17 February 1972 to a father who was born in Belfast in 1954 and was a dual British/Irish citizen. Her parents never married. Had her parents been married at the time of her birth, she would automatically be a British citizen. Birth outside wedlock is a status for the purposes of Article 14 ECHR and falls within the class of suspect grounds where weighty reasons are required to justify discrimination. As a consequence, it was said that the Appellant's exclusion was a violation of Article 14 ECHR, read with Article 8. Reliance was placed on the decision of the Supreme Court in *R (Johnson) v Secretary of State for the Home Department* [2017] AC 365.

10 On 15 April 2020, the Government Legal Department responded to the amended grounds of appeal. The response included the following:

> "Without prejudice to the lawfulness or merits of the decision as made, it seems to my client that the issue of whether the appellant is entitled to obtain British citizenship should be resolved prior to the current case proceeding. We note that section 4I British Nationality Act 1981 entitles a person to be registered as a British citizen where they would automatically become a British citizen at birth if their mother had been married to their father. If, as appears to be the case, your client considers that the above situation applies to her, then provided she is able to produce/obtain the relevant evidence it would be open to her to register as a British citizen pursuant to s. 4I BNA 1981.
>
> For the avoidance of doubt, the Secretary of State's position is that your client is not and was not at the time of the decision a British citizen, and that the decision of the challenge was lawfully and properly made. However, if there is the possibility that the decision, though lawful, may become unsustainable because your client at a future date obtains British citizenship, then this should be addressed now, before significant public funds are spent by either party on an appeal of the exclusion decision.
>
> We therefore suggest that the appropriate way forward would be for the current proceedings to be stayed while your client considers whether to make an application to be

registered as a British citizen, and while any application that she makes is determined."

An extension of 5 weeks was sought for service of the documents required by paragraph 1 of the Commission's Practice Note.

11 By a letter of 16 April 2020, PL indicated that it was unclear to them why a stay was needed and pointed out that any stay would give rise to further delay in circumstances where the Appellant was, on her case, being denied her right to enter Northern Ireland. PL said they would consent to an extension of 14 days for service of the Secretary of State's response, but no longer. As to the location of the hearing, it was said that the 1997 Act made express provision for hearings in Northern Ireland and there were good reasons why the hearing of this appeal should take place in Northern Ireland.

12 On 17 April 2020, the Commission wrote to the parties at the direction of the Chairman. She had noted that there were three questions: (1) Should the appeal be stayed pending an application by the appellant for registration as a British citizen? (2) If not, should the Secretary of State be given an extension of time of more than 14 days for serving the documents required by paragraph 1 of the Practice Note? (3) Should the hearing take place in Northern Ireland or in England and Wales (specifically, in Field House)?

13 The Chairman noted that it appeared that the Appellant would be entitled (if her account of the facts is correct) to be registered as a British citizen pursuant to one of the provisions of ss. 4E-4I of the British Nationality Act 1981 ("the 1981 Act"). She considered that the most sensible way of managing the appeal was for the Appellant to apply to the Secretary of State for registration and for the appeal to be stayed in the meantime. This, she said, was "potentially more cost-effective than proceeding with the appeal, as if the appellant is right in her contentions, it will save the time and effort of preparing for this appeal". As to the location of the hearing, she noted that paragraph 4 of Schedule 1 to the 1997 Act provided that the Commission "shall sit at such times and in such places as the Lord Chancellor made direct" and that the Lord Chancellor had not directed that the Commission should sit in any other place than Field House, London. These were, therefore "proceedings in England and Wales".

14 The Chairman said that if the Appellant wished the proceedings to be "proceedings in Northern Ireland", she should ask the Lord Chancellor to direct accordingly. I was told at the hearing that PL have invited the Lord Chancellor to make a direction to that effect, but there has been no response to date.

15 On 25 April 2020, the Appellant applied to the Commission seeking (a) an order confirming that her current legal team can continue to represent her and (b) an oral hearing to enable her to renew her objection to the stay. To explain why (a) was thought necessary, I must refer to ss. 6(2)-(3) and 7 of the 1997 Act and to r. 33 of the Special Immigration Appeals Commission (Procedure) Rules 2003 ("the Rules").

16 Section 6 of the 1997 Act is headed "Appointment of a person to represent the appellant's interests" (i.e. a special advocate) and provides follows:

> "(1) The relevant law officer may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.
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> (2) For the purposes of subsection (1) above, the relevant law officer is—
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> (a) in relation to proceedings before the Commission in England and Wales, the Attorney General,
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> (b) in relation to proceedings before the Commission in Scotland, the Lord Advocate, and
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> (c) in relation to proceedings before the Commission in Northern Ireland, the Advocate General for Northern Ireland.
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> (3) A person appointed under subsection (1) above—
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> (a) if appointed for the purposes of proceedings in England and Wales, shall have a general qualification for the purposes of section 71 of the Courts and Legal Services Act 1990,
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> (b) if appointed for the purposes of proceedings in Scotland, shall be
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> (i) an advocate, or
>
> (ii) a solicitor who has by virtue of section 25A of the Solicitors (Scotland) Act 1980 rights of audience in the Court of Session and the High Court of Justiciary, and

(c) if appointed for the purposes of proceedings in Northern Ireland, shall be a member of the Bar of Northern Ireland.

(4) A person appointed under subsection (1) above shall not be responsible to the person whose interests he is appointed to represent."

17 Section 7, headed "Appeals from the commission", provides for a right to appeal to the "appropriate appeal court", which is defined in s. 7(3) as:

"(a) in relation to a determination made by the Commission in England and Wales, the Court of Appeal,

(b) in relation to a determination made by the Commission in Scotland, the Court of Session, and

(c) in relation to a determination made by the Commission in Northern Ireland, the Court of Appeal in Northern Ireland."

18 Rule 33 of the Procedure Rules is headed "Representation of parties" and provides as follows:

"(1) The appellant may act in person or be represented by—

(a) a person having a qualification referred to in section 6(3) of the 1997 Act;
…

(c) with the leave of the Commission, any other person,

provided that the person referred to in sub-paragraph (a) or (c) is not prohibited from providing immigration services by section 84 of the Immigration and Asylum Act 1999.

(2) The Secretary of State and the United Kingdom Representative may be represented by any person authorised by them to act on their behalf."

Rule 34 deals with the appointment of the special advocate. Its terms are not material for present purposes.

19 In the light of these provisions, and given the Chairman's view that these were "proceedings in England and Wales", the Appellant's open representatives considered it necessary to seek a ruling from the Commission that they were entitled to act. As to the stay, they submitted that the Appellant was entitled to be treated as a UK national even

before her application for registration was determined and that, in those circumstances, the stay would give rise to unreasonable delay in the determination of her appeal.

20 The Government Legal Department responded by letter of 12 June 2020, indicating its view that, while s. 6(3) of the 1997 Act provided that in proceedings in England and Wales only a person qualified in England and Wales could act as special advocate, r. 33(1)(a) of the Rules permitted anyone with any of the qualifications referred to in that subsection to act as the appellant's advocate, wherever the proceedings were held, and that neither the 1997 Act nor the Rules impose any specific restriction on who may act as the appellant's solicitor.

21 This meant that the currently instructed open representatives could continue to act. If that was wrong, the Secretary of State had no objection to the grant of permission to the currently instructed counsel to act, pursuant to r. 33(1)(c). As far as special advocates were concerned, however, as these were proceedings in England and Wales, only the Attorney General for England and Wales could appoint a special advocate and only a person qualified in England and Wales could be appointed. This meant that it would not be possible for the Appellant to appoint Mr Scoffield as lead special advocate, since he is qualified in Northern Ireland only. This difficulty does not apply to the junior special advocate, Mr Adam Straw, who is qualified in both Northern Ireland and England and Wales.

Issue (b): Representation and appointment as a special advocate

22 I start with the meaning of the domestic legislation without regard to s. 3 of the Human Rights Act 1998 or to EU law.

23 I begin with the plain words of s. 6(2) and (3), which deal with the appointment of special advocates. These subsections rely on a distinction between "proceedings before the Commission in England and Wales", "proceedings before the Commission in Scotland" and "proceedings before the Commission in Northern Ireland". Applying their ordinary meaning, these words distinguish between proceedings by reference to the part of the UK where the Commission is sitting, not to some broader concept such as the place with which the proceedings have the closest connection. Paragraph 4 of Schedule 1 to the 1997 Act provides that the Commission may sit in such places as the Lord Chancellor may direct. To date, the Lord Chancellor has not directed that the Commission should sit in any place outside England and Wales, which means that these and all other proceedings to date are and have been "proceedings before the Commission in England and Wales".

24 If there were any doubt about the proper construction of s. 6(2)-(3), those provisions must in my judgment be read together with s. 7, which deals

with appeals. Here, the wording is, if anything, even clearer. It provides that the "appropriate appeal court" is the Court of Appeal of England and Wales in cases where the determination appealed from is "made by the Commission in England and Wales". This language very clearly fixes on the place where the Commission members are sitting when they make their determination as the deciding factor.

25 It makes sense that the special advocate appointed to appear before the Commission should be someone who is entitled as of right to appear before the appropriate appeal court. If the special advocate could not appear on appeal, particular practical difficulties would ensue. A new special advocate or advocates would have to be appointed and they would have to acquaint themselves with the open and closed material. This might inevitably give rise to delay and would certainly be wasteful of costs, which are met by the Crown. Unless there had been a time-consuming handover process, the new special advocates would inevitably be less well-placed than the original ones to assist the appeal court in understanding how the decisions taken in the closed part of the proceedings on matters such as disclosure.

26 All these considerations make it likely that Parliament intended a simple delineation of proceedings based on the physical location where those proceedings take place. Although the wording used in s. 6(2)-(3) is not identical with that used in s. 7, Parliament appears to have assumed that, if proceedings take place before the Commission in England and Wales, that is where the Commission will make its decision and any appeal will lie to the Court of Appeal of England and Wales. In that case, the relevant law officer for the purpose of appointing a special advocate is the Attorney General for England and Wales (s. 6(2)(a)) and the person appointed must have a general qualification for the purposes of s. 71 of the Courts and Legal Services Act 1990 (s. 6(3)(a)).

27 Mr Southey advanced, in essence, two arguments for reading ss. 6(2)-(3) differently from s. 7.

28 First, he argued that the 1997 Act on its face envisages the possibility of "proceedings before the Commission in Northern Ireland"; that this and similar statutory formulae can be read as invoking a broader test based the connection between the proceedings and the jurisdiction in question; and that the present proceedings have an obvious and natural connection with Northern Ireland and raise issues which ought to be determined by the Northern Ireland courts if there were an appeal or application for judicial review. Mr Southey drew attention by way of comparison to s. 49(3) of the Competition Act 1998, which deals with appeals from another tribunal with UK-wide jurisdiction, the Competition Appeal Tribunal. It defines the "appropriate court" as "the Court of Appeal or, in the case of an appeal from Tribunal proceedings in Scotland, the Court of Session". Yet r. 18 of the Competition Appeal

Tribunal Rules 2015 (SI 1648/2015) allows that tribunal to determine whether proceedings are to be treated as proceedings in England and Wales, Scotland or Northern Ireland by reference to a range of contextual factors.

29 The difficulty with this argument is that r. 18 is expressly authorised by another provision of primary legislation: paragraph 23 of Schedule 4 to the Enterprise Act 2002, which says this:

> "(1) Tribunal rules may make provision enabling the Tribunal to decide where to sit for the purposes of, or of any part of, any proceedings before it.
>
> (2) Tribunal rules may make provision enabling the Tribunal to decide that any proceedings before it are to be treated, for purposes connected with—
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> (a) any appeal from a decision of the Tribunal made in those proceedings; and
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> (b) any other matter connected with those proceedings,
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> as proceedings in England and Wales, Scotland or Northern Ireland (regardless of the decision made for the purposes of sub-paragraph (1))."

30 The 1997 Act, by contrast, does not empower the Commission to decide where to sit: that power is conferred on the Lord Chancellor alone. Likewise, the 1997 Act does not empower the Commission, when sitting in a particular place, to decide that the proceedings are to be treated (whether for the purposes of appeal or otherwise) as proceedings in another place. The difference is, in my judgment, significant.

31 This means that there may be some cases whose subject matter has a close connection with a particular part of the United Kingdom (e.g. Northern Ireland), but the proceedings before the Commission are nonetheless proceedings before the Commission in another part of the United Kingdom (e.g. England and Wales) and the appeal lies to the appeal court there. That is, to my mind, a function of the architecture of the 1997 Act. In any event, I would not overstate the significance of this point. Whilst I accept that the Appellant's challenge to the proportionality of the exclusion order depends in part on its effect on her as a member of a border community, that effect is something which will have to be evidenced. I do not think that a court in England and Wales would be significantly less able to understand and evaluate evidence on that topic than a court in Northern Ireland.

32 Mr Southey's second argument was based on the decision of the House of Lords in *Tehrani v Secretary of State for the Home Department* [2007] 1 AC 521. That case was concerned not with appeals but with judicial review of decisions of the Immigration Appeal Tribunal, a tribunal with jurisdiction throughout the United Kingdom. The statute made clear that, *for appeals*, the appropriate appeal court depended on the place where the first instance adjudicator made his decision. That point was not in issue. What *was* in issue was whether the Court of Session had jurisdiction to entertain a petition for judicial review seeking to reduce (i.e. quash) a decision of the IAT made in London. The answer was that the courts of England and Wales and Scotland had concurrent jurisdiction, but whether they should exercise that jurisdiction depended on the identification of the "appropriate forum", applying the principle in *Spiliada Maritime Corp. v Cansulex Ltd* [1987] AC 640.

33 This brief description should be sufficient to show that *Tehrani* did not turn on whether the proceedings before the IAT were "proceedings… in England and Wales", the phrase used in s. 6(2) and (3) of the 1997 Act. The statutory provision governing appeals was framed in terms similar to s. 7 of the 1997 Act, save that the destination of the appeal depended on the place where the first instance determination had been made. So far as judicial review was concerned, the House of Lords held that, in general, the courts ought to follow the statutory position in relation to appeals, so that the appropriate forum would depend on the place where the adjudicator gave his decision. There might, however, be exceptional circumstances which dictated a different result: see [25] (Lord Nicholls). On the facts, the Scottish court should have accepted jurisdiction even though both the adjudicator and the IAT were sitting in London: [26]-[28]. Lord Hope and Lord Rodger both agreed as to the outcome. For Lord Rodger, one of the questions relevant to the identification of the "appropriate forum" was whether the relief sought was "in form or substance a reduction of a decree of a foreign court": see the Scottish case law cited at [98]. In answering that question at [99], Lord Rodger said this of the IAT decision of which the petitioner sought judicial review: "Certainly, it is the decree of a court or tribunal sitting in England. But the country where a body sits is not an invariable pointer to its nationality". At [100]-[101], he went on to say that the IAT was a United Kingdom body over which the Scottish court had jurisdiction in cases with a Scottish connection.

34 Despite Mr Southey's tenacious submissions, I do not think anything in *Tehrani* assists him. Its main relevance lies in the assumption (albeit the point does not seem to have been argued) that a statutory provision meant what it said when it allocated appeals to the Court of Appeal of England and Wales in cases where the first instance determination was made by an adjudicator in England and Wales. That point seems to me to undermine, rather than support, Mr Southey's construction.

35 Insofar as it addresses the position in relation to judicial review, *Tehrani* shows that, *in general*, the appropriate forum for judicial review will be the same as for an appeal. I accept that it shows that there may be exceptional cases where it is appropriate for the courts of one part of the United Kingdom to entertain judicial review proceedings in relation to decisions made in another, but this does not seem to me to assist Mr Southey's argument on the interpretation of the statutory provisions in issue here, which are not directly concerned with judicial review at all.

36 I turn now to the question whether s. 3 HRA requires that s. 6(2) and (3) to be "read down". The Appellant submits that, having repeatedly asserted her choice to have a Northern Ireland-qualified special advocate appointed to represent her interests, the ECHR requires her choice to be respected unless there are relevant and sufficient grounds for restricting it. She relies for these purposes on the decisions of the European Court of Human Rights in *Croissant v Germany* (1992) 16 EHRR 135 at [29] and of the UK Supreme Court in *In re Maguire* [2018] 1 WLR 1412 at [30].

37 *Croissant* arose from criminal proceedings in Germany in which the applicant was represented by two lawyers of his own choosing but the court appointed a third, whom he did not choose and in whom he did not have confidence. He was convicted and ordered to pay the fees of all three lawyers. This was held not to give rise to any violation of Article 6 ECHR. At [27], the Court said:

> "… appointment of more than one defence counsel is not of itself inconsistent with the Convention and may indeed be called for in specific cases in the interest of justice. However, before nominating more than one counsel a court should pay heed to the accused's view as to the number needed, especially where, as in Germany, he will in principle have to bear the consequent costs if he is convicted. An appointment that runs counter to those wishes will be incompatible with the notion of fair trial under article 6(1) if, even taking into account a proper margin of appreciation, it lacks relevant and sufficient justification".

At [28] the Court held that the appointment of a third counsel was justified by the need to avoid interruptions and adjournments. At [29], the Court said this:

> "It is true that article 6(3)(c) entitles 'everyone charged with a criminal offence' to be defended by counsel of his own choosing. Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned

> and also where, as in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendant's wishes; indeed, German law contemplates such a course. However, they can override those wishes when there are relevant and sufficient grounds for holding that this is necessary in the interests of justice."

On the facts, the Court held that there were relevant and sufficient reasons for the appointment of the third defence counsel notwithstanding the applicant's objections.

38 *In re Maguire* arose from criminal proceedings in Northern Ireland. The appellant wanted to be represented by two junior counsel. That was not permitted by the Northern Ireland Bar Code of Conduct unless senior counsel were unavailable. He argued that this infringed his Article 6 right to counsel of his choice. The Supreme Court rejected that argument. Lord Kerr (with whom the other members of the court agreed) reviewed the Strasbourg authorities and held as follows at [38]:

> "… the essence of the right to choose one's counsel lies in the contribution that the exercise of that right makes to the achievement of the ultimate goal of a fair trial. It is not an autonomous right which falls to be considered outside that context. On that account, the circumstances in which and the reasons that Mr Maguire expressed a wish to have Mr Barlow as his 'leading counsel' are of obvious importance and require close examination."

At [42], Lord Kerr said this:

> "[The relevant rule in the Code of Conduct] is obviously designed to ensure that proper representation of accused persons should be guaranteed when a certificate for two counsel has been issued. Imposing a requirement that senior counsel be engaged, unless none is available, is entirely consonant with that aim. There is no question of interference with the applicant's right under article 6. To the contrary, the rule is designed to promote and vindicate that right."

39 In this case, it is not clear that the proceedings before the Commission involve a determination of civil rights for the purposes of Article 6. Even assuming that Article 8 confers equivalent procedural rights, however, neither *Croissant* nor *In re Maguire* provides any basis for concluding that s. 6(2) or (3) is incompatible with the Convention's procedural guarantees insofar as it prevents the appointment in proceedings in

England and Wales of a Special Advocate who does not have rights of audience in the courts of England and Wales.

40 In the first place, it would be impossible to suggest that the rule which in general prevents those without a right of audience in England and Wales from appearing in the courts of England and Wales infringes Article 6. That rule, like the conduct rule considered by the Supreme Court in *In re Maguire*, is designed in the interests of litigants. It ensures that litigants are represented by persons who have been accredited as competent in the law and procedure applicable in the courts of England and Wales. Since that law and procedure differs from the law and procedure applicable in Northern Ireland and Scotland, a rule which in general prevents those qualified in the latter jurisdictions from appearing before the courts of England and Wales (and *vice versa*) protects and promotes the interests of litigants. Applying *In re Maguire*, I would hold that it gives rise to no interference with Article 6 or 8 rights; so there is nothing which needs to be justified.

41 The Commission is a UK-wide tribunal, but when it makes a determination in England and Wales, the appeal from that determination lies to the Court of Appeal of England and Wales. This means that a lawyer instructed before the Commission who is not qualified in England and Wales will not be entitled to act in any appeal. If an appellant decides to instruct open lawyers who will be unable to act on any appeal, she may end up having to instruct alternative lawyers later on. That is a matter for her. The costs of instructing special advocates are, however, met by the Crown. I can see no reason why the Crown should be required to pay the costs of instructing someone who will not be able to appear as of right if the determination is appealed. It is also highly desirable from the appellant's point of view that the same special advocate who appears before the Commission should also be able to appear before the Court of Appeal. Given that there are many experienced special advocates with a right of audience in the courts of England and Wales, I would hold that s. 6(3) does not give rise to any interference with the Appellant's Article 6 or 8 rights. If, contrary to my view, there is any interference, it is a minimal one; and the desirability of appointing a special advocate who will be able to appear as of right in any appeal supplies a relevant and sufficient reason amply capable of justifying it.

42 Insofar as reliance is placed on Article 14, that reliance is misplaced. Even assuming that the restriction in s. 6(3) of the 1997 Act falls within the ambit of Article 6 or 8, it would be necessary to show that the restriction in s. 6(3) impacts disproportionately on Irish nationals and/or residents so as to give rise to indirect discrimination within the principle in *DH v Czech Republic* (2008) 47 EHRR 3. In my judgment, for essentially the reasons given by Mr Tam in argument, that is not established here. An appellant has an obvious interest in the appointment of special

advocate with appropriate experience whom he or she is able to meet in person before the special advocate receives the closed material. But there are plenty of special advocates in England and Wales who have the appropriate experience and who would be willing and able to travel to the Republic of Ireland for a meeting.

43 Mr Southey suggested that Irish nationals/residents are disadvantaged because they are more likely than other appellants to be involved in an appeal which raises an issue requiring particular knowledge and understanding of conditions in Northern Ireland or of Northern Irish law. I would not regard that proposition as self-evident. Even if it were established, however, there are special advocates qualified in England and Wales who have that knowledge and understanding (some of whom are dual-qualified). In any event, insofar as reliance is placed on the need for someone expert on Northern Ireland law, it must be borne in mind that what is in issue here is the appointment of a special advocate. The special advocate's function is to make submissions, and cross-examine witnesses, in relation to closed material. The main submissions of law will be dealt with by the open representatives.

44 In those circumstances, I do not accept that an appellant who is a national of or resident in Ireland will suffer a particular disadvantage or adverse impact because of the rule that only a special advocate qualified in England and Wales can act. If, contrary to my view, there is such an impact, it is justified by the desirability (both from a public interest point of view and in the interests of the individual appellant) of having a special advocate appointed who is entitled as of right to appear on any appeal.

45 Accordingly, I reject the submission that s. 6(3) of the 1997 Act should be "read down" in accordance with s. 3 of the HRA. It has not been suggested that the procedural guarantees applicable under Article 47 of the EU Charter of Fundamental Rights confer any greater protection than Article 6 ECHR in the cases where it applies. It follows that I also reject the submission that s. 6(3) should be read down in accordance with EU law.

46 For these reasons, I conclude that these are "proceedings before the Commission in England and Wales" within the meaning of s. 6(2) and (3) of the 1997 Act. The relevant law officer who must appoint a special advocate is the Attorney General for England and Wales; and the person appointed must have a general qualification for the purposes of s. 71 of the Courts and Legal Services Act 1990. This means that Mr Scoffield QC cannot lawfully be appointed.

47 This analysis does not mean that the *open* representatives must also be qualified in England and Wales. For my part, I would read the reference in r. 33(1)(a) to "a qualification referred to in" s. 6(3) of the 1997 Act as

including a person qualified in England and Wales only where the proceedings are "proceedings before the Commission in England and Wales", but on any view r. 33(1)(c) empowers the Commission to give leave to any other person to act. On the Appellant's case, the proceedings do involve an issue of Northern Irish law (or of United Kingdom law which has particular significance for Northern Ireland) concerning the construction and application of the Good Friday Agreement, which the open representatives (though not the special advocates) are likely to have to argue. That supplies a particular reason for permitting the Appellant to have open representatives qualified in Northern Ireland. There is no reason not to give leave to PL and Ms Smyth to act before the Commission and I therefore give that leave.

Issue (a): Should the stay be lifted?

48 In considering whether the stay should be lifted, it is important to understand the nature of the Appellant's argument. Mr Southey helpfully clarified at the hearing that the principal argument which will be advanced on her behalf is not that she *was* a British citizen when the decision was made, but that:

(a) her father was a British citizen and, accordingly, she *would have been* a British citizen had her mother and father been married when she was born; and

(b) since there is no good reason for treating those whose parents were married differently from those whose parents were not, she is entitled, by virtue of Article 14 read with Article 8 ECHR, to be treated for the purposes of any decision to exclude her *as if* she were a British citizen.

49 To establish (a), the Appellant will need to provide proof of the relationship with the man she says was her father and proof of his nationality at the time of her birth. If there is any dispute about these things, the tribunal will have to resolve it for itself, making findings of fact on the balance of probabilities. In this respect, the tribunal's position will be no different from that of the Administrative Court hearing a claim for judicial review. Even there, the question whether a person is a British citizen would be a question of precedent fact: *R v Secretary of State for the Home Department ex p. Khawaja* [1984] AC 74.

50 To establish (b), the Appellant will need to show that the Secretary of State acted unlawfully by failing to treat her as a British citizen even though she could have applied for registration as a British citizen pursuant to ss. 4E-4I of the 1981 Act (and could still do so now). Mr Southey indicates that her case will depend in part on her desire not to declare, or be seen to declare, her allegiance to the Crown – something

which he says would be necessary if she were to make an application for registration as a citizen.

51 I have summarised the arguments in brief, not with a view to deciding them or even commenting on them at this stage, but so as to make clear the scope and nature of ground 1 of the appeal. It is clear that, if that ground were to succeed, it would be determinative of the appeal. It is equally clear that ground 1 could properly be determined as an entirely open preliminary issue.

52 In my judgment, there is force in the Appellant's submission that she is entitled to proceed with the appeal. She has been excluded from the United Kingdom in circumstances which she claims were unlawful. As a resident of a town close to the border between the Republic of Ireland and Northern Ireland, the exclusion has a real impact on her life. She does not wish to make a positive application for British citizenship. If her argument is correct, there is no reason why she should have to. She is entitled to have that argument determined. The Secretary of State no longer opposes the lifting of the stay.

53 In the circumstances, I have ordered that it should be lifted to enable the appeal to proceed and I have given directions for the determination of ground 1 as a purely open preliminary issue.