Appeal No: SC/167/2020
SC/168/2020
SC/171/2020
Hearing Date: 23rd, 24th, 25th, 26th, 27th November 2020
Date of Judgment: Thursday 18th March 2021

Before

THE HONOURABLE MR JUSTICE CHAMBERLAIN
VICE PRESIDENT OF THE UPPER TRIBUNAL MR C.M.G OCKELTON,
MRS JILL BATTLEY

Between

C3, C4, C7

Appellants

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

OPEN JUDGMENT

MR D. SQUIRES QC, MS J. JONES and MS P. WOODROW (instructed by Birnberg Perice Solicitors) appeared on behalf of the Appellant C3.

MR D. SQUIRES QC, MS J. KERR MORRISON and MS I. BUCHANAN (instructed by Irvine Thanvi Natas Solicitors) appeared on behalf of the Appellant C4

MR H. SOUTHEY QC and **MR A. MACKENZIE** (instructed by Duncan Lewis Solicitors) appeared on behalf of the Appellant C7.

MRS L. GIOVANNETTI QC, MR A. DEAKIN and **MS J. THELEN** (instructed by **the Government Legal Department**) appeared on behalf of the Secretary of State

MR M. GOUDIE QC, MS J. CARTER-MANNING QC, MR D. LEMER and **MR D.LEWIS** (instructed by **Special Advocates' Support Office**) appeared as Special Advocate

Introduction and summary

1 On 8 November 2019, the Secretary of State for the Home Department ("SSHD") decided to deprive C3 and C4 of their British citizenship. On 30 March 2020, she decided to deprive C7 of his British citizenship. We held a preliminary issues hearing from 23-27 November 2020.

2 At this hearing, we considered two arguments advanced by the appellants:

(a) At the time when the decisions were taken, C3, C4 and C7 had no nationality other than that of the UK. The power exercised by the SSHD was not available in those circumstances.

(b) Even if the power had been available, the SSHD failed to give proper notice of its exercise.

3 Since the hearing, on 26 February 2021, the Supreme Court has given judgment in *Shamima Begum v SSHD* [2021] UKSC 7. Unlike in that case, the issues we have had to consider are not concerned with the question whether the SSHD should have taken the decisions she did, but whether those decisions were legally open to her.

4 For the reasons which follow we have accepted the first argument advanced by the appellants. This means that the SSHD could not in law make the decisions she made. The appeals succeed for that reason alone.

The statutory framework

5 All the decisions were purportedly taken under s. 40(2) of the British Nationality Act 1981 ("the 1981 Act"), which authorises the Secretary of State by order to deprive a person of citizenship if satisfied that deprivation is conducive to the public good.

6 Section 40(4) of the 1981 Act provides that the Secretary of State may not make an order under s. 40(2) if satisfied that the order would make a person stateless. The Secretary of State was not so satisfied in relation to C3, C4 and C7, because in her view all of them were nationals of Bangladesh.

7 Section 40(5) of the 1981 Act provides that, before making an order under s. 40 in respect of a person, the Secretary of State must give the person written notice specifying (a) that the Secretary of State has decided to make such an order, (b) the reasons for the order and (c) the person's right of appeal under s. 40A(1) of the 1981 Act or under s. 2B of the Special Immigration Appeals Commission Act 1997 ("the SIAC Act").

8 Section 41 of the 1981 Act empowers the Secretary of State by regulations to make provision for the giving of any notice required or authorised to be given to any person under the Act. Regulations have been made: the British Nationality (General) Regulations 2003 (SI 2003/548). Regulation 10 prescribes how the notice required by s. 10 is to be given. By an amendment made in 2018, reg. 10(4) provides as follows:

"Where—

(a) the person's whereabouts are not known; and

(b) either—

(i) no address has been provided for correspondence and the Secretary of State does not know of any address which the person has used in the past; or

(ii) the address provided to the Secretary of State is defective, false or no longer in use by the person; and

(c) no representative appears to be acting for the person or the address provided in respect of that representative is defective, false or no longer used by the representative,

the notice shall be deemed to have been given where the Secretary of State enters a record of the above circumstances and places the notice or a copy of it on the person's file."

9 In C3's and C4's case, the Secretary of State concluded that the conditions set out in reg. 10 were met and placed a copy of the notice of the decision to make deprivation orders in their cases on their files. Their representatives learned of the decisions when the Foreign and Commonwealth Office (as it then was) wrote to them on 18 December 2019. They lodged appeals and the Commission extended time for those appeals to proceed.

10 In C7's case, there is no dispute that notice was properly served and no dispute that his appeal was validly lodged.

The issues

11 On 18 May 2020, Steyn J directed that certain of C3's and C4's grounds of appeal be determined as preliminary issues:

(a) whether the deprivation decisions were unlawful because the Secretary of State failed to comply with the notice requirement in s. 40(5) of the 1981 Act and reg. 10 of the Regulations and whether that failure amounted to an abuse of process;

(b) whether the Secretary of State was satisfied that the deprivation decisions did not render the appellants stateless and whether the deprivation decisions did in fact render the appellants stateless.

12 C7's case raises issues concerning Bangladeshi nationality which overlap with those arising under issue (b). On 7 October 2020, those issues were joined to be determined with the preliminary issues in C3's and C4's cases. One subsidiary issue arising in relation to those issues is whether we can rely on CLOSED evidence in determining them. Another is whether the Secretary of State's approach to them amounts to an abuse of process insofar as it involves a departure from the approach adopted by her, and by the Commission, in previous cases.

13 None of the other issues arising in these cases fall for determination by the Commission at this stage. We say nothing about those other issues.

14 For reasons which will become apparent, we have considered the nationality issues first.

The nationality issues

General principles

15 The general principles are not in dispute.

16 First, s. 40(4) of the 1981 Act prohibits the making of a deprivation order under s. 40(2) where the Secretary of State is satisfied that the order would make a person stateless. There is no requirement for the Secretary of State to be satisfied that the order would *not* make the person stateless.

17 Second, in s. 2B of the SIAC Act, Parliament has provided a right of appeal to the Commission against decisions to make deprivation orders taken on national security grounds. In such appeals, it is for the Commission to decide for itself whether the order would make the person stateless: *B2 v SSHD* [2013] EWCA Civ 616, [96] (Jackson LJ); *Al-Jedda v SSHD* [2014] AC 253, [30] (Lord Wilson). We have also considered the decision of the Supreme Court in *Shamima Begum v SSHD*. Nothing in that decision affects the Commission's duties in relation to the question of statelessness: see esp. [71] (Lord Reed).

18 Third, the issue is to be considered as at the date of the order: *Al Jedda*, [32]; *Pham v SSHD* [2015] 1 WLR 1591, [101] (Lord Sumption).

19 Fourth, the burden of proof is on the appellant to demonstrate that the order would render him or her stateless. If the court is left in genuine doubt whether a person who is deprived of his UK citizenship would be stateless, the appeal will fail. But cases will rarely turn on the burden of proof, because in practice both sides will call evidence and the Commission will have to make up its own mind: *Hashi v SSHD* [2016] EWCA Civ 1136, [23]-[24]; *E3 v SSHD* [2020] 1 WLR 1098, [55]-[58] (Flaux LJ).

20 Fifth, the term "stateless" in s. 40(4) is to be interpreted in accordance with the UN Convention Relating to the Status of Stateless Persons. According to Article 1 of that Convention, a person is stateless if he is "not considered as a national by any state under the operation of its law". There is a distinction between those who are stateless *de jure* (i.e. have no nationality under the laws of any state) and those who are stateless *de facto* (i.e. have such nationality but are denied the protection that should go with it). The definition in Article 1 of the Convention corresponds "broadly" to the first of these meanings, though the words of the Convention are determinative: *Pham*, [21].

21 Sixth, in English courts and tribunals, foreign law is treated as a question of fact which must be proved. Generally, this requires expert evidence, though not necessarily where the law in question is in English and is that of another English-speaking country whose law forms part of the common law: *KV (Sri Lanka) v SSHD* [2018] 4 WLR 166, [31] (Leggatt LJ).

22 Seventh, in *G3 v SSHD*, SC/140/2017, the Commission (chaired by Lane J) distilled from a previous decision of the Commission (chaired by Mitting J) in *Al-Jedda*, SC/66/2008, the following propositions of law relevant to the correct approach to the determination of foreign law in a case where expert evidence is relied upon:

(a) The function of experts is to assist the Commission in deciding what the courts of the foreign State would decide if the issue arose for decision before them.

(b) The Commission is not permitted to conduct its own researches into the foreign law.

(c) But if different views are expressed on the issue, the Commission must look at the sources referred to by the experts in order to decide between their conflicting testimony.

(d) The Commission is not entitled to reject agreed expert evidence unless:

> "it is 'obviously false', 'obscure', 'extravagant', or 'patently absurd', or if '[the relevant expert] never applied his mind to the real point of law' or if 'the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning'; or if the relevant foreign court would not employ the reasoning of the expert even if it agreed with the conclusion. In such cases the court may reject the evidence and examine the foreign source so as to form its own conclusions as to their effect. Or, in other words, a court is not inhibited from 'using its own intelligence as on any other question of evidence'": Dicey, Morris & Collins, *The Conflict of Laws*, 14th ed., para. 9-015.

(e) To the extent that the experts fail to say what rules of construction of the foreign state will apply to the legislative sources under consideration, the Commission must construe those sources in accordance with the English rules of statutory construction, since English law presumes that, in the absence of evidence to the contrary, the foreign rules of statutory construction are the same as the English rules: *Al-Jedda* [Commission decision SC/66/2008], [14], citing Dicey, Morris & Collins (op. cit.), para. 9-018.

23 There was, however, an issue on which the parties were not *ad idem*. That concerned the extent (if any) to which the Secretary of State could rely on CLOSED material on the issue of statelessness. The appellants submitted that it was difficult to see how CLOSED evidence could in principle be admissible, unless it went to the *application* of foreign law to the appellants – i.e. to some fact which the foreign law in question required to be established. That apart, the appellants submitted that CLOSED material was in principle inadmissible. When considering any foreign law, the task of the court was to ascertain "the meaning and effect which a court of [Bangladesh] would attribute to it if it applied correctly the law of that country": *A/S Tallinna Laevauhisus v Estonian State Steamship Line* [1947] 80 Lloyd's Rep 99, 108. Since secret law is not law (*Fothergill v Monarch Airlines* [1981] AC 251, 279G), material only before the court in CLOSED cannot properly assist the Commission in ascertaining that meaning and effect.

24 In our view, CLOSED material could in principle be relevant to the issue of statelessness. It could, for example, be relevant to the question whether some condition forming part of the foreign law was established. It seems more doubtful that it could be relevant in any other way, but we do not need to determine that point, because we have considered the

CLOSED material and, for reasons briefly set out in our CLOSED judgment, we do not consider that it assists us in any material way with the issues in this case, even on the assumption that it is admissible. In those circumstances, it is not necessary or appropriate to consider the issue of principle any further.

The facts

C3

25 C3 was born in the UK in 1990. She was 29 when she was deprived of her British citizenship. Both of her parents were born in places which now form part of Bangladesh. Her father came to the UK in 1957 as a Pakistani citizen. He became a British citizen and in doing so lost his Pakistani citizenship, in 1966. He died in 2009.

26 C3's mother came to the UK in 1987. She was issued with her first British passport in December 1990. There is no direct evidence as to whether or when she was naturalised as a British citizen.

27 C3 was, on any view, a British citizen under s. 1(1) of the 1981 Act by virtue of her birth in the UK to a father who was himself a British citizen.

C4

28 C4 was born in the UK on 26 January 1992. At the time of the deprivation decision she was 27 years old. C4's father was born in an area that is now part of Bangladesh in 1940. He moved to the UK in around 1965. He acquired settled status but never became a British citizen. He died in 1995.

29 C4's mother was born in an area that is now part of Bangladesh in 1951. She moved to the UK in 1990. She acquired British citizenship in 2002. She died in 2019.

30 C4 was a British citizen under s. 1(1) of the 1981 Act because she was born here and her father had settled status at the time.

C7

31 C7 was born in Bangladesh in 1978. At birth he was a dual British-Bangladeshi citizen. He was a British citizen because his father was a British citizen at the time of his birth. He was a Bangladeshi citizen because of his birth there.

Key provisions of Bangladesh law

32 The territories now comprising Bangladesh were part of British India until 1947, when they became East Pakistan. Bangladesh became an independent State on 26 March 1971. There are three key Bangladeshi legal instruments which are relevant to the issues in this case.

33 The first was originally part of the law of Pakistan: the Citizenship Act 1951 ("the 1951 Act"). It was written in English and the English version remains the only authentic one. It provides in material part as follows. The words in square brackets are the result of an amendment made in 2009. One of the issues in C3's case is whether the amendment had retrospective effect:

"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 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 of Mission in that country, or where there is no Bangladesh Consulate or Mission in that country, at the prescribed 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."

34 Bangladesh declared independence on 26 March 1971, from which date the Proclamation of Independence of Bangladesh served as the new State's interim constitution. It was adopted by the Constituent Assembly on 10 April 1971 with retrospective effect from 26 March 1971. It gave the President power to legislate by making Presidential Orders. Such Orders had the status of primary legislation. The 1951 Act, together with other laws in force at the time of independence, were given effect by the Bangladesh (Adaptation of Existing Bangladesh Laws) Order 1972 (Presidential Order No. 48 of 1972).

35 The Bangladesh Citizenship (Temporary Provisions) Order 1972 (Presidential Order No. 149 of 1972) ("the 1972 Order") was made on 15 December 1972, but was given retrospective effect from 26 March 1971. On 16 December 1972, the final Constitution was adopted. It conferred power on the President to promulgate ordinances. The 1972 Order was amended by the Bangladesh Citizenship (Temporary Provisions) (Amendment) Ordinance 1973 and then again by the Bangladesh Citizenship (Temporary Provisions) (Amendment) Ordinance 1978. All these instruments were enacted in English. In its amended form, the 1972 Order provides in material part as follows:

"2. Notwithstanding anything contained in any other law, on the commencement of this Order, every person shall be deemed to be a citizen of Bangladesh—

(i) who or whose father was born in the territories now comprised in Bangladesh and who was a permanent resident of Bangladesh on the 25th day of March, 1971, and continues to be so resident; or

(ii) who was a permanent resident of the territories now comprised in Bangladesh on the 25th day of March 1971, and continues to be so resident and is not otherwise disqualified for being a citizen by or under any law for the time being in force:

Provided that if any person is a permanent resident of the territories now comprised in Bangladesh or his dependent is, in the course of his employment or for the pursuit of his studies, residing in a country which was at war with, or engaged in military operations against Bangladesh and is being prevented from returning to Bangladesh, such person or his descendants, shall be deemed to continue to be resident in Bangladesh.

2A. A person to whom Article 2 would have ordinarily applied but for his residence in the United Kingdom shall be deemed to be permanently resident in Bangladesh within the meaning of that Article:

Provided that the Government may notify, in the official Gazette, any person or categories of person to whom this Article shall not apply.

2B. (1) Notwithstanding anything contained in Article 2 or in any other law for the time being in force, a person shall not, except as provided for in clause (2), qualify himself to be a citizen of Bangladesh if he:

(i) owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state, or

(ii) is notified under the proviso to Article 2A:

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.

(2) 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.

3. In case of doubt as to whether a person is qualified to be deemed to be a citizen of Bangladesh under Article 2 of this Order, the question shall be decided by the Government, which decision shall be final.

4. The Government may, upon an application made to it in this behalf in the manner prescribed, grant citizenship to any person.

4A. The Government may, upon an application made to it in this behalf in the manner prescribed, grant right of permanent residence to any person on such conditions as may be prescribed."

36 In 2008, the Bangladesh Government exercised the power conferred by Article 2B(2) of the 1972 Order by giving an Instruction (SRO No. 69/2008: "the 2008 Instruction"). This was in the Bangla language. There is no official English version. There are competing translations – and we heard evidence about these, which we consider below. One was described by the Court of Appeal as the "most authoritative": *E3 and N3 v SSHD* [2020] 1 WLR 1098, [14]. It provides in material part as follows:

> "The Government, in the exercise of the power conferred in sub-article (2) of article 2B [of the 1972 Order as amended] by cancelling all the circulars or directives or orders or notifications issued hereinbefore in this behalf, has issued the following directives only in the case of the United Kingdom as regards granting or continuation of Bangladeshi citizenship of those Bangladeshis who have acquired citizenship of the United Kingdom:
>
> (a) The Bangladeshi citizenship of any citizen of Bangladesh according to the law as in force in Bangladesh shall remain as it is notwithstanding their acquiring citizenship of the United Kingdom, unless the oath to be taken for acquiring citizenship of that country does contain any oath to renounce allegiance to their own country (Bangladesh);
>
> (b) In the aforesaid circumstances, the citizen of Bangladesh, who has acquired citizenship of the United Kingdom, shall not be required to obtain dual citizenship from the Government of Bangladesh;
>
> (c) All Bangladeshis who have acquired citizenship of the United Kingdom may retain and use their Bangladeshi passports;
>
> (d) On the expiry of their validity, their passports shall have to be renewed as usual;
>
> (e) Bangladeshi passports can be issued again to those who had previously acquired citizenship of the United Kingdom.
>
> (2) This order shall be applicable only in the case of citizens of Bangladesh acquiring citizenship of the United Kingdom."

The *note verbale*

37 On 7 January 2018, the UK Government made a formal request to the Bangladesh Government for answers to certain questions about Bangladesh nationality law. The answers were given in a *note verbale* (a formal diplomatic communication) on 3 June 2018 as follows:

> "1. Does SRO No. 69 apply to:

(i) individuals who are Bangladeshi citizens at birth and later naturalise as British citizens?

(ii) individuals who are dual Bangladeshi/British citizens at birth, by descent?

Or both of the above?

According to the Bangladesh Citizenship (Temporary Provisions) Order 1972 PO No 149 of 1972 every person shall be deemed to be a citizen of Bangladesh who or whose father or mother or grandfather was born in the territories of Bangladesh. SRO No. 69 is applied for Bangladeshi Citizen.

2. Does SRO No 69 have retrospective effect, i.e. does it apply to those who prior to 18 March 2008 were naturalised as British citizens and/or those who acquired their Bangladeshi/British citizenship at birth?

Yes. SRO No. 69 has retrospective effect. It applies to those who prior to 18 March 2008 were naturalised as British Citizens and also for those who acquired their Bangladeshi/British Citizenship at birth.

3. If SRO No. 69 does apply to individuals who are dual Bangladeshi/British citizens at birth, by descent and SRO does have retrospective effects, would it apply to someone who had reached the age of 21 (and therefore may have lost their Bangladeshi citizenship in accordance with section 14 of the Citizenship Act 1951) prior to 18 March 2008?

Yes. SRO No 69 is applied for those individuals who had reached the age of 21 prior to 18 March 2008 also.

4. How did SRO No. 69 change the existing law in relation to dual Bangladeshi/British nationals?

According to the Bangladesh Citizenship (Temporary Provisions) Order 1972 PO No. 149 of 1972 section 2B(2) the Government of Bangladesh has issued the SRO No 69-Law/2008. Bangladesh Citizenship (Temporary Provisions) Order 1972 PO No. 149 of 1972 comes after the Citizenship Act 1951. If anything is contradictory with other previous existing law, the Bangladesh Citizenship (Temporary Provisions) Order 1972 No 149 of 1972 will prevail over them. So, there is no contradiction between the existing Bangladeshi Laws and SRO 69-Law/2008 in relation to dual Bangladeshi/British nationals."

<u>The appellants' submissions on the issues common to them</u>

38 C3 says that she was never a citizen of Bangladesh by descent. But on her case that argument does not matter because, even if she was originally a citizen, she lost her citizenship when she turned 21. This latter argument is advanced by the other appellants too. It is therefore convenient to deal with it first. The argument has three strands, each of which is supported by the expert evidence of Professor Hoque.

39 First, the effect of s. 14 of the 1951 Act (read on its own) is that a person who is a citizen of Bangladesh and at the same time a citizen of another country loses her Bangladeshi citizenship unless she renounces her other citizenship. Section 14(1A) gives protection against the operation of this provision for under-21s. But if a person does not renounce her citizenship when she turns 21 she loses her Bangladeshi citizenship.

40 Second, article 2B(1) of the 1972 Order does not address the circumstances in which dual citizenship can be conferred and does not confer any right to dual citizenship.

41 Third, the 2008 Instruction does not apply to those who became British citizens at birth, only to those who acquired British citizenship by naturalisation.

42 The second and third of these points were contested by the SSHD. We have considered them in turn.

Did the proviso to article 2B(1) mean that these appellants retained any Bangladeshi nationality after they turned 21?

The appellants' case

43 The appellants submit that this issue has been considered by the Commission on three previous occasions. In *G3*, the appellant was in a position materially similar to that of C3, C4 and C7. The appellant relied on the evidence of Prof. Hoque. By the end of the hearing it was common ground that article 2B(1) of the 1972 Order did not apply to her. The Commission found at [63] that the opening words of article 2B(1) show that the effect of that article is confined to persons alive on commencement of the 1972 Order (i.e. to the original citizens of Bangladesh). The decision was not appealed by the SSHD.

44 The same issue arose in *E3 & N3*. Their positions were also materially similar to that of C3, C4 and C7. They again relied on the evidence of Prof. Hoque. The SSHD argued that article 2B(1) applied. The Commission held that:

(a) article 2B(1) of the 1972 Order does not confer a right of citizenship; any right to citizenship must come from ss. 4 and 5 of the 1951 Act: [63]-[64];

(b) if the 1951 Act applied at all, that included s. 14: [65];

(c) article 2B(2) was the principal operative provision in the case of dual nationality, not article 2B(1): [66].

45 On that basis, the Commission rejected the SSHD's case based on article 2B(1). The SSHD appealed on various grounds – not including this one – to the Court of Appeal: see [2019] EWCA Civ 2020, at [23].

46 Finally, in *Shamima Begum v SSHD,* Ms Begum sought to argue that Article 2B had superseded s. 14 of the 1951 Act. It was in her interests to do so, because she was under 21 at the time of the deprivation decision. (The argument was that both the prohibition on

dual citizenship and the exception to it for under 21s were overridden by the 1972 Order.) The Commission (chaired by Laing J) said this at [118]-[120]:

> "118. In our judgment, art. 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 art. 2B(2), if he owes allegiance to a foreign state, or is notified under the proviso to art. 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 art. 2B(1) would be to qualify the general rule enacted by art. 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 art. 2B(1), *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 art. 2B(1), rather than qualifying art. 2B(1), appears to some extent to mitigate the effect of s. 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 art. 2B(2) does not cause that person to cease to be a citizen of Bangladesh. As we have noted, Dr Hoque explains, however... that that is not the effect of the proviso: the phrase 'merely by' does not exclude the operation of s. 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 s. 14(1) of the 1951 Act.
>
> 120. ...we accept Professor Hoque's evidence that art. 2B(1) was simply inserted to deal with the position of the Bihari people and does not have the far-reaching effect which it appears to have."

47 The appellants submit that the SSHD's attempt to re-argue points already determined by the Commission amounts to an abuse of process. Previous decisions of the Commission as to the proper interpretation of Bangladeshi law should be followed unless there is very good reason to depart from them. Although foreign law is a question of fact, and decisions on questions of fact are not binding save as between the parties to the decision, there is a well-established jurisprudence in the immigration context governing the use of findings of fact in previous decisions arising out of the same factual matrix. The jurisprudence begins with the decision of the Immigration Appeal Tribunal in *Devaseelan v SSHD* [2003] Imm AR 1, which was affirmed in *AA (Somalia) v SSHD* [2007] EWCA Civ 1040 and more recently in *AL (Albania) v SSHD* [2019] EWCA Civ 950. Although the doctrine has previously been applied in relation to decisions involving family members, there is no reason of principle why it should not apply here – where the proper interpretation of Bangladesh law is also a factual issue likely to arise in many cases.

48 On the substance, the appellants submit, relying on Prof. Hoque's evidence, that article 2B(1) was introduced to deal with a particular group who would otherwise have qualified for citizenship – the Biharis or "stranded Pakistanis", ethnic Urdu-speakers who were

perceived to have sided with Pakistan during the civil war and so to be loyal to Pakistan rather than Bangladesh. It does not refer or apply to dual citizens, but to those who owe, affirm or acknowledge allegiance to another state. The proviso inserted in 1978 was intended to cover the situations covered in article 2B(2) – i.e. to prevent the grant of dual citizenship from being immediately nullified by article 2B(1). Article 2B(1) does not, however, itself confer any right to dual citizenship.

The SSHD's submissions

49 The SSHD submits that the historical context in which this legislation was enacted is important. Following the declaration of independence on 26 March 1971, there was a nine month long war with Pakistan. Bangladesh declared victory on 16 December 1971. The Constitution was adopted in the following year. The 1951 Act and 1972 Order can be described as the "foundational legislative provisions governing Bangladeshi citizenship".

50 The SSHD submits that, as originally enacted, the 1972 Order redefined those who were to be citizens of Bangladesh. Its article 2 (which begins "[n]otwithstanding anything contained in any other law…") effectively replaced s. 3 of the 1951 Act and set out the criteria the new State had decided to apply in order to identify who was to qualify as an "original" citizen.

51 Section 14 of the 1951 Act prohibited dual citizenship, save for those under 21. The 1973 Ordinance added two new provisions to the 1972 Order: Articles 2A and 2B. The latter was broader than s. 14. It disqualified from citizenship anyone who "owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state" even if he or she was not a citizen of that state and even if under 21. The key policy reason for this was to disentitle groups who were perceived to be loyal to Pakistan rather than Bangladesh. One such group were the Biharis.

52 The position as regards dual citizenship was revisited in the 1978 Ordinance. This reformulated article 2B of the 1972 Order. There were two changes. First, the proviso introduced an exception to the broad disqualification for those who owe, affirm or acknowledge allegiance to a foreign state. Such a person would not cease to be a citizen of Bangladesh merely by being a citizen or acquiring citizenship of certain specified states, including the UK. Second, there was a new power in article 2B(2) for the government to grant citizenship to non-Bangladeshis who hold citizenship of one of the specified states.

53 The policy intention was to attenuate the effect of the 1973 amendment, allowing ties with the by now important and growing Bangladeshi diaspora. The maintenance of such ties continues to be of economic importance to Bangladesh.

54 The SSHD accepts that the 1951 Act and 1972 Order have to be read together. As Latifur Rahman J said in the Bangladesh Supreme Court in the leading case of *Bangladesh v Golam Azam* 46 DLR (AD) (1994) 192, [181], these two instruments are "to be read together to get a complete picture of the law of citizenship in Bangladesh". But where they are in conflict, the SSHD submits that the 1972 Order must prevail. Eight reasons for this are advanced.

55 First, in line with ordinary common law principles of statutory construction, where the provisions of two statues are in conflict, the later provisions prevail and the earlier are to be treated as impliedly repealed to the extent of the inconsistency.

56 Second, [181] of *Golam Azam* is not authority for the proposition that the 1972 Order has no overriding effect, only that it remains necessary to look at both instruments because their subject matters do not always overlap.

57 Third, the plain meaning of the opening words of article 2 of the 1972 Order ("Notwithstanding anything contained in any other law") expressly give that provision overriding effect.

58 Fourth, by the 1973 and 1978 amendments, the 1972 Order also now governs dual citizenship. Again, in accordance with common law rules of construction, the later instrument prevails to the extent of any inconsistency.

59 Fifth, the opening words of article 2B ("Notwithstanding anything contained in Article 2 or any other law") – referred to by the experts as the "*non obstante* clause" – expressly give that provision overriding effect.

60 Sixth, neither expert has been able to identify any case law bearing on the issue. There is no decided case in which a Bangladesh court has held that, despite the *non obstante* clause, s. 14 of the 1951 Act operates in respect of a person who holds dual citizenship of Bangladesh and one of the states specified under article 2B, so that such a person ceases to be a citizen at the age of 21.

61 Seventh, both experts agree that a generous and liberal approach is adopted to Bangladeshi citizenship law. As it was put by MJ Rahman J in *Golam Azam* at [47], "[t]he superior courts in our country have always interpreted the law of citizenship liberally so that one's claim to citizenship is upheld rather than destroyed".

62 Eighth, articles 2B(1) and (2) appear, on their face, to provide a complete code regulating dual citizenship under the law of Bangladesh. If the intention had been that dual citizenship should continue to be governed by the 1951 Act, one would expect that intention to have been given effect by an amendment to the 1951 Act (as was done when extending citizenship by descent to the maternal line).

63 The SSHD did not accept that the attempt to re-argue points determined in previous cases was abusive. In *Devaseelan* itself, the context was a human rights appeal arising out of the same facts as a previous asylum appeal. The appellant sought to re-argue factual matters previously determined against him. That was extended in *Ocampo v SSHD* [2006] EWCA Civ 1276 to cases where an individual sought to re-argue a point decided against a close family member in a previous decision. However, because the doctrine represented an exception to the usual rule that findings of fact were not binding save between the parties, it should be regarded as strictly limited in scope to cases where there is a close connection between the appellant in the instant case and the appellant in the previous decision. There was no warrant for extending it to cases such as the present, where there is no such connection at all. Reliance was also placed on the remarks of the Commission

in *G3*, at [98] ("the findings in this appeal are not necessarily determinative of any future appeal brought by a person in a similar position to that of G3") and *Begum*, at [29] ("decisions of other courts of England and Wales on the same question are not binding").

Discussion: the relevance of previous decisions of the Commission

64 We begin by addressing the appellants' submission that it was abusive for the SSHD to instruct an expert with a view to undermining the interpretation of Bangladesh law adopted by the Commission in previous cases. There is no decided case which establishes that the *Devaseelan* doctrine applies in this context. We are considering the point for the first time. So, we do not see how the SSHD could properly be criticised for taking the approach she did. In any event, the instruction of Mr Hossain was on any view justified because some of the points of law raised in this case are new ones. So we find nothing in the SSHD's attempt to re-argue these legal points that could properly be characterised as an abuse of the Commission's process.

65 However, the question of the status of previous decisions on matters of foreign law has now been raised and must be squarely confronted. As the hearing before us demonstrated, the determination of issues of foreign law is a complex and resource-intensive process. We spent the best part of a week hearing evidence and submissions on it. On each occasion when the issue has been considered before, the Commission has spent several days hearing evidence and submissions. Where the law is written in languages other than English, it may be necessary to consider, with the assistance of the experts and of translators, the merits of different translations. This was so here in relation to other parts of the legal analysis. Even where translation issues do not arise, it is necessary to consider with the experts the historical context of the various relevant statutory provisions and the relevant case law of the courts of Bangladesh.

66 If the SSHD's approach were to be accepted, it might be necessary to undertake such a process again and again, in an unlimited number of future appeals. Nor is the problem likely to be confined to the particular issue now under consideration (Bangladeshi nationality law). It is not unlikely that questions about the content or interpretation of the law of a particular country may arise for decision in multiple, and sometimes very large numbers, of cases. On the SSHD's approach, in each successive case it would be open to the SSHD – and no doubt to the appellant as well – to find another expert whose opinion chimes with the case that party seeks to advance and to require the Commission to evaluate that case afresh. If that is what the law requires, so be it. But the *Devaseelan* line of authority seems to us to point to a reason why, in the immigration context, the law does not require this.

67 The conceptual basis for the application of the *Devaseelan* doctrine to cases involving different (though related) parties is most clearly articulated by Carnwath LJ in *AA (Somalia)*. At [66], he noted that the doctrine "reflects the well-established principle of administrative law, that 'persons should be uniformly treated unless there is some reason to treat them differently'", a principle famously explained by Lord Hoffmann in *Matadeen v Pointu* [1998] 1 AC 98, 109C-D: "treating like cases alike and unlike cases differently is a general axiom of rational behaviour". As Carnwath LJ explained, the same principle animates the decision in *R (Iran) v SSHD* [2005] EWCA Civ 982, where at [21]-

[27] the Court of Appeal approved the practice of treating country guidance cases as binding absent evidence of a material change of circumstances.

68 Carnwath LJ said at [70] of *AA (Somalia)* that the obligation to treat like cases alike applies with particular force to the Secretary of State, because she is party to all decisions. If she were permitted to adopt one position in one case and another in a second factually similar case, she would necessarily be treating these like cases differently. (He might have added that the Secretary of State, as a public authority, is legally subject to the general axioms of rational behaviour in a way that private individuals are not.) But Carnwath LJ plainly did not intend to limit the application of the *Devaseelan* principle to cases where it is the Secretary of State, rather than the appellant, who seeks to re-argue a factual point decided in a previous case.

69 We recognise that the previous cases in which the *Devaseelan* doctrine has been applied involve previous decisions arising out of the same factual circumstances – either involving the very same appellant (as in *Devaseelan* itself) or a close family member (as in *Ocampo*). The most recent articulation of the scope of the doctrine was by Nicola Davies LJ (with whom Asplin and Bean LJJ agreed) in *AL (Albania)*, at [23]:

> "The approach to be taken by a tribunal to earlier findings of fact made in a determination relating to a different party, such as a family member, but arising out of the same factual matrix is now established... [I]n such a case the guidelines given by the Immigration Appeal Tribunal in *Devaseelan* apply. Those guidelines begin with the premise that the first tribunal's determination should be the starting point."

She added this at [25]:

> "not only is the earlier determination the starting point, it should be followed unless there is a very good reason not to do so".

70 Given that the conceptual justification for the doctrine is the need to treat like cases alike, we see no reason to confine its application to cases where the previous determination related to the same appellant or a family member. Indeed, the language used by Nicola Davies LJ in the excerpt quoted above – "<u>such as</u> a family member" – seems to us to have been carefully chosen to emphasise that previous determinations involving family members were simply examples of cases where the principle applied. The test is whether the previous determination arises out of the same factual matrix. No doubt, it may often be difficult to satisfy in cases where the previous determination concerns someone other than a close family member. But in our view, on a question of foreign law, a previous determination deciding precisely the same question of foreign law is a determination "arising out of the same factual matrix". Just as it would offend common law standards of rationality and equal treatment for a tribunal without very good reason to find for a man but against his wife, or *vice versa*, on the same factual issue, it would also breach those standards to find without very good reason that the law of a particular country applies to one citizen of that country but not to another citizen in materially the same factual situation.

71 It is, however, worth emphasising the significance of the caveat "without very good reason". Even where the factual situation is the same, the *Devaseelan* doctrine allows departure from a previous determination if there is very good reason to do so. It would not be sensible to attempt to lay down hard limits about what might count as a "very good reason". That will depend on the context. Even in the context of foreign law, it would not be desirable to lay down in advance what might count as a sufficient reason for departing from a previous decision. Cases where the previous decision had overlooked some material provision of foreign law or court decision are obvious examples where a departure would be justified.

72 In this case, however, the SSHD does not contend that the previous decisions of the Commission overlooked anything of that kind; nor that the law of Bangladesh has moved on in any material way. The argument is simply that the decisions reached previously are wrong. Mr Hossain's opinion is relied upon in support of that position.

73 If – as we have held – the previous decisions of the Commission (or, more specifically, those in *E3 & N3* and *Begum*, where the issue was argued and decided) are the proper starting point, we must start from the proposition that the proviso to art. 2B(1) did not prevent s. 14(1) of the 1951 Act from operating to deprive these appellants of their Bangladeshi citizenship when they reached the age of 21. As there are no very good reasons for departing from that finding, we would not do so. We recognise, however, that the application of the *Devaseelan* test to this issue is novel and we have therefore gone on to consider the position if, contrary to our view of the law, the Secretary of State were entitled to invite us to approach the matter afresh on the expert evidence we have heard.

Discussion: does the proviso to art. 2B(1) allow for the automatic retention of citizenship by these appellants?

74 Approaching this matter purely on the basis of the evidence we have heard, and without reference to the previous decisions of the Commission, we have reached the following conclusions.

75 First, as all parties agreed, and the Commission has noted on previous occasions, article 2B(1) is not easy to interpret if one focuses solely on its language shorn of historical context; so, it is necessary to consider that historical context. Its original purpose was to prevent those who were considered to have been hostile to Bangladesh at its inception from becoming citizens. There was no serious challenge to Prof. Hoque's account of the particular political problem (or perceived problem) to which it was directed – that of the Biharis or "stranded Pakistanis" who were seen as being loyal to Pakistan and on whom the authorities of the new state wished to avoid conferring citizenship. It was put to Prof. Hoque in cross-examination that article 2B(1) could not have been intended to bar citizens of friendly states from becoming citizens. Prof. Hoque's reply was, in our view, compelling: when article 2B(1) was originally enacted, in 1973, there was no possibility of dual citizenship as this was prohibited by s. 14, so the original language of article 2B(1) could not have been intended to say anything about people who were citizens of friendly states.

76 Secondly, the position changed in 1978, when article 2B(2) was inserted. That provision on its face confers power on the Government of Bangladesh to grant Bangladeshi

citizenship to citizens of certain friendly states. Prof. Hoque said that this was a significant change of posture on the part of the Government of Bangladesh. No doubt, it reflected a recognition of the political, cultural and economic importance of the Bangladeshi diaspora to the new State. The proviso to article 2B(1) was inserted at the same time. The fact that it is a proviso suggests that it was intended to qualify the effect of article 2B(1) rather than to effect a separate and fundamental change in nationality law. The fact that it was introduced at the same time as article 2B(2) suggests that the proviso was needed in the light of article 2B(2). All this powerfully supports the view that article 2B(2) is the principal operative provision.

77 Third, if it is right to regard article 2B(2) as the principal operative provision, then the proviso to article 2B(1) is most naturally read as making clear that the bare fact of dual nationality is not, in and of itself, something which demonstrates that an individual "owes, affirms or acknowledges... allegiance to a foreign state". There was, however, no intention to abrogate s. 14 of the 1951 Act generally. It would have been an odd drafting technique to do that by a proviso to an enactment which on its face removes the right to citizenship from a class of persons who would otherwise enjoy it.

78 Fourth, this interpretation is consistent with the reasoning of the High Court of Bangladesh in *Halim v Kaiser* 21 BLD (HCD) 2001, 391, where the respondents (who were MPs) had become ineligible to serve under a provision of the Constitution when they acquired US and UK nationality. The judge, Md Joynul Abedin J, said that they "[s]ubsequently again acquired citizenship... under article 2B(2)". On Mr Hossain's analysis, the proviso to article 2B(1) would have meant that they retained their Bangladeshi citizenship and there was no need to apply under article 2B(2).

79 Fifth, this interpretation is also consistent with the academic literature. In M. Islam, *Constitutional Law* (a work cited by Mr Hossain himself), the author notes that "S. 14 of the [1951] Act prohibits dual citizenship and a citizen of Bangladesh will cease to be a citizen of Bangladesh unless he renounces citizenship of any other state. By amendment of P.O. No. 149 [the amendment of 1978], a citizen of Bangladesh has been allowed to continue as a citizen of any of the specified states and accordingly, a citizen of Bangladesh can acquire citizenship of any such specified state without losing his citizenship of Bangladesh" (emphasis added). See also M.R. Islam, 'Nationality law and practice of Bangladesh', in K.S. Sik (ed.), *Nationality and International Law in Asian Perspective* (1990): "If a Bangladeshi national is simultaneously a national of another State, he must immediately relinquish his status as a national of that State, lest his Bangladeshi nationality be automatically extinguished" (in a passage which referred to both the 1951 Act and the 1972 Order).

80 Sixth, our view is bolstered by our impression of the witnesses:

(a) Prof. Hoque is an academic with particular expertise in Bangladeshi public law. He has advised the Government of Bangladesh in relation to nationality law. He has been instructed in cases before the Commission before, both by appellants and by the Secretary of State. The views he has expressed have been broadly consistent. Whilst the Commission has not always been convinced by every such view, it has generally accepted his evidence. We found him to be a thoughtful witness, who

reflected on the questions being put to him and gave explanations that were in general cogent, though it was sometimes necessary to invite him to elaborate.

(b) Mr Hossain is an experienced and articulate advocate, both in this jurisdiction and in Bangladesh. We have no doubt at all about his legal ability. But he accepted in cross-examination that, in many cases, his analysis was based on the application of "first principles" and differed from that of other commentators. This fact did not affect his confidence in the correctness of his view because, as he told us, he had on several occasions won cases before the highest courts in Bangladesh, successfully deploying arguments at odds with received wisdom. Whilst we admire Mr Hossain's intellectual confidence, we remind ourselves that our primary task is to ask ourselves how a court in Bangladesh would interpret the provisions in issue. Although common law courts are occasionally attracted by novel arguments based on "first principles", they more often decide cases in accordance with received and established views. For the reasons we have given, the appellants' arguments, based on the evidence of Prof. Hoque, seem to us to supply a safer guide to those views than the purist but idiosyncratic analysis of Mr Hossain.

81 It follows that:

(a) As British citizens from birth, s. 14 of the 1951 Act applied to C3, C4 and C7. Under that Act, assuming they were citizens of Bangladesh by descent, they had until their 21st birthdays to decide whether to renounce their British citizenship.

(b) C3 (if she was a citizen of Bangladesh by descent) and C4 and C7 (in any event) lost their Bangladeshi citizenship under s. 14 of the 1951 Act when they turned 21.

(c) This was not affected by the proviso to article 2B(1).

Does the 2008 Instruction have the effect of making these appellants citizens of Bangladesh?

Preamble: the status of notes verbales generally

82 We begin by recalling that, in *E3 & N3*, the Court of Appeal held that the Commission had erred in its approach to the interpretation of the 2008 Instruction. There were two errors. First, the Commission had wrongly confused the legal burden with the evidential burden. If the Secretary of State wanted to call evidence on the interpretation of the 2008 Instruction, the onus was on her to do so. That, however, did not alter the fact that it is the appellants who bear the legal burden of proving that the decision would render them stateless: [68]. This was unlikely to be determinative in many cases because "[i]n practice, decisions of courts or tribunals rarely turn on where the burden of proof lies". Normally, the court "simply considers the evidence in the round and decides a particular issue on the balance of probabilities": [69]. In this case, however, the Commission's reasoning was "infected" by its error as to where the burden of proof lay: [70].

83 The second error was that the Commission had mischaracterised the *note verbale* as being relevant only (or principally) to show the practice of the Bangladesh Government, as opposed to its view of the law. Flaux LJ said at [71] that this was wrong:

> "It is clear from both the questions and answers that what is being addressed is application or interpretation of the *law* of Bangladesh. The note verbale is an official document which complied with all the formalities. For whatever reason, SIAC failed to take account of the level of formality it entailed and disregarded that this was an official response as to the law from the correct ministry of a friendly foreign government. SIAC mischaracterised the note verbale as being somehow 'extra-official' and only evidence of or an opinion about *practice*."

84 We must ensure that we do not make the same mistakes as the Commission in *E3 & N3*. Accordingly, we have approached the interpretation of the 2008 Instruction as follows:

(a) On this issue, as with all others, the appellants bear the burden of proving that the challenged decisions would render them stateless. This means that they must convince us, on the balance of probabilities, that on its proper interpretation the 2008 Instruction does not apply to them.

(b) In considering that question, the *note verbale* is relevant: it is addressed to the proper interpretation of the law and not just to the practice of the Bangladesh Government.

(c) In deciding what weight to give to it, it must be borne in mind that it represents the official view of the correct ministry of the Bangladesh Government.

85 This, however, is only the starting point. The appellants submitted that we should consider how a court in Bangladesh would apply Bangladeshi law and then to do the same: see para. 22(a) above. There was no evidence before the Commission as to the weight that would be attached to the document by a court in Bangladesh, so the correct approach was to ask how an English court would treat such a document. They submitted that:

> "In this jurisdiction, the Court would determine the substantive issues for itself; once that determination had been made the Executive's opinion of what the law is – whether consistent with the Court's conclusion or otherwise – would not carry significant weight."

86 The Respondent, for her part, submitted that:

> "In the absence of Bangladeshi authority to the contrary (and there is none), there is simply no basis on which it would be appropriate for the Commission to go behind the clearly expressed views of the appropriate department of the Bangladeshi Government as to how that Government operates its own nationality laws."

87 In our view, neither of these submissions is correct. We begin by assuming that, in the absence of evidence as to the weight that would be given to the *note verbale* by a court in Bangladesh, the key question is what weight would be attached to an equivalent document by an English court: see para. 22(e) above. On that assumption, it is not correct to say

(without qualification) that such a document "would not carry significant weight". There are examples of documents expressing the view of the UK Government on questions of UK law, which would be admissible in a court in England and Wales. These include the explanatory notes and memoranda accompanying a statutory instrument and departmental "transposition notes" explaining how EU law has been implemented in a given case. Such documents might well be accorded significant weight in considering how to interpret the law to which they relate, particularly if they cast light on the mischief to which a particular provision was addressed, or the factual background against which it was enacted. But much would depend on the content and context of the statement in question. If, for example, they were promulgated at the same time as the relevant law, and contained apparently cogent and coherent explanations of its background or purpose, they would no doubt be entitled to considerable weight.

88 However, to submit – as the Secretary of State does– that the *note verbale* must be treated as determinative unless contradicted by Bangladeshi authority would be to apply a method of construction unknown to English law and antithetical to the rule of law generally. A sovereign government's view about the proper interpretation of its own law will often be of considerable interest and value, but it can never be determinative, even in the absence of authority from its courts. Everything we have seen and heard about the way the courts of Bangladesh operate (i.e. in a way which is, in general, robustly independent of the executive) leads us to think that they would take the same view. The weight to be accorded to a statement by the executive of its view on a particular point of law will depend on its terms and on all the circumstances.

Our conclusions about the weight to be accorded to the note verbale

89 In the circumstances of the present case, we make the following observations about the *note verbale*:

(a) For present purposes, the key question on which the experts are divided here is question 1: "Does [the 2008 Instruction] apply to: (i) individuals who are Bangladeshi citizens at birth and later naturalise as British citizens? (ii) individuals who are dual Bangladeshi/British citizens at birth, by descent? Or both of the above?" If the Secretary of State's interpretation is correct, the answer would be "both of the above". Instead, the answer was: "According to the [1972 Order] every person shall be deemed to be a citizen of Bangladesh who or whose father or mother or grandfather was born in territories of Bangladesh. [The 2008 Instruction] is applied for Bangladeshi Citizen." As the appellants submit, this suggests the drafter had not understood the question which is critical for present purposes. That fact seems to us to be very important in deciding what weight should be attached to the *note verbale* as a whole.

(b) Question 2 asks a different question – whether the 2008 Instruction has retrospective effect – i.e. "does it apply to those who prior to 18 March 2008 were naturalised as British citizens and/or those who acquired their Bangladeshi/British citizenship at birth?" The answer given was "Yes. SRO No. 69 has retrospective effect. It applies to those who prior to 18 March 2008 were naturalised as British Citizens and also for those who acquired their Bangladeshi/British Citizenship at birth." The first part of this answer responds to the question asked and concerns

retrospectivity. The last part appears to support the Secretary of State's position, but – given the apparent failure to understand question 1 – the weight to be placed on it must be limited.

(c) Question 3 arises only if both questions 1 and 2 have been answered the affirmative. If so, it asks whether the 2008 Instruction applies to those who had reached the age of 21 (and therefore may have lost their Bangladeshi citizenship prior to its coming into force). The answer ("Yes") might on its face be thought to support the Secretary of State's case, but the answer is very brief and does not allay the concerns arising from the answer to question 1.

(d) Even the answers to questions 2 and 3 (which contain the best material from the Secretary of State's point of view) contain no reasoning or explanation for the conclusions stated. They do nothing to explain the mischief to which the 2008 Instruction was addressed or the factual or legislative context. That does not make them categorically irrelevant. It does mean, however, that there is nothing to allay our concerns about the process by which the answers were drafted.

90 We have therefore given the *note verbale* as much weight as we can. But that weight is necessarily limited by our analysis of its contents. It counts in the Secretary of State's favour, but must be considered alongside the extensive expert evidence we have heard about the proper interpretation of the 2008 Instruction.

Our conclusions about the proper interpretation of the 2008 Instruction

91 The interpretation of the 2008 Instruction presents more difficulty than that of the 1972 Order because the former was enacted in Bangla, whereas the latter was in English. None of the Commission's members speaks or reads Bangla. There are different translations and the experts do not agree on which of them is the most accurate. Nonetheless, we heard at length from both experts as to the meaning of the Bangla words used. Having considered the evidence as a whole, we have been able to reach a clear view as to the proper interpretation of the 2008 Instruction. This means that it has not been necessary for us to decide this issue by reference to the burden of proof (the first error identified by the Court of Appeal in *E3 & N3*). The burden lies with the appellants to show that the 2008 Instruction does not apply to them, but, despite the contents of the *note verbale*, they have in our judgment discharged it.

92 We start from the translation produced by an independent translator, Mr Das, and described by the Court of Appeal in *E3 & N3* as the most authoritative. We asked the experts to highlight the phrases which they considered to be significant to its meaning and to insert next to those words or phrases the original Bangla verbs (transliterated). The experts were able to agree on this:

> "The Government, in the exercise of the power conferred in sub-article (2) of article 2B [of the 1972 Order as amended] by cancelling all the circulars or directives or orders or notifications issued hereinbefore in this behalf, has issued the following directives only in the case of the United Kingdom as regards granting or continuation of Bangladeshi citizenship of those

Bangladeshis who **have acquired citizenship** *[nagorikottoprapto]* of the United Kingdom:

(a) The Bangladeshi citizenship of any citizen of Bangladesh according to the law as in force in Bangladesh shall remain as it is notwithstanding their **acquiring citizenship** *[grohon]* of the United Kingdom, unless the oath to be taken for **acquiring citizenship** *[nagorikottoprapti]* of that country does contain any oath to renounce allegiance to their own country (Bangladesh);

(b) In the aforesaid circumstances, the citizen of Bangladesh, who **has acquired citizenship** *[grohon-kari]* of the United Kingdom, shall not be required to **obtain dual citizenship** *[grohon-er]* from the Government of Bangladesh;

(c) All Bangladeshis who **have acquired citizenship** *[grohon-kari]* of the United Kingdom may retain and use their Bangladeshi passports;

(d) On the expiry of their validity, their passports shall have to be renewed as usual;

(e) Bangladeshi passports can be issued again to those who had previously **acquired citizenship** *[grohon]* of the United Kingdom.

(2) This order shall be applicable only in the case of citizens of Bangladesh **acquiring citizenship** *[grohon-kari]* of the United Kingdom."

93 Now we set out Mr Hossain's preferred translation, marked up in the same way:

"Under powers granted in section 2B sub-section 2 [of the 1972 Order as amended], by cancelling all previously issued circulars or directions or orders or notifications in this regard, the Government hereby issues the following directions on the issue of granting or maintaining Bangladeshi citizenship solely in the case of the United Kingdom for all those Bangladeshis who **have received UK citizenship** *[nagorikottoprapto]*:

(a) If any person who is a Bangladeshi citizen according to the prevalent laws of Bangladesh **gets/receives citizenship** *[grohon]* of the United Kingdom, his citizenship of Bangladesh shall continue, provided that any oath taken for the purpose of **receiving UK citizenship** *[nagorikottoprapti]* does not contain withdrawal/renunciation of allegiance to Bangladesh;

(b) In the above situation the citizen of Bangladesh **receiving UK citizenship** *[grohon-kari]* need not **apply to** *[grohon-er]* the Bangladesh Government for dual nationality;

(c) All Bangladeshis who **receiving UK citizenship** *[grohon-kari]* may retain and use their Bangladeshi passport;

(d) If the period of validity of the passport has expired, it can be renewed in the usual way;

(e) For those who have **received UK citizenship** in the past *[grohon]*, Bangladeshi passports may be issued in their name as well.

(2) This shall apply only in the case of citizens of Bangladesh **who have received UK citizenship** *[grohon-kari]*."

94 The first point of note is that the operative parts of the Instruction use two terms (and their cognates) to describe those to whom it applies. The first is "nagorikottoprapto", which is used in the opening text of the first paragraph (which, using the style once common in the UK, does not have a number) and in para. 1(a). The second is "grohon", which is used in para. 1(a), (b), (c) and (e). It became clear to us as we heard the evidence that it would be important to understand the meaning of these words both in general and in context.

95 Prof. Hoque's evidence was that "nagorikottoprapto" can mean "achieved", "received", "awarded" or "got". In context, he considered the proper translation was "given or awarded". As can be seen from the above, Mr Hossain rendered it as "received".

96 Prof. Hoque said that "grohon" can mean "accepted" or "acquired" but "acquired" was the better translation "as this term is commonly used in the citizenship context". It implies some positive step, such as an application for naturalisation. Mr Hossain preferred "gets/receives", which he said could include acquisition of nationality by birth.

97 Our conclusions are as follows:

(a) Insofar as it is necessary to prefer one translation over the other, we prefer the translation used in *E3 & N3*, which was supplied by an independent translator (and thus independently of any view as to the proper interpretation of the text translated), to that of Mr Hossain, which was prepared in the course of preparing evidence for these proceedings. Mr Das's independent translation renders both "nagorikottoprapto" and "grohon" as "acquire". This shows two things: first, that the expert translator did not think it right to use different words to translate these terms, despite the wealth of alternatives available in English; second, that the English word chosen was a word which connotes "getting" rather than merely "having".

(b) The interpretation of a legal text is necessarily dependent on context. In this regard, we prefer Prof. Hoque's evidence as to the meaning of the relevant terms in the context of Bangladesh nationality law. Despite his obvious eminence, Mr Hossain did not claim to be an expert in this area of the law. We therefore conclude that both "nagorikottoprapto" and "grohon" are words which connote the conferral of nationality by a positive act, rather than by automatic operation of law at birth.

(c) This is consistent with the reference in para. 1(a) to "the oath to be taken for acquiring citizenship". This contemplates a process by which citizenship is "acquired" by positive reciprocal acts of the applicant (in applying for it) and the UK Government (in conferring it). Whilst we noted Mr Hossain's view that the same phrase could be translated as "any oath taken for the purpose of receiving citizenship" (the Bangla text apparently does not use an article at all), the fact that there is a reference to oaths at all seems to us to be a strong indicator that the type of citizenship the legislator had in mind was the kind acquired upon application.

(d) It is also consistent with para. 1(b), which uses "grohon" on the second occasion to refer to something that can only be conferral by application (as even Mr Hossain agrees).

(e) We do not consider it relevant that the 1981 Act uses the concept of "acquisition by birth or adoption" in the heading to s. 1 (though not, we note, in its operative provisions). The most relevant context for interpreting the 2008 Instruction is the way its terms are used in Bangladesh law, not UK law. The 1951 Act, which continues to apply in Bangladesh, does not use the term "acquisition" – even in its headings – to describe the process by which a person becomes a citizen at birth. And, like the 1981 Act, its operative provisions say simply that those qualifying for citizenship by birth or descent "shall be a citizen of Bangladesh" by birth or descent (see ss. 4 and 5).

(f) Prof. Hoque and Mr Hossain agreed that it would have been easy to find Bangla words describing those who "have" UK citizenship or "are" UK citizens. The fact that such simple words were not used seems to us, as it seemed to Prof. Hoque, to be significant.

(g) Prof. Hoque's view is more consistent with the terms and aims of the 2008 Instruction as reported in the press at the time. He referred to an article in *The Daily Star*, an English language newspaper published in Dhaka. In an article published on 24 March 2008, reporting what a "senior foreign ministry official" has said, the word "grohon" was rendered as "acquired"; and it was said that the 2008 Instruction "will be applicable only for the expatriate Bangladeshis living in the UK". Those born in the UK would not ordinarily be described as "expatriates".

(h) Mr Hossain's understanding of the effect of the 2008 Instruction was necessarily affected by his understanding of the proviso to article 2B(1) of the 1972 Order. He believed that the latter already prevented those who became British citizens at birth from losing their nationality by operation of s. 14 of the 1951 Act. That being so, the 2008 Instruction had the effect of clarifying the true position (at least in relation to UK nationals). But this is not consistent with the terms of the Instruction, which make clear that it is an exercise of the power conferred by article 2B(2) of the 1972 Order. Furthermore, our rejection of Mr Hossain's view as to the effect of the proviso to article 2B(1) necessarily causes us to accord less weight to his view as to the interpretation of the 2008 Instruction, given his own view as to the connection between the two instruments.

98 It follows that, in our view, the 2008 Instruction did not operate to confer Bangladesh nationality on C3, C4 and C7.

Conclusions

99 If C3 was a citizen of Bangladesh when born, she lost her citizenship when she turned 21 by operation of s. 14 of the 1951 Act. Neither the proviso to article 2B(1) of the 1972 Order nor the 2008 Instruction applied to her. The same is true of C4 and C7. On that basis, C3, C4 and C7 have discharged their burden of showing that they are not citizens of Bangladesh and, accordingly, that the Secretary of State's decisions would render them stateless.

100 This means that we do not have to determine whether C3 was a Bangladeshi citizen at birth. However, since we have heard argument on that, we consider that we ought to decide it.

C3

C3's father

101 C3's position is that her father was never a Bangladeshi citizen, because he abandoned permanent residence in the territories that became Bangladesh before 25 March 1971 and did not fall within the terms of the 1972 Order. So, C3 says she could not have obtained Bangladeshi citizenship by descent from her father. Article 2A of the 1972 Order does not apply.

102 The Secretary of State submits that, on the evidence, C3's father was born in Sylhet, in the territories that became Bangladesh, was a permanent resident there on 25 March 1971 (the date when the 1972 Order took effect) and remained a permanent resident there on 15 December 1972 (the date when the 1972 Order was made). If that is wrong, the Secretary of State relies on article 2A of the 1972 Order.

103 We have considered carefully the views of the experts on this point and conclude as follows:

(a) It is common ground that C3's father came to the UK in 1957 and abandoned his citizenship of Pakistan in 1966, from which time he had UK nationality and no other. It follows that he was not a citizen of Pakistan on 25 March 1971, when the 1972 Order took effect.

(b) But citizenship of Pakistan as at 25 March 1971 is not a precondition for the conferral of Bangladesh citizenship under article 2 of the 1972 Order.

(c) Article 2(1) of the 1972 Order focuses instead on birth in the territories now comprising Bangladesh and permanent residence on two dates: 25 March 1971 and 15 December 1972 (referred to by the Bangladesh Supreme Court in *Golam Azam*, at [12] and [102] as the "terminus date").

(d) At [52] of his judgment in *Golam Azam*, M.H. Rahman J held that:

> "The connotation of permanent residence by birth, as provided in article 2, is akin to that of domicile of origin, an expression found in private international law. The domicile of origin is not a matter of choice or free will. It is received or communicated to a person at his birth by operation of law. The domicile of origin is not lost by mere abandonment, nor is it extinguished by mere removal *amino non revertendi*. Overwhelming evidence is required to rebut the presumption in favour of its continuance. The onus of proving that a domicile had been chosen in substitution for the domicile of origin would lie upon those who assert that the domicile of origin had been lost... Any event or incident in a man's life, his health and humours, his expectations of financial gains or advancement, his religious belief or political conviction, his prejudices and preferences will be relevant and admissible as indicia of his intention to abandon his permanent residence with no intention of return."

(e) At [82] of his judgment in the same case A.T.M. Afzal J held that, on the facts of that case, the fact of the respondent's Pakistani citizenship was irrelevant to whether he continued to be a permanent resident of Bangladesh on 15 December 1972. "The right matter to look for", he said, "was whether there was any material to doubt that the respondent ceased to continue as a permanent resident on 15.12.72."

(f) At [182] of his judgment, Latifur Rahman J said this:

> "If a person goes to a country for employment, business or to stay there, for some other purposes he will retain his permanent residence i.e. his domicile of origin. The domicile of origin is thus a concept of law and clings to a man until he abandons it but if it can be shown that the person has permanently settled down in a country and has established his permanent home and residence with his family and children then, of course, the matter will be different."

(g) We agree with the Secretary of State that these passages establish that very strong ("overwhelming") evidence is required to establish that a person has given up his permanent residence in Bangladesh.

(h) C3's own evidence is to the effect that, when her father departed Pakistan for the UK in 1957, he left behind his first wife and children.

(i) There is a dispute about what can be inferred from the stamps in his passport. Having looked at the stamps ourselves, we consider that the evidence establishes: (1) that he entered Bangladesh on 1 October 1966 and left on 9 October 1968; and (2) that he entered again on 29 February 1972 and left on 18 August 1974. Whilst we accept that it is not impossible that his passport was not stamped on the way out (and so the visits were shorter), we do not find it implausible that there would have been such long stays if (as C3's own evidence confirms) he had a first wife and children still resident there. It is also consistent with the pattern of later visits, which include long stays.

(j) If that is the position, we do not think the evidence reaches the high standard which the judgments in *Golam Azam* show is necessary to establish that he had lost his permanent residence by 25 March 1971 or 15 December 1972.

(k) Accordingly, we conclude that C3's father was a Bangladeshi citizen by operation of article 2 of the 1972 Order and remained so at the date of her birth.

(l) If that were not so, we would not accept the Secretary of State's submission that Article 2A of the 1972 Order operated to deem C3's father's permanent residence in the UK to be permanent residence in Bangladesh for the purposes of article 2(i) and (ii). In cross-examination, Mr Hossain accepted that, since this was the true effect of article 2A, every resident of the UK in 1971 would be entitled to Bangladeshi citizenship, irrespective of his or her connection with Bangladesh. The fact that he did not shrink from this consequence was, in our view, an example of his purist approach to statutory interpretation. In our view, the consequence is absurd and cannot have been intended. In re-examination, Mr Hossain suggested that the presumption against absurdity (a principle applied by the courts of Bangladesh as much as in the courts of England and Wales) might be applicable. We agree that the presumption would apply – but to our mind it tells against Mr Hossain's construction and not merely its consequence. Although the drafting of these provisions is less than pellucid, the better view on this point is that of Prof. Hoque: that article 2A applies only to those who were permanent residents of Bangladesh at 25 March 1971 but subsequently came to the UK so that (but for article 2A) they would not have remained permanent residents as at 15 December 1972.

C3's mother

104 It is common ground that C3's mother was a citizen of Bangladesh, having been born in Sylhet. She lived there until 1987, when she moved to the UK.

105 C3 submits that: her mother had naturalised as a UK citizen before C3's birth on 1 May 1990; by doing so, she had lost her Bangladesh citizenship by operation of s. 14 of the 1951 Act; the 2008 Instruction did not operate retrospectively so as to have the effect of enabling her to pass on citizenship to C3; the 2009 amendment to s. 5 of the 1951 Act does not operate retrospectively so as to confer citizenship on those born to a Bangladeshi mother prior to 31 December 2008.

106 Having considered the evidence of both experts, and the factual evidence, we have concluded as follows:

(a) The evidence seems to us to establish, narrowly, that it is more likely than not that C3's mother naturalised before C3's birth on 1 May 1990. The naturalisation documents are not available. The passport was issued on 12 December 1990. However, there is a letter dated 30 August 1990 from C3's mother's MP chasing her outstanding passport application. On the balance of probabilities, we conclude that it is unlikely that the following all happened within a 4 month period: C3 was born; C3's mother was naturalised; she then applied for a passport; she became

concerned that the application was not being dealt with (and in all likelihood made an enquiry of the Passport Office); she then sought the assistance of her MP; and the MP wrote the letter to the Passport Office. In all the circumstances, it is more likely that C3's mother was naturalised and she applied for her passport before C3 was born.

(b) We do not think Mr Hossain can be right that s.14 of the 1951 Act does not apply to original citizens under the 1972 Order. That contention was based on his view that s. 14 is limited in application to those who are "a citizen of Bangladesh under the provisions of the Act" and so is limited to individuals obtaining citizenship under (for example) s. 5 and not to those whose citizenship derives from the terms of article 2 of the 1972 Order. As the appellants point out, there is no academic or commentator or judge who has expressed this view. It is inconsistent with the case law and academic works cited at paras 72-73 above. It is also inconsistent with Latifur Rahman J's statement in *Golam Azam* that "[t]he provisions of the [1951] Act and the [1972] Order are to be read together to get a complete picture of the law of Citizenship in Bangladesh". In any event, C3's mother would have been a citizen by virtue of s. 3 or 4 of the 1951 Act and so s. 14 would apply to her.

(c) This means that C3's mother lost her Bangladeshi citizenship prior to C3's birth by operation of s. 14 of the 1951 Act.

(d) It is common ground that C3's mother regained her Bangladeshi citizenship under the provisions of the 2008 Instruction (since the oath she would have had to swear on being naturalised would not have required her to renounce allegiance to Bangladesh). But neither expert suggested that would retrospectively have made C3 a Bangladeshi citizen.

(e) Accordingly, C3's mother was not a Bangladeshi citizen at the time of C3's birth.

107 It does not therefore matter whether the 2009 amendment to the 1951 Act was retrospective. However, in case the issue should become relevant, we can see no reason why it should not be. The amendment was needed because the courts had declared the previous version of s. 5 of the 1951 Act (which conferred citizenship based on patrilineal descent only) to be discriminatory and therefore unconstitutional. After amendment, s. 5 provides that "a person born after the commencement of this Act shall be a citizen of Bangladesh if his father or mother is a citizen of Bangladesh at the time of his birth".

108 There is nothing in the language used to suggest that the effect of this amendment was intended to be limited to those born after its coming into force in 2009. If it were limited in that way, it would not have addressed the discrimination found by the court to exist. In any event, in English law, "the force of the presumption [against retrospectivity] is not invariable and must... by fixed by reference to the unfairness which would stem from giving the statute a retrospective effect". See e.g. *L'Office Cherifien des Phosphates v Yamashita Shinnihon Steamship Co.* [1994] 1 AC 486, 524-5: "the true principle is that Parliament is presumed not to have altered the law applicable to past events and transactions in a manner which is unfair to those concerned in them unless a contrary

intention appears" (Lord Mustill). Both experts agreed that the same principle would apply in the courts of Bangladesh.

109 We do not see how the mere conferral of citizenship by the amended s. 5 of the 1951 Act could be regarded as unfair. On the face of it, citizenship constitutes a benefit. If and to the extent that this benefit is associated with obligations (in relation to tax for example), it might perhaps be argued that it would be unfair to impose those obligations, but that would not make it unfair to confer citizenship.

The notice issues

110 We have set out the relevant provisions of ss 40-41 of the 1981 Act and of reg. 10 of the Regulations at the start of this decision.

111 The appellants say that reg. 10 is *ultra vires* the 1981 Act. Their argument can be summarised as follows. Subordinate legislation will be *ultra vires* its parent power if it has an effect or is made for a purpose which goes beyond the scope of that power: *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531, [22]. In determining the scope of the power, ordinary principles of construction apply. One of these is that any interference with fundamental rights (including the right of access to a court) requires express words: *R (Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409, [65], [79]-[82]. The right of access to the court is an "absolute and inviolable right", which is not susceptible to being outweighed by other factors: *FB (Afghanistan) v SSHD* [2020] EWCA Civ 1338, [117].

112 Applying those principles, s. 41 confers power to make regulations only "for carrying into effect the purposes of the Act" and, in particular, "for the giving of any notice required or authorised to be given to any person under this Act". Section 40(5) stipulates that the Secretary of State "must give the person written notice". This enacts the principle vouchsafed in *R (Anufrijeva) v SSHD* [2004] 1 AC 604, [26], that "[n]otice of a decision is required before it can have the character of a determination with legal effect". The "service" of notice "to file" is not giving the person written notice. That is clear from the words of the statute, but is reinforced by the constitutional importance of the right of access to the court, which requires ss. 40(5) and 41(1) to be restrictively construed.

113 Even if reg. 10(5) is *intra vires*, C3 and C4 say that the notice was not validly served because the conditions for service to file were not met. They point to the fact that the Secretary of State knew the whereabouts of C3 and C4 and, in any event, knew who was representing them.

114 The Secretary of State responds that the purposes served by ss. 40 and 41 go beyond enabling the person the subject of a notice to appeal. They strike a balance between the interests of the person concerned and the public interest. The insertion of s. 40A reflects a deliberate decision by Parliament that the pursuit of an appeal should no longer prevent the Secretary of State from making an order depriving a person of his citizenship. Regulation 10 is consistent with the aims of the parent statue. When considered as a whole, its effect is to ensure that, where notice of deprivation can be brought to someone's attention consistently with the need to safeguard that person's privacy and confidentiality, that is done. Service to file is only permitted in tightly defined circumstances, where there

is no previous address or the address known would not be an appropriate address for service.

115 The Secretary of State avers that the conditions for service to file were met in this case, because, although she knew in general terms where C3 and C4 were, she had no address at which she could effect service; and although she knew that they had been represented for other purposes, she was not aware of anyone authorised to accept service of the notice on their behalf.

116 The issues raised by these grounds of appeal (and particularly the *vires* issues) could have wide ramifications for other provisions within and outside the immigration sphere permitting the service of notice to file. It would only be appropriate for us to consider the notice issues if they are relevant to an issue that falls within our jurisdiction. We have formed the view that they are not relevant to any such issue:

(a) The Commission's jurisdiction to hear an appeal stems from s. 2B of the SIAC Act. The appeal is not against the deprivation itself, but the "decision to make an order" under s. 40 of the 1981 Act.

(b) The requirement to give notice in s. 40(5) applies after the decision to make the order has been made and before the order itself is made.

(c) In *S1 v SSHD* [2016] EWCA Civ 560, [2016] 3 CMLR 37, the Court of Appeal had to consider whether the Commission had jurisdiction, on an appeal, to determine whether the timing of the deprivation order (shortly after the decision to deprive) made it impossible for the appellants to return to the United Kingdom (where they would be entitled to pursue their appeal). At [61], Burnett LJ (with whom Lindblom and Briggs LJJ agreed) said this:

> "SIAC had no jurisdiction to consider the timing of the deprivation order. SIAC noted, correctly in my judgment, that the statutory scheme envisages two distinct stages. First, the decision to deprive and then, but separately, the deprivation order. SIAC is not empowered to hear an appeal against the deprivation order, still less its timing. As SIAC observed, it is difficult to see how a decision lawfully made could become unlawful in consequence of the timing of the subsequent order."

(d) In *R (W2) v SSHD* [2017] EWCA Civ 2146, [2018] 1 WLR 2380, the Court of Appeal had to consider the point again. The argument, this time in the context of a claim for judicial review, was that the order was unlawful because it was made while W2 was outside the United Kingdom. One of the issues was whether [61] of Burnett LJ's judgment in *S1* was part of the *ratio*. Beatson LJ (with whom Singh and Davis LJJ agreed) held at [64] that the question whether a "timing" challenge fell within the jurisdiction of the Commission on appeal turned on whether it was a challenge to the timing of the decision (as in *L1 v SSHD* [2015] EWCA Civ 1410, in which case it was within the Commission's jurisdiction) or a challenge to the timing of the making of the order (as in *S1*, in which was it was not).

(e) The issue raised in the present case is not about "timing" but about whether valid notice has been given of the decision to deprive. Nonetheless, on analysis, it seems to us that the challenge falls into the second category identified by Beatson LJ at [64] of his judgment in *W2*. It is a challenge to the validity of the order, not the decision. If the challenge is a good one, the result would be to undermine the validity of the order, not the decision to make it. The decision would still have been lawfully made. That being so, the observations of Burnett LJ at [61] of *S1* seem to us to apply.

(f) We can see that there might be cases where, on an appeal before the Commission, it would be necessary to consider the validity of things done after the decision to deprive had been made. One example could be where the validity of the notice given after the decision to deprive is relevant to the question whether the appeal is in time (or whether an extension of time should be granted). But there is no such question in the present case. The Secretary of State accepts that the present appeals were in time. In those circumstances, we consider that we have no jurisdiction to consider the validity of things done after the decision to deprive was taken.

(g) Accordingly, the notice grounds are not relevant to any issue within our jurisdiction. For that reason, and in the light of our conclusions on the nationality issues, we have not determined them.

Outcome

117 C3, C4 and C7 have persuaded us that, on the dates when the decisions and the orders in their cases were made, they were not nationals of Bangladesh or any other State apart from the UK. This means that orders depriving them of their British citizenship would make them stateless. Because of s. 40(4) of the 1981 Act, the Secretary of State had no power to make orders with that effect. For that reason (and that reason alone), the appeals against the decisions to make those orders succeed.