Appeal No: SC/66/2008
Hearing Dates: 2nd – 4th and 7th July 2014
Date of Judgment: 18th July 2014

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE FLAUX
UPPER TRIBUNAL JUDGE WARR
SIR STEWART ELDON

Hilal Abdul Razzaq Ali AL-JEDDA

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant:	Mr Tom Hickman and Ms Samantha Knights
Instructed by:	Public Interest Lawyers
For the Respondent:	Mr Jonathan Swift QC, Ms Karen Steyn QC and Mr Rupert Jones
Instructed by:	The Treasury Solicitor

JUDGMENT

The Honourable Mr Justice Flaux:

Introduction

1. On 1 November 2013, the Respondent (referred to hereafter as "the Secretary of State" made an order in exercise of the power under section 40(2) of the British Nationality Act 1981 as amended ("the 1981 Act") depriving the appellant (referred to hereafter as "Mr Al-Jedda") of his British citizenship. Mr Al-Jedda appeals against that order to the Commission pursuant to section 2B of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act").

2. By Order of Irwin J dated 13 February 2014, the Commission ordered the determination of the following preliminary issues:

   (1) Did the deprivation order made by the Secretary of State on 1 November 2013 render Mr Al-Jedda stateless contrary to section 40(4) of the 1981 Act (including the sub-issues of issue estoppel and abuse of process which are referred to in the Scott Schedule and the Grounds of Appeal)?

   (2) Is the Secretary of State required to provide a minimum level of disclosure and information about the case against Mr Al-Jedda pursuant to the requirements of the European Convention on Human Rights and/or European Union law?

   (3) Was the deprivation of citizenship unfair by failing to provide Mr Al-Jedda with an adequate opportunity to make representations to the Secretary of State before it was made?

3. This is the judgment of the Commission following the hearing of those preliminary issues.

Background facts

4. Mr Al-Jedda was born in Kirkuk, Iraq, in 1957. His parents had been born in Iraq, and they were both Iraqi nationals at the time of his birth. He married his first wife in 1990 and came to this country in 1992 as a refugee from the regime of Saddam Hussein, and claimed asylum here. He was accorded refugee status in 1994, and given leave to remain in the UK for four years. In 1998, he, his wife and four children were granted indefinite leave to remain here, and shortly afterwards he applied for British nationality. He was granted British nationality on 12 June 2000.

5. In 2001, he and his wife divorced. She lives in London and has remarried. In 2002, he married his second wife, a Syrian national. They divorced in 2008. They had a son who lived in Syria until recently but now lives with his father in Turkey. In 2002, he married his current, third wife, initially

polygamously. She is a Jordanian national. They have four children, the youngest born in February this year. Mr Al-Jedda, his third wife and those four children live together in Istanbul, Turkey. At least at the time that they produced witness statements in mid-June 2014, two of his adult children by his first wife lived in London.

6. In September 2004, Mr Al-Jedda travelled from the United Kingdom to Iraq where he was detained by British forces on grounds of suspected involvement in terrorism. On 30 December 2007, Mr Al-Jedda was released from detention without charge. He travelled to Kirkuk and then in January 2008 he went to Turkey where he was joined by his third wife and some of his children. The status of the identity card and passport which he used to travel within Iraq and to Turkey thereafter are in issue in these proceedings (subject to questions of issue estoppel and abuse of process raised by Mr Al-Jedda which we address in detail later in this judgment).

7. Prior to Mr Al-Jedda's release from detention, the Secretary of State considered whether to deprive Mr Al-Jedda of his British nationality under section 40(2) of the 1981 Act. On 12 November 2007, she wrote to Mr Al-Jedda informing him that she was minded to make such an order, as well as an order excluding him from the UK. She summarised the involvement in terrorism of which he was suspected. He was invited to make such representations as he chose on the orders she was minded to make. On 20 November 2007, his solicitors wrote to the Secretary of State saying he wished to challenge the proposed orders, but on 12 December 2007, the Secretary of State informed Mr Al-Jedda that she had decided to make an order depriving him of his British citizenship. Mr Al-Jedda appealed to the Commission.

The first SIAC proceedings

8. In the proceedings before the Commission, Mr Al-Jedda relied upon a number of grounds of appeal, including challenging that he had been involved in terrorist activity and claiming that the decision to deprive him of his citizenship was contrary to section 40(4) of the Act because it had rendered him stateless. By a Consent Order dated 8 February 2008, Mitting J ordered the statelessness issue to be heard as a preliminary issue.

9. One of the sub-issues raised by that preliminary issue was whether Mr Al-Jedda lost his Iraqi nationality automatically when he was granted British citizenship on 12 June 2000 by virtue of the operation of Article 11 of the Iraqi Nationality Law of 1963 ("the 1963 Law") which provided (in an unofficial translation transmitted to the UNHCR in 1996):

> "1. Every Iraqi national who has acquired a foreign nationality in a foreign country by his own choice shall lose his Iraqi nationality.

> 2. If the person who has lost his Iraqi nationality under item 1 of this article returns to Iraq in a legal manner and resided there for one year, the Minister may deem him after the lapse of this year to be acquiring the Iraqi nationality from the date of his return if he submits a request to restore the Iraqi nationality before the expiration of the said period."

10. Before the Commission in relation to that preliminary issue, the Secretary of State relied upon an expert report from Mr Ian Edge, a barrister and academic, whose opinion was that Mr Al-Jedda did not lose his nationality automatically under the 1963 Law, but that formal notification to the Iraqi authorities was necessary before he did so. He based that opinion principally upon his understanding of an article published in 1974 by Professor Daudi, a leading Iraqi authority on nationality questions. Mr Al-Jedda relied upon an expert report from Judge Al Saedi, an Iraqi investigative judge then on sabbatical leave at a university in the United States. His opinion was that any Iraqi who of his own free choice acquired foreign nationality in a foreign country lost his Iraqi nationality without any need to notify the Iraqi authorities.

11. In its judgment dated 23 May 2008 (Mitting J, Senior Immigration Judge Lane and Mr J Mitchell), the Commission expressed at [5]-[6] its concern about the shortcomings in the expert evidence, specifically that neither expert had any particular expertise in Iraqi nationality law and that because, quite properly, the Government of Iraq, whilst content for Judge Al Saedi to provide an expert report, did not wish him to be cross-examined before the courts of another country, his evidence had not been tested in cross-examination. Given those shortcomings, the Commission said at [6] that it approached the Iraqi legislation by employing the same tenets of construction and interpretation as it would domestic legislation, analysing the words used against the historical and statutory background so as to give effect to the apparent intention of the legislators.

12. At [16] of its judgment, the Commission set out the passages in the article by Professor Daudi upon which Mr Edge relied in support of his opinion that Mr Al-Jedda had not automatically lost his Iraqi nationality when he acquired British citizenship in June 2000. However, the Commission preferred the evidence of Judge Al-Saedi and concluded at [17] that Mr Al-Jedda had automatically lost his nationality, in these terms:

> "17. We accept that, as a matter of Iraqi administrative procedure, it was necessary for an Iraqi national who wished to divest himself of Iraqi nationality on the voluntary acquisition of foreign nationality to notify the Iraqi authorities. Otherwise, they might continue to hold him to his obligations as an Iraqi national under Article 21 of the 1963 law. However, as Professor Daudi states, Iraqi nationality is lost by operation of law when foreign nationality is acquired "upon his free choice". The analysis of Iraqi law in the second citation and in the examples which follow it demonstrate the need for an Iraqi

> national who has had foreign nationality imposed upon him to signify his acceptance of it. Professor Daudi's comments have no bearing upon the case of an Iraqi national who demonstrates his free choice by applying for foreign nationality. Accordingly, in our view, the fundamental premise of Mr Edge's conclusion is wrong. We prefer the opinion of Judge Al Saedi on this question, which follows the straightforward wording of Article 11.1. Judge Al Saedi's view accords with the conclusion which we would have reached upon the straightforward approach to interpretation stated in paragraph 6 above."

13. Mr Edge also expressed the opinion in his report that, even if Mr Al-Jedda had lost his Iraqi nationality by operation of Article 11.1 of the 1963 Law, it had been automatically restored to him by operation of Article 11(C) of the Transitional Administrative Law ("TAL"). In the light of that expert report, Mr Al-Jedda's legal advisers applied for an adjournment of the hearing to obtain further expert evidence of their own. That application was refused and the hearing proceeded on 19 and 20 May 2008. In its judgment of 23 May 2008, the Commission found in favour of the Secretary of State on this point and concluded that the deprivation order had not rendered Mr Al-Jedda stateless.

14. Further hearings before the Commission took place, including on 19-23 January and 20 March 2009 hearings comprising open and closed sessions, focusing on the allegations which formed the basis for the Secretary of State's decision. For the purposes of those hearings, Mr Al-Jedda produced two witness statements (in addition to a statement dated 15 May 2008 he had produced for the earlier hearing). In particular, a statement dated 13 October 2008 was produced to provide further information of the impact of the deprivation decision upon him. In that statement he asserted that, at the time of his release from detention in December 2007, he could not obtain a genuine Iraqi passport and that that month his brother in law had gone to the citizenship and immigration office in Baghdad to enquire whether Mr Al-Jedda could obtain some Iraqi identification. He says that his brother in law was told that under Iraqi law it was not possible to hold dual citizenship at the same time and his brother in law informed him he had lost his Iraqi citizenship. He says that he obtained around $700 from his family to obtain a fake Iraqi passport and then travelled to Turkey in January 2008.

15. At those hearings in 2009, Mr Swift cross-examined Mr Al-Jedda by videolink, but did not ask him about those parts of his statement concerned with the allegedly fake passport. In his submissions before us, Mr Swift explained that the reason for this was that the passport was not relevant to the issue of what was conducive to the public good, then under consideration before the Commission.

16. In open and closed judgments dated 7 April 2009, the Commission concluded that the allegations against Mr Al-Jedda were made out. No

appeal was pursued against that conclusion, but an appeal was pursued to the Court of Appeal on behalf of Mr Al-Jedda against the Commission's refusal to grant an adjournment of the hearing in May 2008. That appeal was allowed ([2010] EWCA Civ 212). In his judgment Hooper LJ (with whom Maurice Kay and Mummery LJJ agreed) said this at [7] about the issue as to whether Mr Al-Jedda had lost his Iraqi citizenship automatically:

> "It is now no longer in dispute that, by virtue of Article 11(1) of the Iraqi Nationality Law of 1963, he automatically lost his Iraqi citizenship on acquiring British citizenship. That issue, disputed by the respondent at the hearing of the preliminary ruling, was resolved by SIAC in favour of the appellant."

17. Hooper LJ went on to conclude that Mr Al-Jedda had been significantly prejudiced by the refusal of an adjournment and that that refusal was wrong in law and procedurally unfair. At [74] of his judgment he stated:

> "In my view the appeal should therefore be allowed and the case remitted for a fresh hearing on the whole issue of statelessness. There would be no point in remitting the case on the statelessness issue if the outcome was inevitably going to be the same. Having read the reports of Dr Mohsin and Professor Gowlland-Debbas it seems to me impossible to say that the outcome is inevitably going to be the same. Mr Swift submitted that they added little to the debate. I do not accept that submission."

18. Accordingly, the statelessness issue was remitted to a differently constituted Commission. This issue was reconsidered by the Commission (Keith J, Senior Immigration Judge Jordan and Mr Glyn-Jones) at a hearing on 19 to 23 July 2010. At that hearing it was common ground (as it had been before the Commission in May 2008 and indeed was before us) that an appeal to the Commission under section 2B of the 1997 Act is a merits appeal, meaning it is for the Commission to decide whether it is satisfied that the deprivation order would render Mr Al-Jedda stateless and the hearing is not simply a review of the decision of the Secretary of State. This principle was recorded by the Commission at [8] of its judgment of 26 November 2010:

> "Had the order depriving Mr Al-Jedda of his British nationality been challenged by judicial review, the question whether the Home Secretary had addressed the issue of statelessness by the time the order was made would have been very important. But the order is being challenged by an appeal to the Commission under section 2B of the Special Immigration Appeals Commission Act 1997 ("the 1997 Act"). As Mitting J noted in an earlier judgment (7 April 2009) of the Commission in respect of Mr Al-Jedda's other grounds of appeal at [7]:

> ‘An appeal is a challenge to the merits of the decision itself, not to the exercise of a discretion to make it.’
>
> It is therefore open to the Commission to decide for itself whether the order depriving Mr Al-Jedda of his British nationality made him stateless, even though the focus of section 40(4) of the Act is on whether the Home Secretary was satisfied that it would have made him stateless. That was conceded by the Home Secretary when this issue was first considered by the Commission: see the judgment of the Commission of 23 May 2008 (Mitting J presiding) at [4]. That is why it has never been in issue that the Commission should hear evidence about the Iraqi law of nationality which was not considered by the Home Secretary. It follows that there is no question of any deference being afforded to the Home Secretary’s view expressed in the letter of 18 January 2008 that the effect of the order depriving Mr Al-Jedda of his British nationality did not make him stateless.”

19. In its judgment, the Commission summarised the case for the Secretary of State at [11] in these terms:

> “The Home Secretary’s case originally was that Mr Al-Jedda has at no time been stateless because he did not lose his Iraqi nationality when he was granted British nationality in 2000. That explains why her letter of 18 February 2008 talked of Mr Al-Jedda “remaining” an Iraqi national. However, the Home Secretary now accepts that Mr Al-Jedda lost his Iraqi nationality when he acquired British nationality since that was the effect of the prohibition in Iraqi law on dual nationality before the fall of the Saddam regime. The Home Secretary’s case now is that Mr Al-Jedda regained his Iraqi nationality before being deprived of his British nationality since that was the *automatic* effect of[various provisions including Article 11 of the TAL and Article 10 of the Iraqi Law of Nationality of 2006].”

20. The Iraqi Law of Nationality of 2006 (“the 2006 Law”) replaced the 1963 Law which was repealed. The 2006 Law permitted dual nationality and Article 10 provided that Iraqi nationality was not lost unless specifically renounced. So far as relevant, it provided as follows:

> “1. An Iraqi who acquires a foreign nationality shall retain his Iraqi nationality, unless he declares in writing his renunciation of Iraqi nationality.
>
> …
>
> 3. An Iraqi who renounces his Iraqi nationality may regain it, if he legally returns to Iraq and stays there for at least one year. The Minister may, on expiry thereof, consider him to have

> acquired Iraqi nationality from the date of his return if he submits an application to regain Iraqi nationality before the end of the aforementioned period. He may avail himself of his rights on only one occasion."

21. In its judgment dated 26 November 2010, the Commission decided that Mr Al-Jedda had automatically regained his Iraqi nationality by the time of the deprivation order in December 2007, without any need for him to make an application for Iraqi nationality, by reason of, inter alia, Article 11(C) of the TAL and/or Article 10.1 of the 2006 Law. Mr Al-Jedda appealed that decision to the Court of Appeal.

22. By its judgment of 29 March 2012, the Court of Appeal allowed Mr Al-Jedda's appeal on the grounds, inter alia, that (a) the Commission had erred in law in failing to take into account the argument on behalf of Mr Al-Jedda that the Iraqi courts would adopt a restrictive interpretation of Article 11 of the TAL and (b) the Commission had erred in law in departing for no good reason from the common position of the experts as to the application of Article 10.1 of the 2006 Law.

23. For the purposes of this judgment, the following paragraphs in the main judgment of Richards LJ ([2012] EWCA Civ 358 are relevant:

> "5. At the time when he first came to the United Kingdom, the appellant had Iraqi nationality. The effect of his being granted British nationality in 2000 was that, under the law of Iraqi as it existed at the time, he lost his Iraqi nationality. The main issue for SIAC to determine was whether his Iraqi nationality had been automatically restored to him by one or other of a number of Iraqi legislative instruments enacted following the occupation of Iraq by coalition forces in 2003. This required SIAC to consider the effect of the legislation as a matter of Iraqi law, and for that purpose to receive expert evidence on the subject. As SIAC put it at [13]:
>
> > 'Whether the effect of the order depriving Mr Al-Jedda of his British nationality was to make him stateless is a matter of English law, but the answer turns on the Iraqi law of nationality. It is trite law that the determination of foreign law is a question of fact to be decided on expert evidence ….'
>
> 109….Even leaving aside the points made above about SIAC's departure from the common position of the experts, it seems to me that Article 10.3 applies more naturally than Article 10.1 to a person in the appellant's position. SIAC's principal reason for rejecting the applicability of Article 10.3 was that they did not think that the appellant could be said to have "renounced" his Iraqi nationality (or, on another translation, to have "relinquished" it). But I agree with Mr Hermer that it does not

> involve any great stretching of language to say, as Dr Mohsin did, that someone who voluntarily acquired a foreign nationality and thereby lost his Iraqi nationality by operation of Iraqi law "renounced" his Iraqi nationality; whereas I also agree that SIAC's interpretation of Article 10.1 does far greater violence to the language of that provision. It was only after rejecting the applicability of Article 10.3 that SIAC moved to consider Article 10.1; and it was only because they had rejected the applicability of Article 10.3 that they were able to reason that an anomalous result would arise if Article 10.1 did not apply to the appellant. But if the two provisions are looked at together, Article 10.3 is the better fit; and if Article 10.3 applies, the suggested anomaly falls away and there is no need to adopt a strained interpretation of Article 10.1.
>
> 117. In my judgment, the relevant factors come down strongly in favour of the view that the Iraqi courts would find the appellant's situation to be covered by Article 10.3, not by Article 10.1, and that the restoration of his Iraqi nationality depends on his meeting the conditions of Article 10.3, including the making of an application for its restoration. Article 10 does not operate to restore it to him automatically. Despite their differences of view about Article 10, the experts were at least agreed that it requires an application to be made. That is also the clear view of Iraq's Director General of Nationality, and it accords with the practice of the General Directorate of Nationality. The language of the provisions supports it. It also sits comfortably with the 2006 Constitution, Article 18(3)A of which, as SIAC themselves held, requires a person who has had his citizenship withdrawn to make a "demand" to have it reinstated. It is unnecessary to decide whether any application, once made, has to be granted if the basic conditions are fulfilled or whether there exists a residual discretion to refuse it. What matters is that an application has to be made if Iraqi nationality is to be restored."

24. The reference in that last paragraph to the view of the Director General of Nationality was to the evidence of Major-General Al-Yasiri in a letter to Mr Al-Jedda's Iraqi law expert, Dr Mohsin, which Richards LJ quotes at [114] of his judgment. In particular, Major-General Al-Yasiri stated:

> "6. The applicant, like all those who lost their Iraqi nationality in accordance with the annulled [1963 Law] on the ground of acquiring a foreign nationality, must submit an application to the Ministry of Interior expressing his desire to restore his Iraqi nationality, in accordance with the conditions stated in [Article 10.3 of the 2006 Law]."

25. The Secretary of State advanced an alternative case by way of Respondents' Notice that if, as at December 2007, the position under Iraqi law was that Mr Al-Jedda had not regained Iraqi nationality but rather had

the right to apply to regain that nationality, then the deprivation order had not rendered him stateless because it was open to him to make an application which would have succeeded as a matter of Iraqi law. The Court of Appeal rejected that case on the basis (as articulated by Richards LJ at [12] of his judgment) that section 40(4) of the 1981 Act is directed to the effect of the Secretary of State's *order* and, at the time of the order in December 2007, Mr Al-Jedda was not an Iraqi national: his only nationality was British and so the effect of the order rendered him stateless.

26. By a Notice of Appeal dated 15 May 2012, the Secretary of State sought permission to appeal to the Supreme Court on all the issues on which she had lost before the Court of Appeal. In the event the Supreme Court only gave permission to appeal on the one issue which had been the subject of the Respondents' Notice before the Court of Appeal referred to at [25] above. The appeal on that issue was heard by the Supreme Court on 27 June 2013.

27. Before that hearing took place, on 29 April 2013, the British Embassy in Ankara sent a note verbale to the Consular Department of the Ministry of Foreign Affairs of Turkey referring to the forthcoming appeal in the Supreme Court and stating that it would assist the Home Office if the Turkish Government could confirm Mr Al-Jedda's nationality and provide documentary evidence of his current passport. In its response of 28 June 2013, the Turkish Government said as a result of research by the National Police Department: "Iraqi citizen [Mr Al-Jedda] …has entry and exit stamps from Turkey on the passport with the serial number G1739575". The records of those exits and entries were attached which showed that Mr Al-Jedda had travelled from Turkey on three occasions earlier in 2013. It appeared from those records that he was outside Turkey between 8 and 19 January, 25 February and 14 March and 28 March and 2 April 2013.

28. On 8 July 2013, the Foreign Office contacted the Kurdistan Regional Government, Iraq Ministry of Interior, Passport Nationality and Residence by email about the passport held by Mr Al-Jedda with the serial number G1739575, asking if the passport was genuine. The response received the same day was "After investigation in our documents we verified that the Iraqi passport no G1739575 is genuine and it belongs to [Mr]…Al-Jedda". Further information was received from the Iraqi authorities that Mr Al-Jedda had applied for that passport in Baghdad on 20 January 2008. The application form was produced and sent to the Supreme Court under cover of a letter of 26 July 2013.

29. The effect of this further information and what was said about it by the Secretary of State was summarised by Lord Wilson JSC in the judgment of the Supreme Court of 9 October 2013 ([2013] UKSC 62 at [27]):

> "I add, as a postscript to this section of the judgment, that following the hearing in this court the Secretary of State has drawn to its attention what she contends to be important further information recently provided to her by the Iraqi authorities. It

is that on 20 January 2008, namely three weeks after his release, the respondent applied in Baghdad for an Iraqi passport; that his application form, a photocopy of which the Secretary of State has produced to the court, shows that it was accompanied by a certificate of his Iraqi nationality purportedly issued on the same date in Kirkuk; that on 28 January 2008 the Iraqi authorities issued a passport, number G1739575, to the respondent; and that the passport is genuine and betokens a valid grant of nationality to the respondent. ”

30. Mr Al-Jedda’s lawyers were asked to comment on this additional information. Their comments are summarised by Lord Wilson at [28] of the Judgment:

> “When asked by the court to comment on these allegations, the respondent, by his solicitors, has said:
>
> (a) from an early stage of the protracted proceedings referable to his appeal against the Secretary of State's order, he had averred that, in order to travel from Iraq to Turkey on 3 February 2008, he had used a "fake" Iraqi passport: see, for example, his witness statement dated 10 October 2008 which was placed before the Commission;
>
> (b) in 2008 he had also filed a report by a Turkish lawyer who stated that she had reviewed a scanned copy of what purported to be an Iraqi passport referable to him issued in Baghdad on 28 January 2008 and stamped with a Turkish entry visa dated 3 February 2008;
>
> (c) in the course of cross-examination of him at a hearing before the Commission in January 2009 Mr Swift had never sought to challenge his assertion that the Iraqi passport by which he had travelled to Turkey was fake;
>
> (d) in January 2008, in Kirkuk, he had in fact acquired two fake passports, one in his name and one in another name, on the black market by payment of about US$750 which he borrowed from his family;
>
> (e) he had provided his payee with details about himself and photographs of himself but not with a certificate of Iraqi nationality because he did not have one;
>
> (f) the fake passport in his own name, which the payee provided to him, was indeed numbered G1739575 and it stated that it had been issued on 28 January 2008; this was the passport which he had elected to use for his travel to Turkey on 3 February 2008;

> (g) he is unaware of the documents which his payee may have completed or caused to be completed in the course of procuring the passports;
>
> (h) he, the respondent, never completed the application form a copy of which the Secretary of State has produced to the court and he has never previously seen it;
>
> (i) the passport G1739575 is therefore fake, by which he appears to mean that it was forged, or, more probably, that it was fraudulently obtained; and
>
> (j) since 2000 he has never held Iraqi nationality and in the above circumstances the passport is no evidence to the contrary."

31. In addition, a further witness statement was obtained from Mr Al-Jedda dated 16 August 2013, in which he commented on the application form for the passport which the Secretary of State had obtained, stating that he had not seen it before and had not made the application. He agreed though that the photographs were of him and the personal details were correct save that it incorrectly stated that he was single in 2008. The application stated that it was accompanied by four documents: (i) a National Identity Card issued in Kirkuk on 10 January 2008; (ii) a Certificate of Nationality issued in Kirkuk on 20 January 2008; (iii) a Housing Card issued in Kirkuk on 26 February 2007 and (iv) a Food Rations Card issued in Kirkuk on 22 February 2007. Mr Al-Jedda said that at no stage did he or his relatives obtain a National Identity Card or a Certificate of Nationality. He had never obtained or been entitled to either of the other two documents and when they were supposedly issued he was being detained by the British authorities and was not in Kirkuk.

32. He went on to explain that, after his release from detention in December 2007, he had paid a man approximately $700-$800 to obtain the necessary documentation so he could leave Iraq safely. He asked him to obtain two passports, one in his own name and one in name of Shahin Mohammed Ali. He gave the man six to eight passport photographs and provided information as to his name, his parents' names and his date of birth. He said that after a few weeks the man brought him National Identity Cards and two G-series Iraqi passports, both using different passport photographs which he had given the man. He attached copies of the photograph pages of the two passports and stated that neither contained his real signature. He also confirmed that he had used the passport in his own name to travel from Turkey to Iraq.

33. In the Judgment of the Supreme Court, Lord Wilson summarised the history of the case, including at [4]: "The effect of his acquisition of British nationality was that the respondent automatically lost his Iraqi nationality pursuant to article 11 of the Iraqi Nationality Law No 43 of 1963" and then went on to consider the Secretary of State's case before the Supreme Court. He pointed out at [23] that the case was based on the

premise that as at the date of the deprivation order in December 2007, Mr Al-Jedda could have made an application to the Iraqi authorities for restoration of his nationality, to which he had a right under Iraqi law and the restoration would have been effected immediately. Lord Wilson made the point at [25] that even if the requirements of Article 10.3 of the 2006 Law were satisfied i.e. that Mr Al-Jedda returned to Iraq legally, stayed there at least one year and applied during the course of the year for restoration of his nationality, the fact that the Article said in those circumstances the Minister may restore his nationality connotes that the Minister retains a discretion to refuse the application.

34. Nonetheless, as he indicated in [26] of the Judgment, the Supreme Court was prepared to adopt the premise and determine what he described as "the clean point, namely whether an order for deprivation made against a person who, at its date, can immediately, by means only of formal application, regain his other, former, nationality is invalid under section 40(4) of the Act." The Supreme Court went on to decide that point against the Secretary of State. The essence of its reasoning is at [32] of the Judgment:

> "Section 40(4) does not permit, still less require, analysis of the relative potency of causative factors. In principle, at any rate, the inquiry is a straightforward exercise both for the Secretary of State and on appeal: it is whether the person holds another nationality at the date of the order. Even that inquiry may prove complex, as the history of these proceedings demonstrates. But a facility for the Secretary of State to make an alternative assertion that, albeit not holding another nationality at the date of the order, the person could, with whatever degree of ease and speed, re-acquire another nationality would mire the application of the subsection in deeper complexity. In order to make his argument less unpalatable to its audience, Mr Swift, as already noted, limited it to the re-acquisition of a former nationality, as opposed to the acquisition of a fresh nationality. But, with respect, the limitation is illogical; if valid, his argument would need to extend to the acquisition of a fresh nationality. Yet a person might have good reason for not wishing to acquire a nationality available to him (or possibly even to re-acquire a nationality previously held by him)."

35. Before leaving the Judgment of the Supreme Court, we should refer to what Lord Wilson said at [29] about the further information obtained by the Secretary of State from the Iraqi authorities and the comments of Mr Al-Jedda's lawyers:

> "It is not the function of this court to resolve an issue whether an Iraqi passport was regularly obtained and therefore betokens a valid grant of nationality under Iraqi law. In my view it should set the issue to one side and, not that it matters, should therefore resist concluding that the Secretary of State's new allegations add significantly to the validity of the suggested

> premise upon which the argument is founded. Were this appeal to be dismissed, the Secretary of State might perhaps make a further deprivation order on the basis that, in the light of the passport, no such order would now make the respondent stateless. He would evidently dispute that conclusion and it appears that he might also contend that the Secretary of State is estopped from alleging the validity of the passport at so late a stage. This court should make no comment on any of these possibilities."

36. The effect of the Judgment of the Supreme Court was that the deprivation order had rendered Mr Al-Jedda stateless and, accordingly, that order was quashed.

The second deprivation order and the history of the present proceedings

37. On 11 September 2013, before the Judgment of the Supreme Court, the British embassy in Baghdad sent a Note Verbale to the Iraqi Ministry of Foreign Affairs. That sought information from the Ministry relating to the appeal. The Note stated in terms that Mr Al-Jedda had held British nationality from June 2000 to December 2007, following a naturalisation application and then stated that an issue which had arisen was whether he was an Iraqi national. The Note then set out a summary of the information which the United Kingdom Government had about Mr Al-Jedda, including that he had been born in Kirkuk, Iraq of parents who were both Iraqi nationals, that he held a valid Iraqi passport no G1739575 issued in Baghdad on 28 January 2008, that he held a certificate of Iraqi nationality no 0326964 issued in Kirkuk on 20 January 2008 [that being the certificate referred to in the application form for the passport] and that the Turkish authorities had confirmed that he had used the passport to travel out of Turkey on a number of occasions recently, which may have included to Iraq. The Note Verbale requested the Iraqi Government to confirm that it considers the passport no G1739575 a valid Iraqi passport and to confirm that it considers Mr Al-Jedda to be an Iraqi national by reason of the matters set out.

38. No response having been received, a reminder letter was sent on 14 October 2013. On 24 October 2013, the Iraqi Foreign Ministry provided a Note Verbale which stated that it was: "honoured to inform the Embassy that the Special Authorities have informed us of the authenticity of the Iraqi passport issuance no G1739575 issued on 28/01/2008 and expires on 27/01/2016 under the name of the Iraqi citizen …Al-Jedda." An internal British Foreign Office memorandum dated 4 November 2013 recorded that this official written response had failed to answer the key secondary question about him being considered an Iraqi national now and at all material times in the past. It stated that, in subsequent discussion, the Deputy Head of the Iraq Ministry's Consular Department had said that Mr Al-Jedda was considered an Iraqi national by virtue of his having been issued a genuine Iraqi passport. A further formal written note confirming this was promised. That further Note Verbale dated 7 November 2013 was then provided by the Iraqi Foreign Ministry stating that it had the honour

"to inform the Embassy that the Iraqi citizen (…Al-Jedda) is of Iraqi nationality."

39. After the first Note Verbale but before the second, the Secretary of State served notice under section 40(5) of the 1981 Act on Public Interest Lawyers ("PIL") Mr Al-Jedda's solicitors of her intention to make a deprivation order under section 40(2) because it would be conducive to the public good to do so. The reason for the decision was that it was assessed that he was closely associated with a number of Islamist extremists and his commitment to extremist causes meant that he presented a risk to the national security of the United Kingdom. The notice stated that the Secretary of State was satisfied that the order would not make him stateless. In reaching that assessment, the recent findings of the Supreme Court had been taken into consideration but a number of factors informed the assessment that it was considered he would not be rendered stateless "not least your continued possession of, and reliance upon, an Iraqi national passport, which strongly evidences my assessment that you have not, as claimed, surrendered your Iraqi citizenship".

40. The notice was signed on behalf of the Secretary of State by Mr Phil Douglas, Head of Special Cases, who gave evidence at the hearing before the Commission. He explained in his witness statement that the reference to Mr Al-Jedda's citizenship not having been surrendered was in error and did not reflect the advice on statelessness issues provided to the Secretary of State prior to her making the decision. The inclusion of that wording arose in the context of the need to act speedily to give effect to her deprivation decision and in the absence from the office of the officials who had drafted the submission which had gone to the Secretary of State on 25 October 2013. Mr Douglas had been unaware that the wording did not accurately reflect the advice given.

41. Subsequently, on 18 December 2013, Mr Swift QC produced an Open Summary of the Submission dated 25 October 2013. That stated the submission had referred to the judgment of the Supreme Court which had determined that the previous deprivation order was unlawful because it rendered Mr Al-Jedda stateless contrary to section 40(4) of the Act. The Summary stated that in relation to the statelessness issue, the submission had referred to recently obtained information to the effect that (a) Mr Al-Jedda was in possession of an Iraqi passport obtained in 2008; (b) had made recent use of the passport and (c) was in possession of a certificate of nationality. Based on those matters, the submission had stated that a deprivation decision at that time would not render him stateless. The Summary also stated the consequences of a decision to deprive were considered, as were the consequences of a decision not to make an order, the former including consideration of material subject to legal professional privilege. The submission was provided to the Secretary of State on 28 October 2013 and invited her to consider the options, including in discussions with senior officials. She had considered the submission and considered matters further with senior officials, after which she made the deprivation decision on 31 October 2013.

42. Mr Al-Jedda issued a Notice of Appeal to the Commission against the deprivation order. A directions hearing took place before Irwin J on 7 February 2014 at which he ordered the determination of the three preliminary issues set out at [2] above. He also ordered the Secretary of State to set out her case on the first preliminary issue in a skeleton argument and to identify each question of Iraqi law which she said arose that had not been decided by the Court of Appeal and was properly derived from fresh material she sought to introduce, in advance of a further directions hearing to consider, inter alia, her application to rely upon expert evidence.

43. That further directions hearing took place on 27 March 2014 before Flaux J. The parties were diametrically opposed. The Secretary of State had filed the skeleton argument ordered by Irwin J but was seeking permission to adduce wide ranging evidence of Iraqi law and it did not seem to the Commission that she had focused her application for permission in the manner envisaged by the order of Irwin J. Mr Hickman on behalf of Mr Al-Jedda sought to exclude any expert evidence of Iraqi law, on the basis that the issues to which it went had been determined in the first SIAC proceedings and there was therefore an issue estoppel or that to raise them would be an abuse of process. Furthermore, as foreshadowed in the Judgment of the Supreme Court, Mr Hickman also submitted that what may usefully be described in shorthand as "the passport issue" was one which could and should have been raised by the Secretary of State in the first SIAC proceedings so that the Secretary of State was issue estopped from raising that issue or that were she to do so, there would be an abuse of process.

44. At that directions hearing, Flaux J indicated that all questions of issue estoppel and abuse of process should be dealt with at the substantive hearing in July 2014. He also indicated that the Commission would not permit the Secretary of State to adduce expert evidence of Iraqi law that sought to traverse ground covered before the Commission in the first SIAC proceedings.

45. Following the hearing the Commission made an order dated 2 April 2014 which gave the parties permission to adduce expert evidence on two issues of Iraqi law:

    (1) Whether Mr Al-Jedda's Iraqi nationality was restored to him by Article 10(3) of the 2006 Nationality Law, so as to make him an Iraqi national on 1 November 2013; and

    (2) Alternatively, whether, irrespective of Article 10(3), Mr Al-Jedda regained his Iraqi nationality so as to render him a national of Iraq on 1 November 2013.

    That permission was expressed to be "without prejudice to the Appellant's right to contend at the preliminary issues hearing that the Secretary of State is prohibited from relying on any such evidence, or any part thereof,

by reason of the operation of estoppel or because it would be an abuse of process for her to do so."

46. In the event both the experts instructed (Ms Kurdistan Daloye for Mr Al-Jedda, instructed late in the day because PIL lost contact with Major-General Al-Yasiri who was originally instructed), and Mr Ahmed Dawood for the Secretary of State, produced reports in which they answered the two questions of Iraqi law for which permission had been granted in the negative. However, notwithstanding that one of the agreed facts presented to the experts was that Mr Al-Jedda had lost his Iraqi nationality on 15 June 2000 when he became a British national as a consequence of Article 11 of the 1963 Law, in his report Mr Dawood expressed the opinion that Mr Al-Jedda had never lost his Iraqi nationality as a consequence of that Law. The basis for that opinion was that Article 11.1 did not withdraw nationality automatically, rather it would only be withdrawn if the Iraqi Government enforced the Law against the individual upon notification that the individual had obtained a foreign nationality in a foreign country by his own free choice. Mr Dawood relied upon the opinion of an Iraqi jurist, Dr Hafidh, in a treatise on International Private Law according to Iraqi and Comparative Law.

47. PIL on behalf of Mr Al-Jedda objected before the hearing to the Secretary of State having permission to adduce this expert evidence, on grounds of issue estoppel and abuse of process and of lateness. Without prejudice to that contention, PIL was able to obtain a supplementary report from Ms Daloye taking issue with Mr Dawood's opinion and expressing the view that the 1963 Law had automatically deprived Mr Al-Jedda of his nationality and was not conditional on notification to the Iraqi authorities or any act of withdrawal by the Iraqi authorities. In the event, the Commission heard oral evidence from both Iraqi law experts *de bene esse* at the hearing.

48. In addition to the various witness statements Mr Al-Jedda had made, he provided a further statement dated 13 June 2014 in which he described the deleterious effect of the second deprivation order on himself and his family. He also provided further details of his travel to Turkey after he was released from detention. He said that his wife had paid a dealer to obtain a false identity card for him and the British authorities had known that he was obtaining this. He had carried the false ID on the journey to Kirkuk but had not had to show it to anyone.

49. He also explained how in January 2014, he had used the passport in his own name to travel to Saudi Arabia on business selling perfume. He carried it in his jacket pocket but it was taken by someone whilst he was there. Whoever took it only took the passport and not also his Turkish ID or his money. He reported the matter to a newspaper as required by Saudi law and to the police. He went to the Iraqi consulate and showed them a photo of his passport on his phone, together with his Turkish ID and the newspaper report. He obtained from them a laissez-passer to Iraq but could not get a Turkish visa.

50. He went to stay with his sister in Kirkuk and asked friends if someone could obtain an Iraqi passport. He said that he paid US$3,000 to obtain the four documents required to be presented with the application form. The man who was helping him took him to the passport office and sent the application to Baghdad. He gave his papers including the laissez-passer and his thumb print. He eventually collected the new passport from the passport office. He said he then paid US$4,000 for it, presumably to the unidentified man. The fact that he had come into Iraq on the laissez passer having lost his original passport and had been issued with a new Iraqi passport in February 2014 was confirmed by an email from an official in the Iraqi Ministry of the Interior to an official in the British Foreign Office dated 3 March 2014.

51. At the outset of the hearing before us, Mr Hickman made an application to exclude any cross-examination of Mr Al-Jedda on the passport issue. We ruled against him and permitted such cross-examination, which took place by video link. We set out our findings in relation to the passport issue in the light of that cross-examination and the other evidence later in this judgment.

52. At the hearing, as already noted, the Secretary of State called Mr Phil Douglas, the official who had signed the deprivation notice on her behalf. He was cross-examined by Mr Hickman. His evidence was really relevant to the third preliminary issue and we will deal with it in that context. The Secretary of State also called Mr Mohammed Khadoum, a police officer with the rank of Major Jurist at the Directorate of Nationality in the Ministry of the Interior in Iraq. He was cross-examined at the hearing. Again we set out our findings about his evidence later in the judgment.

The first preliminary issue

53. In the light of the negative answer to the two questions of Iraqi law for which permission was given in the order of 2 April 2014, Mr Jonathan Swift QC now puts the case for the Secretary of State as to why Mr Al-Jedda was not rendered stateless by the second deprivation order in two ways:

    (1) His primary case is that, in the light of the evidence now available about the genuineness of the original passport, Mr Al-Jedda's use of it for travel, the issue of a fresh passport this year and the Notes Verbales from the Iraqi Government that Mr Al-Jedda is an Iraqi national, as at 1 November 2013, Mr Al-Jedda was an Iraqi national. That was not just the *de facto* position but the *de jure* position.

    (2) The alternative case is that Mr Al-Jedda always retained his Iraqi nationality and did not lose it as a matter of Iraqi law in June 2000 upon naturalisation as a British citizen. That case depends upon Mr Dawood's expert evidence and Mr Swift QC recognises that he needs permission to adduce that evidence. He submits that permission should be given, as no question of issue estoppel or abuse of process arises.

54. In summary, Mr Hickman submits on behalf of Mr Al-Jedda that the Secretary of State should be precluded from putting forward either of these cases on the ground that there is an issue estoppel or that for her to do so would be an abuse of process. So far as the alternative case is concerned, he submits that that issue was decided against the Secretary of State by the Commission in its judgment of 23 May 2008 and it has been common ground since, right the way up until service of Mr Dawood's report in June 2014, that Mr Al-Jedda had lost his nationality automatically under Article 11 of the 1963 Law upon becoming a British national in June 2000. The Secretary of State should not be permitted to go behind that now and permission to adduce Mr Dawood's evidence should be refused.

55. In relation to the primary case, Mr Hickman submits that both the information about the passport and, more importantly, the official statements of the Iraqi authorities that Mr Al-Jedda is an Iraqi national could and should have been obtained by the Secretary of State during the course of the first SIAC proceedings. In his skeleton argument dated 22 March 2014 for the second directions hearing, Mr Hickman had pointed out that no explanation had been given as to why the enquiries made of the Turkish and Iraqi authorities in 2013 had not been made at an earlier stage of the proceedings and that it should be inferred that it was a deliberate calculated decision not to make such enquiries, since a statement by the Iraqi Government that it did not regard Mr Al-Jedda as an Iraqi national would have been extremely prejudicial to the Secretary of State's case in the first SIAC proceedings. Before us, Mr Hickman submitted that Mr Swift had not engaged on this point or provided any explanation as to why enquiries were not made earlier, so that we should draw the inference that this was a deliberate decision. Accordingly, issue estoppel operated or for the Secretary of State to raise these points now would be an abuse of process.

56. If the Secretary of State was able to run this primary case, Mr Hickman submitted that at best it demonstrated that Mr Al-Jedda was *de facto* an Iraqi national as at 1 November 2013, the position as a matter of Iraqi law being that had lost his Iraqi nationality in 2000 and had never regained it pursuant to Article 10.3 of the 2006 Law or otherwise. As a matter of international law and English law, statelessness is to be judged by the *de jure* position. It was quite possible that the stance of the Iraqi authorities was based upon an entry in the register in Iraq to the effect that Mr Al-Jedda was an Iraqi national and was incorrect because Mr Al-Jedda had never been crossed off the register. He invited the Commission to conclude that Mr Al-Jedda was nonetheless stateless as at 1 November 2013, so that the second deprivation decision was unlawful and should be quashed.

57. Before dealing in more detail with the evidence and submissions on the first preliminary issue, logically we should deal with the question of issue estoppel and abuse of process and it is to that which we now turn.

Issue estoppel and abuse of process

58. In his Amended Skeleton Argument, Mr Swift QC submitted that the doctrine of issue estoppel has no direct application in public law and although the principle of abuse of process was applicable, that as always subject to the discretion of the court to depart from the principle if the interests of justice required it.

59. It is certainly correct that in a number of cases of judicial review the courts have stated that, in the case of judicial review, the doctrine of issue estoppel cannot apply. The reasons were given by the Divisional Court in *R v Secretary of State for the Environment ex p Hackney LBC* [1983] 1 WLR 524 at 538-9, that there is no true *lis* between the applicant and the Crown in judicial review proceedings and a decision in such proceedings is not a final decision in the sense required for issue estoppel to operate, since the nature of the relief often leaves open reconsideration by the relevant statutory body or government department. That principle was applied by the Court of Appeal in the same case ([1984] 1 WLR 592 at 602A-B (per Dunn LJ) and 606D (per Sir John Donaldson MR) and in *R v Secretary of State for the Home Department ex p Momin Ali* [1984] 1 WLR 663 at 670A (per Sir John Donaldson MR). Although there has been some criticism of this principle (see for example *Spencer Bower and Handley: Res Judicata* 4th edition at [16.07]), as Simon J said in *Eco-Power UK Ltd v Transport for London* [2010] EWHC 1683 (Admin) at [19]-[20]:

> "It seems to me that there is now a well-established rule that a decision in judicial review proceedings cannot be relied on to found an estoppel per rem judicatem. It may be that this principle, if such it is, needs to be looked at again…
>
> Nevertheless, in my view, if the rule needs to be reconsidered it is for the Court of Appeal to do so. The *Hackney* case was decided 26 years ago; and has been assumed to be a correct statement of the law for as long. It is not for a single judge in this court to embark on restating the law in this area."

60. That cautious approach should equally be adopted by this Commission. However, in our judgment, that principle is only applicable in judicial review cases, not in cases where there is a full merits appeal before the court or tribunal, as in the present case. Where, following a merits appeal, there has been a final determination of the relevant issue by the Commission, it seems to us that the doctrine of issue estoppel should apply, pursuant to the principle enunciated by Lord Bridge of Harwich in *Thrasyvoulou v Secretary of State for the Environment* [1990] AC 273 at 289:

> "The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims "interest reipublicae ut sit finis litium" and "nemo debet bis vexari pro una et eadem causa." These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They

> certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions."

61. Furthermore, even if, contrary to the conclusion we have reached, the doctrine of issue estoppel does not apply as such in public law, it is quite clear from the authorities (and indeed is accepted by Mr Swift on behalf of the Secretary of State) that the parallel concept of abuse of process will be applied by the courts in public law cases. That was made clear by Sir John Donaldson MR in *R v Secretary of State for the Home Department ex p Momin Ali* [1984] 1 WLR 663 at 670B-D:

> "However I think that the principles which underlie issue estoppel and the decision in *Ladd v. Marshall* , namely that there must be finality in litigation, are applicable, subject always to the discretion of the court to depart from them if the wider interests of justice so require. In expressing this conclusion, I find myself in complete agreement, mutatis mutandis, with the judgment of the Divisional Court, given by Gibson J. in *Reg. v. Governor of Pentonville Prison, Ex parte Tarling* [1979] 1 W.L.R. 1417 , 1422–1423, when he said:
>
> > 'First, it is clear to the court that an applicant for habeas corpus is required to put forward on his initial application the whole of the case which is then fairly available to him. He is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for a second or renewed application to the court. The true doctrine of estoppel known as res judicata does not apply to the decision of this court on an application for habeas corpus: … There is, however, a wider sense in which the doctrine of res judicata may be applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings: …'
>
> In my judgment this approach is right and it is not the one adopted by the judge. The standard of proof required by the House of Lords where there has been no previous adjudication is that appropriate to an allegation of a serious character and one involving the liberty of the subject. Here an even higher standard is required, because the starting point is a binding decision of an appropriate tribunal in favour of the applicant. That decision may not render the issue of his status res judicata,

but it comes very close to it. If it is to be reversed, the Home Office must prove fraud to a standard appropriate to such an allegation."

62. The most recent and authoritative consideration of the principles of res judicata and abuse of process was given by the Supreme Court in *Virgin Atlantic Airways v Zodiac Seats UK Ltd* [2013] UKSC 46; [2014] AC 160. The principles were set out in the judgment of Lord Sumption JSC at [17]-[26]. The other Justices agreed with that exposition. Having set out the history of the development of cause of action estoppel and issue estoppel and the principle of abuse of process derived from the judgment of Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115, Lord Sumption cited the more recent authorities in which the House of Lords has sought to impose what he described at [18] as "some coherent scheme on these disparate areas of law". In particular he referred to the speech of Lord Keith of Kinkel in *Arnold v National Westminster Bank plc* [1991] 2 AC 93.

63. At [22] he stated:

"*Arnold* is accordingly authority for the following propositions:

(1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.

(2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.

(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

64. Lord Sumption went on to reject a submission by the claimant in that case that recent case law had taken the principle in *Henderson v Henderson* outside the domain of res judicata altogether, so that the qualification of the absolute character of the doctrine of res judicata by Lord Keith in *Arnold* was no longer good law. He stated at [24]:

"I do not accept this. The principle in *Henderson v Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before. There

> was nothing controversial or new about this notion when it was expressed by Lord Kilbrandon in *Yat Tung*. The point has been taken up in a large number of subsequent decisions, but for present purposes it is enough to refer to the most important of them, *Johnson v Gore-Wood & Co* [2002] 2 AC 1, in which the House of Lords considered their effect."

65. He then went on to cite extensively from the speeches of Lord Bingham of Cornhill and Lord Millett in *Johnson v Gore-Wood*, before concluding at [25]:

> "Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank* at p 110G, 'estoppel per rem judicatam, whether cause of action estoppel, or issue estoppel is essentially concerned with preventing abuse of process.'"

66. Turning to the application of these principles to the present case, we deal first with the alternative case where the Secretary of State seeks permission to amend her case and to adduce expert evidence to the effect that Mr Al-Jedda had not lost his Iraqi nationality automatically when he took British nationality in 2000 by reason of the 1963 Law, but that he had always been and remained an Iraqi national. Despite Mr Hickman's strenuous argument to the contrary, we simply do not see how the fact that that issue was decided by the Commission in its judgment of 23 May 2008 in the first SIAC proceedings, let alone the common ground thereafter, can be said to give rise to cause of action estoppel. That judgment cannot in any sense be said to be a decision establishing the existence or non-existence of a cause of action. Rather the critical question is whether the Secretary of State should be precluded from amending her case and adducing the expert evidence by virtue of an issue estoppel or because to do so would be an abuse of process.

67. Mr Hickman's submission on behalf of Mr Al-Jedda was very straightforward: the relevant issue, as to whether Mr Al-Jedda had lost his Iraqi nationality in June 2000 had been determined against the Secretary of State by the Commission in its judgment of 23 May 2008 and had not been challenged by the Secretary of State since, but had been common ground. There was accordingly an issue estoppel and there were no special circumstances which would cause injustice such as would justify not applying the estoppel. The highest it could be put on behalf of the Secretary of State was that Mr Dawood had produced an opinion which was contrary to that of other experts, including Judge Al Saedi and Dr Mohsin, previously instructed on behalf of Mr Al-Jedda. Even if it could

be said that his opinion was better than theirs or an improvement upon that of Mr Edge, which Mr Hickman did not accept, that came nowhere near being the special circumstances which would justify an exception to the application of the doctrine of issue estoppel.

68. Mr Swift QC submitted that the doctrine of issue estoppel simply did not apply here because of the effect of the decision of the Court of Appeal in March 2010 allowing the appeal against the decision of the Commission in May 2008 on grounds of procedural unfairness and remitting the case for a fresh hearing before a differently constituted Commission on the whole issue of statelessness ([74] of the judgment of Hooper LJ). He submitted that accordingly the whole issue of statelessness was reconsidered by the Keith J Commission. In those circumstances, the statement by Donaldson MR in *ex parte Momin Ali* quoted above about a binding decision of an appropriate tribunal was not applicable in this case. There was no binding decision of the Commission because it had been overturned by the Court of Appeal.

69. Mr Swift also relied in this context on a statement by Lord Bingham of Cornhill in *Jones v Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270. There the claimant relied upon statements in the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 1)* [2000] 1 AC 61 to the effect that acts of torture could not be official government acts. That decision of the House of Lords had been set aside and the case reheard by a differently constituted Judicial Committee in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)*[2000] 1 AC 147. Lord Bingham stated at [19]:

> "It is certainly true that in *Pinochet (No 1)* and *Pinochet (No 3)* certain members of the House held that acts of torture could not be functions of a head of state or governmental or official acts. I have some doubt about the value of the judgments in *Pinochet (No 1)* as precedent, save to the extent that they were adopted in *Pinochet (No 3)*, since the earlier judgment was set aside… "

70. Mr Swift submitted that the Commission should reach the same conclusion here and that the decision of the Commission of 23 May 2008 that Mr Al-Jedda had lost his Iraqi nationality automatically under Article 11 of the 1963 Law was not binding, so could not give rise to an issue estoppel. Mr Swift accepted that it was correct that no point about Article 11 of the 1963 Law had been taken at the fresh hearing before the Commission presided over by Keith J. Accordingly, he submitted that the doctrine of issue estoppel would only be applicable if the Article 11 point could and should have been run before the second Commission, but was not. He then relied upon the passages in [24] and [25] of the judgment of Lord Sumption JSC in *Virgin Atlantic* which I have referred to above, in support of the submission that even the doctrine of issue estoppel is not inflexible.

71. We are unable to accept Mr Swift's submissions as to the status of the decision of the Commission of 23 May 2008 on the Article 11 point. That point, as to whether Mr Al-Jedda had lost his Iraqi citizenship when he

was granted British citizenship in June 2000, was identified by Mitting J as one of the four "determinative issues" in relation to the preliminary issue of statelessness at [15] of the judgment. Mr Al-Jedda won on that issue, although he lost on statelessness overall. If the Secretary of State had wanted to challenge the decision of the Commission on that Article 11 point, a cross-appeal could and should have been pursued. It was not and instead, as the Court of Appeal recorded at [7] of the judgment of Hooper LJ, before the Court of Appeal it was no longer in dispute that by virtue of Article 11.1 of the 1963 Law, Mr Al-Jedda had lost his Iraqi citizenship automatically on acquiring British citizenship in June 2000.

72. Accordingly, when the Court of Appeal remitted the "whole issue of statelessness" ([74] of the judgment), they were not intending to remit that issue for re-decision since it had been decided against the Secretary of State and was no longer in issue. It seems to us that the point can be tested in this way: if the Secretary of State had sought to reargue the whole of the Article 11.1 point before the Commission presided over by Keith J in July 2010, would the Commission have permitted her to do so? We consider that the answer to that question is no: having chosen not to cross-appeal the Article 11.1, it seems to us the Secretary of State was bound by the decision of the Commission on the point in its judgment of 23 May 2008.

73. Even if that analysis were wrong, the Article 11.1 point was one which the Secretary of State could and should have raised in the first SIAC proceedings, before the Commission presided over by Keith J or in the Court of Appeal or Supreme Court. In those circumstances, issue estoppel bars the Secretary of State from raising the Article 11.1 point in the present subsequent proceedings. It cannot possibly be said that there are special circumstances where to hold that there was an issue estoppel would cause injustice. Nothing new has arisen in relation to the Article 11.1 point since the first SIAC proceedings. The highest it could be put on behalf of the Secretary of State is that, in Mr Dawood, she has a new expert who disagrees with the experts relied upon by Mr Al-Jedda in the first proceedings, Judge Al Saedi and Dr Mohsin and expresses a different opinion. Those are not special circumstances: the Secretary of State could with reasonable diligence have located Mr Dawood as an expert in the first proceedings and should have done so. In our judgment there is an issue estoppel which bars the Secretary of State in the present proceedings from contending that Mr Al-Jedda did not lose his nationality automatically upon taking British citizenship in June 2000.

74. We should add that, even if Mr Swift were right that issue estoppel did not arise in this case, either because it is a doctrine which has no place in public law or because the decision of the Commission of 23 May 2008 on the Article 11.1 point is not binding, we consider that the principle of abuse of process would still be applicable to prevent abusive and duplicative litigation. For the Secretary of State to seek to raise the Article 11.1 point now in these proceedings is abusive, in circumstances where, since May 2008, both parties have proceeded on the basis that it was common ground that Mr Al-Jedda had lost his Iraqi nationality

automatically under the 1963 Law in June 2000. The interests of justice certainly do not require that the Secretary of State should be entitled to reopen the Article 11.1 point.

75. Our conclusion that the Secretary of State is precluded by issue estoppel or abuse of process from reopening the Article 11.1 makes it unnecessary to consider whether, had the principles of issue estoppel or abuse of process not been applicable, we should still have refused the Secretary of State permission to amend her case and rely upon the expert evidence of Mr Dawood on the Article 11.1 point, on the grounds that the point came late and the Secretary of State was in breach of the procedural order of the Commission of 2 April 2014, applying by analogy the principles in relation to compliance with Court orders laid down by the Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 WLR 795.

76. That case set out guidelines as to the circumstances in which relief from sanctions under Part 3.9 of the Civil Procedural Rules should be refused or granted. Those guidelines have been very recently clarified and restated by the Court of Appeal in *Denton v TH White Limited* [2014] EWCA Civ 906. For present purposes it is only necessary to cite [24] of the judgment of Lord Dyson MR and Vos LJ:

> "We consider that the guidance given at paras 40 and 41 of *Mitchell* remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]". We shall consider each of these stages in turn identifying how they should be applied in practice. We recognise that hard-pressed first instance judges need a clear exposition of how the provisions of rule 3.9(1) should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities."

77. Mr Swift relied upon the fact that in accordance with his duties to the Commission as an expert, Mr Dawood had answered the two questions of Iraqi law for which the Commission gave permission for expert evidence in the negative but had indicated that he did not agree that Mr Al-Jedda had lost his Iraqi nationality automatically, at which point the Treasury Solicitor asked him to expand on his opinion in his report and wrote promptly to the Commission seeking permission to amend the case for the Secretary of State and to rely upon Mr Dawood's expert evidence on the

Article 11 point. In those circumstances, Mr Swift submitted that there had been no breach of the Commission's order or, if there had, it was not serious or significant.

78. We agree that, if it were open to the Secretary of State to reopen this point, there is no question of her being in breach of our order so as to necessitate relief from sanctions. It would simply be a question of the Secretary of State, albeit only shortly before the hearing, seeking permission to call expert evidence on a different issue. Whilst Mr Hickman emphasised repeatedly that the Secretary of State should have had her expert evidence on Iraqi law before the procedural hearing on 27 March 2014 and, indeed, before she even made the second deprivation decision, that would simply have meant that the present application would have been made at that hearing. Whilst it is true that, at the hearing, Flaux J indicated that the Commission would not permit a wide ranging expert report seeking to reopen maters determined in the first SIAC proceedings, the hypothesis upon which we are proceeding at this stage of the argument is that there is no issue estoppel or abuse of process. In those circumstances, no question of breach of the order made at that hearing arises and the Secretary of State would not need to seek the equivalent of relief against sanctions.

79. It follows that, if we had not concluded that the Secretary of State's alternative case was precluded by issue estoppel or because to be permitted to raise it would be an abuse of process, for the reasons we have given above, we would have granted permission to the Secretary of State to amend her case and adduce the expert evidence of Mr Dawood on the Article 11 point. We would have reached that conclusion not least because Ms Daloye was in a position to address the point in a supplementary report so no prejudice was caused and the hearing date was not threatened. We deal briefly later in the judgment with what our conclusions would have been on the Article 11 point if we had not concluded that it should not be raised because of issue estoppel and/or abuse of process.

80. We turn to consider whether, as Mr Hickman contends, the Secretary of State should also be debarred from running her primary case by reason of the application of the doctrine of issue estoppel or because for her to do so would be an abuse of process. In relation to that primary case, the material on which the Secretary of State now seeks to rely is evidence from Notes Verbales in 2013 that his 2008 passport and identity card are genuine and that the Iraqi government states that he is an Iraqi national, together with the evidence from the Turkish government as to his use of that passport to travel outside Turkey several times in 2013.

81. It seems to us that these were not matters which were in issue before the Supreme Court, as the first sentence of [29] of the judgment of Lord Wilson makes clear: "It is not the function of this court to resolve an issue whether an Iraqi passport was regularly obtained and therefore betokens a valid grant of nationality under Iraqi law." Nor were these matters in issue in the SIAC proceedings either in 2008 or 2010. The highest it can be put is that, if the Secretary of State had asked these questions of the Iraqi and Turkish governments earlier, she might have obtained evidence earlier as

to the genuineness of the passport and its use and as to whether the Iraqi authorities regarded Mr Al-Jedda as an Iraqi national. Such evidence as to the position in 2008 and later would have been of no more than marginal relevance in relation to the issue which was before the Commission in the first proceedings, namely whether Mr Al-Jedda was an Iraqi national or stateless at the time of the first deprivation order in December 2007. Accordingly, in our judgment, there is no question of an issue estoppel operating to preclude the Secretary of State from relying on this material now.

82. Even if we were wrong about that, the question is whether the relevant points, that the Iraqi government considers Mr Al-Jedda an Iraqi national and that he has a genuine passport and national identity card, could with reasonable diligence and should have been raised in the first SIAC proceedings. The point about the genuineness of the passport was in fact raised in those proceedings, albeit at a late stage, before the Supreme Court. If, contrary to the view of the Supreme Court expressed at [29] of Lord Wilson's judgment, they had considered that material relevant to the issue they had to decide, a difficult question might have arisen as to whether the Secretary of State had to satisfy the test for adducing fresh evidence on appeal in *Ladd v Marshall* [1954] 1 WLR 1489, specifically the first criterion that the evidence could not have been obtained with reasonable diligence for use before the Commission. However, since the Supreme Court did not consider the material relevant to the issue they had to decide, they did not need to consider *Ladd v Marshall*. It can have no application before us, since these are fresh proceedings concerned with a second, separate, deprivation order.

83. Since the point about the genuineness of the passport was raised in the first proceedings, but was not considered relevant by the Supreme Court, it is difficult to see how issue estoppel could apply to exclude evidence on that point in the present proceedings. So far as the point that the Iraqi Government considers that Mr Al-Jedda is an Iraqi national is concerned, that point was not raised in the first SIAC proceedings, but it plainly could have been, in the sense that, as Mr Hickman said, the Secretary of State could have asked the Iraqi government earlier than September 2013 for an official response as to the status of Mr Al-Jedda. However, as we see it, the critical question is whether that point <u>should</u> have been raised in the earlier proceedings. In our judgment, despite Mr Hickman's submissions to the contrary, this was not a point which should have been raised in the earlier proceedings, for the simple reason that, as we stated above, the question of the regularity of an Iraqi passport in January 2008 and how the Iraqi Government regarded the status of Mr Al-Jedda in the light of that passport, would have been of no more than marginal relevance to the issue in the first proceedings, whether he was stateless at the time of the first deprivation order in December 2007.

84. By parity of reasoning, it seems to us that there is no abuse of process in the Secretary of State raising these points as the justification for the fresh deprivation order in November 2013. As we noted above, Mr Hickman

submitted that, in the light of the failure of the Secretary of State to provide an explanation as to why the opinion of the Iraqi Government as to the status of Mr Al-Jedda was not sought before September 2013, the Commission should draw the inference that a deliberate decision had been taken because the Secretary of State did not want to receive an answer from the Iraqi Government which might be unhelpful to her case, particularly in circumstances where Mr Al-Jedda had obtained, via Dr Mohsin, the letter from Major-General Al Yasiri.

85. However, even if we were prepared to draw that inference, it does not follow that evidence as to the official response of the Iraqi Government in 2008 or 2010 was evidence which the Secretary of State should have adduced in the earlier SIAC proceedings, for the reason we have already given at [83] above. Accordingly, we consider that it is not an abuse of process for the Secretary of State to rely upon the information obtained in 2013 as to the passport and the status of Mr Al-Jedda.

86. In challenging the case on abuse of process, Mr Swift submitted that it is open to the Secretary of State to consider the exercise of the power under section 40(2) of the 1981 Act from time to time, relying upon whatever material she has that is probative of a decision that the relevant person is not stateless. Obviously, if simply the same material and nothing else had been relied upon in making the November 2013 order as in making the December 2007 order, there would arguably have been an abuse of power which could be challenged by way of judicial review. However, here the Secretary of State relied upon material obtained in 2013 which had not been available in 2007. Mr Swift QC submitted that it was immaterial that the Secretary of State could have obtained the material earlier. The logical endpoint of Mr Hickman's submission on abuse of process would be that the Secretary of State could never make a fresh deprivation decision at all on the basis of material now available to her if the person the subject of the decision was able to demonstrate that the Secretary of State could have obtained the new material earlier.

87. It seems to us that there is considerable force in Mr Swift's submission and that, as he says, Mr Hickman's point is essentially a reflection of the bad *Ladd v Marshall* point, to which we have already alluded. Just as that principle is not applicable to evidence called in fresh proceedings, so where new material has become available which justifies a separate fresh deprivation order, it should not be relevant that the material could have been obtained at an earlier stage. Of course there will be cases where the new material not only could, but should, have been obtained at the time of the earlier decision, so that questions of abuse of power or of process might arise, but since we have already decided that the new material now relied upon by the Secretary of State was not material which should have been deployed in the earlier SIAC proceedings, *a fortiori* it was not material which the Secretary of State should have obtained before making the earlier decision.

88. We also agree with Mr Swift that, upon analysis, the actual decisions in *ex parte Momin Ali* and *Thrasyvoulou* do not assist Mr Al-Jedda. The former

was a case where an adjudicator had held, after appeals against the refusal of entry to the applicant, that he should be granted an entry certificate. Relying upon material subsequently obtained in Bangladesh which cast doubt upon that decision and upon whether the applicant's entry to the United Kingdom was legal, the Secretary of State detained the applicant in custody upon his re-entering the country. On his application for judicial review of that decision, the Court of Appeal held that, if the decision of the adjudicator was to be reversed, the Secretary of State had to prove fraud to the requisite high standard, which he simply could not: see per Donaldson MR at 671A and Fox LJ at 673G. We accept Mr Swift's submission that that was a case where the Secretary of State was seeking the reversal of a decision of a tribunal, not where, as here the Secretary of State was engaging in a separate successive exercise of the relevant statutory power. The reasoning in that case is simply not applicable.

89. In *Thrasyvoulou* a planning inspector had determined on appeal by the applicant that particular premises had been used for hotel use not hostel use and quashed the enforcement notices of the local authority. Four years later the local authority served fresh enforcement notices even though there had been no change of use since the first enforcement notices. The House of Lords held that the later enforcement notices should be quashed on the grounds that there was an issue estoppel. Thus, that was not a case where fresh evidence was being relied upon in support of the second decision to issue enforcement notices. As we have said it was common ground both in that case and the case of *Oliver* which was heard at the same time, that there had been no material change of use since the first enforcement notice. We agree with Mr Swift that the present case, which concerns successive considerations of the exercise of the power under section 40(2) of the 1981 Act, is completely different from *Thrasyvoulou*.

90. For all the above reasons, we conclude that the Secretary of State is not precluded from relying upon the material as to the regularity and use of the passport and as to the official response of the Iraqi Government obtained in 2013, either by issue estoppel or abuse of process. We therefore turn to that evidence and to our findings on it before setting out our conclusions on the primary case of the Secretary of State.

The evidence about the passport and the nationality status of Mr Al-Jedda

91. We have already set out above what Mr Al-Jedda had said in his witness statements about the passport. In summary, his account appears to be that his wife obtained a fake identity card for him in 2007 from a dealer, evidently when he was still in detention and that, after his release, he obtained from a dealer two passports, one in his own name and one in the false name of Shaheen Ali. His account as it appeared from the witness statements was that he had not filled in the application form for the passport in his own name (or by inference that in the false name) nor provided any of the four documents which it was necessary to submit with the application form. His evidence was that even the passport in his own name was a fake passport, since he could not obtain a genuine one. When his brother in law had asked the Iraqi authorities in December 2007

whether he could obtain nationality documents, his brother in law was told that this was not possible because he could not hold dual nationality.

92. We agree with Mr Swift that a somewhat different picture emerged in cross-examination. First, as regards the question of whether he had a national identity card, Mr Swift pointed out to him that there was an inconsistency between his evidence that his wife had obtained an identity card for him, albeit he said a fake one, whilst he was in detention in 2007, and his evidence in his August 2013 statement that members of his family could not obtain an identity card for him. In cross-examination he confirmed that his wife had obtained an identity card for him through other members of her family, which he said was not obtained through the proper channels, but on the black market. He appeared unable or unwilling to explain the contradiction between his various witness statements on this point. Nor was he able to explain why, if he had an identity card obtained by his wife in 2007, he needed to ask the unidentified man who obtained the passport for an identity card as well, as he claimed in his recent June 2014 statement.

93. We note that, despite Mr Al-Jedda's evidence on this point, the evidence of Major Khadoum is that Mr Al-Jedda has an Iraqi Nationality Certificate numbered 032964 issued on 20 January 2008 by the Directorate of Nationality in Kirkuk, which the Directorate has confirmed is correct and according to law in a letter of 4 May 2014 which Mr Khadoum exhibits. He also states that Mr Al-Jedda has a civil status identification card number 57567 issued by the Kirkuk Civil Status Department on 10 January 2008. The Directorate of Nationality support that civil status and thus the genuineness of the identification card in another letter dated 4 May 2014 which he also exhibits. Those two documents are of course precisely the documents submitted with the application form for the passport. The fact that the Iraqi authorities recognise them as genuine and validly issued seems to us to cast considerable doubt upon the veracity of Mr Al-Jedda's evidence that he had nothing to do with the completion of the application form and that the documents submitted and the passport itself were not genuine. The evidence from the Iraqi authorities points very strongly to Mr Al-Jedda having obtained a genuine Nationality Certificate and identity card and, in turn, a genuine passport in January 2008.

94. Mr Al-Jedda was cross-examined about obtaining two passports from the unidentified man. He said he had paid $700-$800 for the one in his own name, but could not remember how much he had paid for the one in the false name. He said he hesitated to say how much because he could not remember. He said he had chosen the false name and given the man the details as he had given his own details for the passport in his own name. The name he had chosen was a common one in Turkey. Mr Swift pointed out that the first time he had mentioned two passports was in his August 2013 statement and that in his earlier statement in October 2008, he had referred to obtaining a passport. Mr Al-Jedda claimed that he had meant that he was travelling on that passport. He had also only mentioned one

passport in his February 2010. He did not know why he had not mentioned having two passports before August 2013, but insisted he did have two.

95. Mr Swift pointed out that the two passports were issued twelve days apart and that the man in the photograph on the Shaheen Mohammed Ali passport was wearing different clothes, which Mr Al-Jedda accepted. In the photograph on his own passport he was wearing a collar and tie. His explanation was that that photograph was taken just after he was released from detention, whereas the Shaheen Ali one was taken fourteen days later. Mr Swift put that they looked like different people, but Mr Al-Jedda insisted they were both him. He accepted that both passports were issued by the Iraqi Government and when he checked on the internet, both were recorded there.

96. Mr Swift put that the second passport in the name of Shaheen Ali had nothing to do with Mr Al-Jedda at all, but he insisted that he had obtained that passport as well. He said he still had the passport and it was in Iraq, where it had always been. He admitted that he had been in Iraq earlier this year, 2014. He had been travelling from Saudi Arabia to Iraq and wanted to use that passport. That was when he had checked on the internet and found that both the passports were registered with the Iraqi authorities, which was why he used it.

97. He agreed that the details on the passport were his details and were correct. These were the details he had given the man who obtained the passport. He agreed that as far as he was aware the passport was issued by the Iraqi authorities and the fee he paid to the man was a facilitation fee to ensure that the application was dealt with promptly. Mr Swift put that although he had said in his August 2013 statement that the passport was "irregularly obtained" all that meant was that he had made a payment to ensure the passport was issued to him speedily. Mr Al-Jedda said yes speedily so he could leave the country speedily. In re-examination Mr Hickman asked him whether when he got the passport in 2008, he knew it was coming from the Iraqi Government. Mr Al-Jedda said to be honest when he travelled in 2008, he assumed that. He had then travelled again two or three years later on the passport but said he didn't know then that it was registered. It was only when he came back in 2014 and lost his passport, that he found both passports were registered.

98. Mr Swift asked him in cross-examination about the use of the 2008 passport in his own name. He admitted that he had travelled from Turkey in 2013 but said he had only gone to Iraq once not three times. He accepted, somewhat reluctantly, that he had travelled previously to Iraq on that passport before 2013, not regularly but possibly on two occasions. Once was for his sister's wedding in Kirkuk, but he purported not to remember which year that was. His trip to Iraq in 2013 was not on business but because his daughter was there. He admitted that he had also travelled on that passport to Saudi Arabia on business and for umrah. He said quite categorically that he had only ever used the passport in his own name, not the other one (i.e. the Shaheen Ali passport), somewhat

contradicting what he had said earlier about looking up on the internet whether the other passport was registered, which was why he had used it.

99. He was asked about losing the Iraqi passport in his own name in Saudi Arabia earlier this year when he was there on his perfume business. He confirmed it was taken from his pocket but his Turkish identity card and money were not taken. Mr Swift put that he was content to undertake a business trip to Saudi Arabia using the Iraqi passport but he said, not content but scared. Mr Swift asked why he decided to sell perfume in Saudi Arabia if he was scared and he said he had nine children, they had to eat and live.

100. He said he had travelled to Saudi Arabia previously on business six or seven times before 2014 using the Iraqi passport and agreed that he used the passport regularly on business. Mr Swift put that this was inconsistent with what he had said in his October 2008 statement about not being able to get a job which required him to travel because he only had a fake Iraqi passport. He accepted that he did have a job which required him to travel and he did regularly travel on business with that passport. He agreed that when he used the passport he was saying he was Iraqi: what else would he say when he was travelling to Saudi Arabia? In re-examination he said he worked selling perfume for a company. He had not travelled elsewhere than to Saudi Arabia and Iraq, other than once to Bahrain. The reason he had not travelled to other countries was that with an Iraqi passport it was not easy to get visas to other countries, unless you worked.

101. In cross-examination, he said that when he lost the passport in Saudi Arabia he presented himself to the Iraqi embassy there to obtain a travel document and he agreed that the document they had issued to allow him to travel was one properly issued by the Iraqi embassy. He agreed that he had then obtained a new passport on his return to Iraq and that he had paid $3,000 in order to obtain it speedily. As set out below, later in cross-examination he contradicted himself on this point.

102. He was asked by Mr Swift why, as he claimed in his June 2014 statement, he had applied for a new identity card and he said this was because the old one incorrectly said he was single. He said the new card had a different number from the old one and was not simply a duplicate. Mr Swift pointed out that the Iraqi authorities said that he had used his January 2008 identity card to obtain the new passport in 2014 and Mr Al-Jedda agreed that was correct. He said that at the passport office they had asked him to get a new identity card which recorded that he was married in order that his documents were in good order. He agreed that the application for the 2014 passport had been made to the Iraqi authorities and they had issued the passport simply as a replacement for the lost one.

103. When Mr Swift then put to him again that he had paid the $3,000 fee simply to ensure the passport was supplied speedily, he said no, it had been paid for the four documents required with the application form, the identity card, the nationality certificate, the residence certificate and the food rationing card. Not only did this contradict his earlier evidence

agreeing that he had paid the $3,000 to obtain the passport speedily, but it is difficult to see why he would need to pay for an identity card, given that he had just given evidence about using his 2008 identity card to obtain the passport in 2014. He also said that he presented the photocopy he had of the identification page of the 2008 passport not only to the Iraqi embassy in Saudi Arabia to get the travel document, but at the passport office.

104. Mr Swift then put to him that when he had taken British nationality in June 2000, he had not informed the Iraqi authorities. He agreed and said that if you informed them at the Iraqi embassy that you had taken British or other nationality, they would not have anything to do with you. He agreed that it was actually worse during the Saddam Hussain regime and if you lost your Iraqi nationality, there were serious consequences for you and your family. Mr Swift put that what he had said in his May 2008 statement about his brother informing the Iraqi intelligence services in 2000 that he had taken British nationality and that the intelligence services had left his brother alone after that was not true. He insisted that his brother was a famous actor in Iraq and that everyone was asking his brother where he was and he had said that Mr Al-Jedda had gone to Britain and taken British citizenship. Mr Al-Jedda said that eventually the authorities had stopped questioning his brother about him. After 2000, he said things were different in Iraq. The country was under siege. He said in re-examination that the officials had come to see his brother rather than vice-versa. On balance, although we could see the force of Mr Swift's suggestion that it was somewhat implausible that Mr Al-Jedda's brother would have given the authorities the information that he had taken British citizenship, we accept that at some stage before the end of the Saddam Hussain regime, the Iraqi authorities did become aware that Mr Al-Jedda had taken British nationality.

105. Mr Swift then asked him about what he then said in that May 2008 statement about his brother in law being informed at the citizenship and immigration office in Baghdad shortly after Mr Al-Jedda was released from detention in December 2007 that it was not possible to hold dual nationality and that he had lost his Iraqi citizenship. Mr Swift suggested it was odd if his brother in law had been told this, as the 2006 Nationality Law was in force by then, which no longer prohibited dual nationality. Mr Al-Jedda said even officials in the offices in Iraq did not know the law. He did not know whether what he said his brother in law was told was true or not.

106. Turning to the evidence of Major Khadoum called by the Secretary of State, in his witness statement he said that he was authorised to make the statement on behalf of the Minister of the Interior of Iraq. He made the statement to confirm the status of Mr Al-Jedda's nationality both at the time of the deprivation decision in November 2013 and at present. He had undertaken research into Mr Al-Jedda's personal data and obtained confirmation from Major-General Abdul-Razaq, Head of the General Nationality Directorate that all the personal data was correct.

107. He confirmed that Mr Al-Jedda was an Iraqi citizen now and in November 2013 and there was nothing to suggest he had abandoned his nationality at any time. He made the point that when Mr Al-Jedda took British nationality in June 2000, he was considered to have abandoned his Iraqi nationality because of the inadmissibility of dual nationality under the 1963 Law. That evidence seems to us to confirm that Mr Al-Jedda lost his Iraqi citizenship automatically in June 2000 by reason of the 1963 Law. However, Major Khadoum goes on to say that there was no entry on the records of the Directorate and the fact that he remained in their records as an Iraqi citizen shows that his Iraqi citizenship was not withdrawn. Major Khadoum was cross-examined about this and Mr Hickman suggested it was possible the Iraqi authorities would not amend the register if they were not aware that someone had obtained another nationality. Major Khadoum said that there was an office which specialised in amending the register and that if they were aware that someone had obtained another nationality, changes would be made to the register. If they were not aware, then changes would not be made.

108. Of course, it is Mr Al-Jedda's evidence that, at a time when the 1963 Law was in force, the Iraqi authorities were aware that Mr Al-Jedda had obtained British nationality and we have accepted that was the case. Accordingly, despite Major Khadoum's evidence, it is apparent that there were cases where, although the Iraqi authorities did know that someone had obtained a foreign nationality, the register was not changed to delete them from those with Iraqi citizenship. It seems to us that there are two possible explanations for this: (a) that although the formal legal position under the 1963 Law was that Iraqi citizenship was lost automatically when someone obtained foreign nationality, in practice the Iraqi authorities did not always enforce the Law by amending the register or in other ways and (b) that the register in the case of Mr Al-Jedda was simply wrong because no-one had altered it and deleted Mr Al-Jedda's name.

109. The latter explanation was the one expounded by Ms Daloye, the expert witness instructed on behalf of Mr Al-Jedda. She is a practising lawyer in Iraq, although her legal education was at English universities, rather than in Iraq. She did not seem to us to have any particular expertise in Iraqi nationality law. She comes from the autonomous Kurdish region of Iraq. She took British nationality in 2002, at a time when the 1963 Nationality Law was still in force. She said she did not report the fact that she had taken British nationality to the Iraqi authorities, but the Kurdish authorities had not applied the 1963 Law since 1991. Accordingly, since that date, no-one from the autonomous region who obtained a foreign nationality had been crossed off the register. She said that the 1963 Law did not apply to her and for that reason, she had not lost her Iraqi nationality, although later in cross-examination she said that if she had returned to Baghdad (meaning from abroad), she would have had to return on a visa. That problem did not arise in practice because when travelling abroad, she flew to and from Sulaymania, in the autonomous Kurdish region, via Turkey.

110. Her evidence was that the register was not conclusive as a matter of Iraqi law but gave rise to a presumption which could be rebutted and equally a certificate of nationality was not determinative but gave rise to a presumption which could be rebutted. She said that even though the Iraqi authorities might be saying in their documents or Notes Verbales that Mr Al-Jedda was Iraqi, the register could be wrong and may not be a true reflection of his status. If there was a proper investigation which revealed that the 1963 Law applied, the Iraqi court would say that documentation had been illegally obtained and that he had lost his Iraqi nationality in 2000 and had not applied to regain it in the proper way, so that the Iraqi court would say he was not an Iraqi. However, it was striking that she could not give a single example of a case where the register showed someone as Iraqi but an Iraqi court had declared that he was not. In our judgment, her inability to give any example of this happening demonstrates how unreal is the scenario which she postulates.

111. Accordingly, it seems to us that the true explanation for why Mr Al-Jedda appears on the register as an Iraqi is that, whatever the strict position about loss of nationality under the 1963 Law, the Law was not always enforced in practice by the authorities. That is really borne out by Ms Daloye's own position. On her evidence, if the Iraqi authorities could revoke Mr Al-Jedda's Iraqi nationality, it must follow that they could revoke her Iraqi nationality as well if she went to Baghdad (whatever the position in the Kurdish autonomous region). However, the suggestion that this will happen to either of them is fanciful. Since the Iraqi authorities regard Mr Al-Jedda as an Iraqi and the register shows him as such, there is simply no question of the authorities making some application to the Iraqi court for a declaration that he has lost his nationality.

112. The evidence of Mr Dawood, the expert instructed on behalf of the Secretary of State strongly supports that conclusion. He said that the Notes Verbales issued by the Iraqi authorities have the status of administrative orders. Iraqi administrative law developed from Egyptian administrative law, which in turn developed from French administrative law. Administrative orders are highly considered by the Government and are given considerable weight as to their truth. They would be accepted as correct subject to any contrary ruling by an Iraqi administrative court. To the extent that Ms Daloye's evidence on this point differed, we prefer the evidence of Mr Dawood.

113. In relation to the particular administrative orders relied on here, the two Notes Verbales from the Ministry of Foreign Affairs dated 24 October 2013 and 7 November 2013 confirming respectively the authenticity of the 2008 Iraqi passport and Mr Al-Jedda's Iraqi nationality, it is striking that those were sent by the Iraqi authorities notwithstanding that they had been told in terms in the Note Verbale of the British Embassy dated 11 September 2013 that Mr Al-Jedda had obtained British nationality in June 2000. This suggests that, contrary to the suggestion made in Ms Daloye's evidence, the Iraqi Government no longer regards the 1963 Law as of any significance or effect.

114. That is borne out by what Mr Dawood was told by the General Nationality Directorate. He asked them what their position would be if they found out that someone on the register as an Iraqi had in fact obtained foreign nationality at a time when the 1963 Law was in force. They said that they had no duty or interest to apply that Law retroactively. That ties in with Mr Dawood's evidence about the change in public policy after the fall of the Saddam Hussain regime. The 1963 Nationality Law was passed by the Baathist regime at least in part to punish opponents of the regime who left Iraq and took foreign nationality by depriving them of their Iraqi nationality. With the fall of Saddam Hussain, many of those who came to power were former opponents of his regime who returned from exile abroad. They wanted to make sure that Iraqi citizens could not lose their citizenship unless they renounced it by formal declaration in writing, as required by Article 10.1 of the 2006 Nationality Law.

115. In the light of the totality of the evidence on the issue of the 2008 passport and the nationality status of Mr Al-Jedda, our findings are as follows:

(1) The certificate of nationality, identity card and passport issued in 2008 were all valid and genuine, in the sense that they were issued by the proper Iraqi authorities. To the extent that he paid someone to obtain them, that was not to obtain fake documentation, but to facilitate the smooth and speedy acquisition of genuine documentation. We do not consider that if, as Mr Al-Jedda says, the signature on the passport is not his, that affects the genuineness of the passport.

(2) Furthermore, it is clear that the Iraqi authorities consider that the 2008 passport, certificate of nationality and identity card are valid and genuine and that he is an Iraqi national. They have said as much in the Notes Verbales, in the correspondence exhibited to Major Khadoum's witness statement and in the evidence of Major Khadoum himself who was authorised to give that evidence by the Minister of the Interior.

(3) We consider that the supposed second passport in the name of Shaheen Ali has nothing whatever to do with Mr Al-Jedda and relates to someone different. The fact that he was unable to say how much he alleges he paid for this passport and the fact that the photograph is different from the one on his own passport demonstrate that this evidence about the second passport is an invention to bolster his case that the passport in his own name was a fake, which we have held it was not.

(4) We reject Mr Hickman's suggestion that any inconsistency between Mr Al-Jedda's witness statements and his oral evidence or any implausibility in his evidence can be explained away by any difficulty in understanding the questions. Having seen and heard Mr Al-Jedda give his evidence, albeit by videolink, we considered that he could both understand and speak English well and, in any event, he had the benefit of an Arabic interpreter.

(5) It is clear that the Iraqi register of nationality shows Mr Al-Jedda as an Iraqi national and that he has not been crossed off the register. As we have already set out above, this is not because the register is wrong but because, whatever the strict position under the 1963 Law, in practice the Iraqi authorities did not always enforce the Law by deleting someone from the register and, now that the Law is no longer in force, the Iraqi authorities have no interest in enforcing it retrospectively. Whilst the register and the certificate of nationality are not conclusive, they would have a presumptive effect as a matter of Iraqi law unless and until they were challenged before an Iraqi court and that court said they were incorrect and should be set aside. The possibility of such a challenge taking place is so remote as to diminish to vanishing point.

(6) That the Iraqi authorities regard the 2008 passport, certificate of nationality and identity card as genuine and consider that Mr Al-Jedda is an Iraqi national is borne out by the fact that (a) he has been able and quite happy to travel to and from Iraq on that passport without impediment on several occasions (in which context we reject his evidence that he was scared when using the passport) and (b) earlier this year, the Iraqi authorities issued Mr Al-Jedda with a fresh replacement passport, which on any view is valid and genuine.

The submissions on the primary case

116. Mr Swift QC relies upon the fact that the Iraqi Government regards Mr Al-Jedda as an Iraqi national and has formally stated that in Notes Verbales, together with the fact that he possessed a valid 2008 passport on which he travelled not only to Iraq itself but to Saudi Arabia and Bahrain and a valid certificate of nationality, together with the fact that he is recorded on the official register as an Iraqi and always has been. Mr Swift submits that all those matters have presumptive effect as a matter of Iraqi law and should be conclusive unless and until set aside by an Iraqi court so that *de jure* Mr Al-Jedda is an Iraqi national and is not stateless.

117. In support of that submission, Mr Swift relies upon the report *UNHCR and De Facto Statelessness* 2010 by Hugh Massey, Senior Legal Adviser at the UNHCR which adopts Van Panhuys in stating at p. 40 that the main test for identifying nationals of a state is how they are regarded by it. At p. 59, in a passage dealing with persons inside the state whose nationality is in issue, Massey says this: "If the state concerned finds that the persons are its nationals, they are neither *de jure* nor *de facto* stateless". Mr Swift submits that that statement must apply equally to nationals of a state who are outside the state, such as Mr Al-Jedda.

118. Mr Swift submits that there is nothing in the decision of the Court of Appeal in *B2 v The Secretary of State for the Home Department* [2013] EWCA Civ 616 (a case upon which Mr Hickman placed considerable reliance) which on analysis assists Mr Al-Jedda's case. In that case, the Secretary of State had made a deprivation order under section 40(2) of the Act against B2 who originated from Vietnam and had taken British citizenship. The Vietnamese government declined to accept that that B2

was a Vietnamese citizen and SIAC held that omission was deliberate. Having analysed the Vietnamese national laws in force from time to time, Jackson LJ stated as follows at [88]:

> "The position under Vietnamese nationality law is tolerably clear. B2 retained his Vietnamese nationality through all the events of the 1980s and the 1990s. The 2008 Law did not change B2's legal status. The fact that in practice the Vietnamese Government may ride roughshod over its own laws does not, in my view, constitute "the operation of its law" within the meaning of article 1.1 of the 1954 Convention. I accept that the executive controls the courts and that the courts will not strike down unlawful acts of the executive. This does not mean, however, that those acts become lawful."

119. Jackson LJ continued at [92] and [95] as follows:

> "92. If the relevant facts are known and on the basis of those facts and the expert evidence it is clear that under the law of a foreign state an individual is a national of that state, then he is not *de jure* stateless. If the Government of the foreign state chooses to act contrary to its own law, it may render the individual *de facto* stateless. Our own courts, however, must respect the rule of law and cannot characterise the individual as *de jure* stateless. If this outcome is regarded as unsatisfactory, the remedy is to expand the definition of stateless persons in the 1954 Convention or in the 1981 Act, as some have urged. The remedy is not to subvert the rule of law. The rule of law is now a universal concept. It is the essence of the judicial function to uphold it.
>
> 95. The word stateless in section 40 (4) means *de jure* stateless, not *de facto* stateless in the sense discussed above: see Fransman's British Nationality Law, third edition, paragraph 25.4 and *Abu Hamza v The Secretary of State for the Home Department* (SIAC, 5th November 2010)."

120. Mr Swift submitted that *B2* was a case of a state blatantly ignoring its own nationality laws and thus of an outrageous denial to a citizen of his legal right to citizenship. Thus, as a matter of the rule of law or public policy, the English courts would not recognise the position being adopted by the Vietnamese state. In the present case that principle of the rule of law or public policy was not engaged and nothing in *B2* required the Commission to go behind what Mr Swift characterised as the "run of the mill" acceptance by the Iraqi state that Mr Al-Jedda was an Iraqi national given that, as a matter of Iraqi law he remains an Iraqi national unless and until the Iraqi courts declare otherwise, a really remote possibility. There was no proper basis upon which the Commission could gainsay the formal declaration by a foreign government that a person was its national, absent some evidence that the declaration was an exorbitant attribution of

nationality to someone with no effective links to the state, clearly not this case.

121. In support of that submission, Mr Swift relied upon passages at pp 853-856 of *Oppenheim's International Law* 9th edition, in particular these passages:

> "…notwithstanding the general principle that it is for each state to determine who are its nationals, a state's assertion that in accordance with its laws a person possesses its nationality is not conclusive evidence of that fact for international purposes…this power of investigation is one which is only to be exercised if the doubts cast on the alleged nationality are not only manifestly not groundless but are also of such gravity as to cause serious doubts with regard to the truth and reality of that nationality.
>
> Furthermore, it is not only international tribunals which may question the grant of nationality by a state to an individual. Even the national courts of other states may, although usually reluctant to do so, in certain circumstances feel it right to inquire into the justification and lawfulness of a state's grant of its nationality. This is likely particularly to be the case where the grant of nationality is questioned because of alleged non-conformity with international law.
>
> …a state's own determination that an individual possesses its nationality is not to be lightly questioned. It creates a very strong presumption both that the individual possesses that state's nationality as a matter of its internal law and that that nationality is to be acknowledged for international law purposes. Furthermore, even where the effects in international law of a state's grant of nationality are limited, the individual will still be a national of that state for purposes of its own laws."

122. Mr Hickman emphasised that the issue of statelessness raised by section 40(4) of the Act involves whether Mr Al-Jedda is *de jure* stateless, not whether he is *de facto* stateless, which is obviously correct given that, as Jackson LJ said in *B2* at [28]-[30], section 40(4) of the 1981 Act is intended to give effect in domestic law to the International Convention on the Reduction of Statelessness of 1961 and under that and the earlier 1954 Convention the focus is on *de jure* stateless persons, not *de facto* stateless persons. That conclusion is repeated at [95] of the judgment which we have quoted above and also emerges from the decision of SIAC in *Abu Hamza v Secretary of State for the Home Department* (2010) UKSIAC 23/2005 at [5]-[6].

123. He then submitted that at most the matters relied upon by the Secretary of State demonstrate that Mr Al-Jedda is *de facto* an Iraqi national and thus *de facto* not stateless, which is not sufficient for the purposes of section

40(4). He submitted that the issue of statelessness as a matter of Iraqi law had been determined against the Secretary of State by the previous decisions of the Commission and the Court of Appeal in the first SIAC proceedings. The only possibility was that the position being adopted by the Iraqi government of regarding Mr Al-Jedda as an Iraqi national did not reflect the correct position under Iraqi law. In relation to Mr Swift's point about the presumption of regularity, he submitted that, as the passages cited from *Oppenheim* and from *Fransman's British Nationality Law* 3rd edition [25.3] demonstrated, under international law the position of the state that someone was its national was only evidence. In the present case, it was much more likely that the Iraqi nationality register was simply wrong and the attitude of the Iraqi government derived from that error.

124. In relation to *B2* he submitted that, if anything, the rule of law considerations to which Jackson LJ referred at [92] pressed much more strongly in the present case than in that case. In that case, the Court of Appeal was not prepared to extend the protection of section 40(4) to someone who was not *de jure* stateless, even though he was *de facto* stateless. In the present case, Mr Hickman submitted that, even if Mr Al-Jedda was not *de facto* stateless because of the position being adopted by the Iraqi government, he was *de jure* stateless for the reasons given by Mr Hickman.

Analysis and conclusion on primary case

125. As we have already found at [115] above, the 2008 passport, the certificate of nationality and the identity card were all valid and genuine, issued by the Iraqi authorities, as is the 2014 passport. Furthermore, those documents are clearly regarded by the Iraqi authorities as valid and genuine and as conferring Iraqi nationality on Mr Al-Jedda. They have stated as much in Notes Verbales, in the correspondence attached to Major Khadoum's witness statement and in his evidence, which was authorised by the Minister of the Interior.

126. The Iraqi nationality register also shows that Mr Al-Jedda is an Iraqi national and has not been struck off that register. As we found at [111] and [115] above, this is not because the register is wrong, as Mr Hickman suggests, but because, whatever the strict position as regards loss of nationality under the 1963 Law, the Law was not always enforced in practice by the Iraqi authorities. The evidence is that, now that the 1963 Law is no longer in force, the Iraqi authorities have absolutely no interest in applying the Law retrospectively, nor any duty to do so. It follows that the scenario envisaged by Ms Daloye of some application by the Iraqi authorities to the Iraqi courts to strike Mr Al-Jedda off the register or for a declaration that he is not an Iraqi national by reason of the application of the 1963 Law is so remote as to diminish to vanishing point.

127. In the circumstances, we agree with Mr Swift that a presumption of regularity does apply here. Furthermore, Mr Al-Jedda's status as an Iraqi national is not only borne out by all the material to which we have referred but by the Notes Verbales dated 24 October and 7 November 2013, which

have the status of administrative orders as a matter of Iraqi law, conclusive unless and until an Iraqi administrative court overturned them, again a very remote prospect. In those circumstances, it seems to us that at the date of the deprivation order in November 2013, as a matter of Iraqi law, Mr Al-Jedda was an Iraqi national.

128. We consider that there is nothing in *B2* which compels or even points to a contrary conclusion. That case was, as Jackson LJ held, a case of a state riding roughshod over its own nationality laws to deny someone citizenship who was clearly a Vietnamese national pursuant to the relevant Vietnamese nationality laws and was therefore a flagrant denial of his rights. Where what is in issue, as in the present case, is the assertion by a foreign state that someone is their national, as the passages in *Oppenheim* which Mr Swift cited establish, both international and national courts should only rarely and with reluctance go behind an assertion of nationality by a state, for example where the assertion of nationality is exorbitant.

129. There is nothing exorbitant in the Iraqi authorities declaring in the present case that Mr Al-Jedda is an Iraqi national. Mr Al-Jedda was born in Iraq in 1957 of Iraqi parents and lived there until he came to the United Kingdom in 1992 seeking asylum from the regime of Saddam Hussein. He returned to Iraq in 2004 after the removal of that regime and following his release from British detention, the Iraqi authorities issued him with a valid Iraqi passport which he was quite happy to use for travel abroad on business and when he lost that passport, he applied to the Iraqi authorities for a replacement passport with which he was issued earlier this year. In fact, subject to the automatic loss of nationality under the 1963 Nationality Law, it might be thought that, on the material before us, the case that Mr Al-Jedda not only is, but always has been an Iraqi national as a matter of Iraqi law, was completely overwhelming.

130. However, as we have held, the Secretary of State is precluded by issue estoppel or abuse of process from contending that Mr Al-Jedda did not lose his Iraqi nationality automatically under the 1963 Law when he took British nationality in June 2000, whatever the position in fact was as to enforcement of that law in practice by the Iraqi authorities. Nonetheless, we are concerned not with the position in 2000 but with the question whether the deprivation order in November 2013 made Mr Al-Jedda stateless. In our judgment, the clear answer to that question is no. At that time Mr Al-Jedda was regarded by the Iraqi Government as an Iraqi national and was an Iraqi national as a matter of Iraqi law.

The alternative case on the effect of Article 11.1 of the 1963 Law

131. In the light of that conclusion and our earlier conclusion that the Secretary of State is precluded by issue estoppel or abuse of process from contending that Mr Al-Jedda did not lose his Iraqi nationality automatically under the 1963 Law when he took British nationality in June 2000, it is not strictly necessary to set out what our conclusion would have been on the effect of Article 11.1 of the 1963 Law, had issue estoppel or abuse of process not

been applicable. Nonetheless, given that we heard the expert evidence on this issue *de bene esse* and that this case may well go further, we will set out in summary the expert evidence and our conclusions on it.

132. In her evidence Ms Daloye relied upon a number of matters which she said supported her conclusion that, as a matter of the proper interpretation of Article 11.1, Mr Al-Jedda lost his nationality automatically in June 2000 and that such loss of nationality was not conditional upon either notification to the Iraqi authorities or any act of withdrawal carried out by the Iraqi authorities. First, she relied upon the correct translation of the Arabic word *"Ufqad"* in the Article as "shall lose" rather than "shall be denied". She said that "shall lose" was consistent with the provision having automatic effect rather than an act of removal by the State. However, in cross-examination she agreed that she did not have any example of "shall lose" having that automatic effect from her own practical experience. We agree that the point is only a neutral one.

133. Second, she relied upon the fact that the rationale for the Article was the political one designed to strip opponents of the regime of their nationality to which we have alluded. However again, it seems to us that is a neutral point. The political nature of the law does not help as to its construction, does not tell one how nationality is lost.

134. Third, Ms Daloye relied upon the fact that by a subsequent amendment to the Article which was in force from 1970 to 1980, the Minister of the Interior could exempt certain persons from the Article and contended that the amendment would scarcely have been necessary if the loss of nationality did not take immediate effect. Although she would not agree with what Mr Swift put to her in cross-examination, we agree with the point he was making that the power to grant an exemption or, as he put it in his submissions, the "wiggle room" allowed to the Minister assumes that he knows in the first place that but for his granting an exemption, deprivation of nationality will occur. That suggests that the deprivation does not occur until some act of the Government withdrawing nationality. If loss of citizenship were automatic, one would have expected the amendment to say something like: "but nationality shall not be lost automatically if the Minister grants an exemption".

135. Fourth, Ms Daloye states that any other reading of Article 11.1 than that the loss of nationality is automatic would undermine the "controlling provision" in Article 11.2 as to those who are entitled to regain Iraqi nationality. In cross-examination, she was not really able to explain how it was that Article 11.2 was the controlling provision and we agree with Mr Swift that this is just wrong. If anything it is the reverse and Article 11.2 is subsidiary to and arises as a consequence of Article 11.1. Article 11.2 is about how you regain Iraqi nationality but tells one nothing about the circumstances in which you lose Iraqi nationality.

136. Her fifth point drew the contrast between Article 11.1 of the 1963 Law and Article 10.1 of the 2006 Law under which there is an express requirement for a renunciation in writing of citizenship for someone to lose it.

However, we agree with Mr Swift that this is simply not comparing like with like. The 2006 Law was introduced by the new regime and contains no prohibition on dual nationality. In those circumstances, it is perhaps not surprising that a positive written renunciation is required before Iraqi citizenship can be lost by someone who has also taken foreign citizenship. However, that provision tells one absolutely nothing about what is the correct construction of Article 11.1 of the 1963 Law. We agree with Mr Swift that Ms Daloye's reasoning as to why the provision had an automatic effect does not, on analysis, bear scrutiny.

137. Mr Dawood's expert opinion, relying on the 1969 juristic opinion of Dr Hafidh, was that there were four conditions required under the 1963 Law for the Ministry to withdraw Iraqi nationality pursuant to Article 11.1: (i) that the Iraqi must obtain foreign nationality; (ii) that it was obtained in a foreign country; (iii) that he obtains the foreign nationality voluntarily by choice and through a positive act and (iv) that the Minister of the Interior issues a decision for the loss of Iraqi nationality status. It is when all four conditions are satisfied that Iraqi nationality is withdrawn automatically and the Minister has no discretion in the matter.

138. Mr Swift emphasised that third condition, that loss of nationality under Article 11.1 only occurs in relation to someone who acquires foreign nationality in a foreign country by his own choice and submitted that the requirement of freedom of choice must import some decision taken by the authorities that the person had freedom of choice. Although the translation of the opinion of Dr Hafidh relied upon by Mr Dawood is somewhat obscure, it seems to us that it is the need for a decision as to whether there was freedom of choice which lies behind the fourth condition for loss of nationality identified by Dr Hafidh: "Issuance of a decision by the Minister of the Interior for the withdrawal of Iraqi nationality". Dr Hafidh goes on to discuss the need for the Minister to demonstrate that someone has taken positive action to obtain the foreign nationality, which seems to us to be focusing on the concept of freedom of choice. In that context, Mr Dawood described in his evidence the concept of honorary nationality conferred on someone as appreciation for his services to a foreign country where that nationality might be treated as imposed upon him, not a situation therefore where there was freedom of choice.

139. The effect of Mr Dawood's evidence is that the Minister had no discretion in the matter once notified of the obtaining of the foreign nationality, if the first three conditions he identifies were satisfied. Mr Dawood appears to have proceeded on the assumption that no decision was taken by the Minister in accordance with his fourth condition because Mr Al-Jedda never reported his British citizenship to the Iraqi authorities. However, as we have held at [104] above, at some stage when the 1963 Law was in force, the Iraqi authorities did become aware that Mr Al-Jedda had taken British nationality. Thus, even if Mr Dawood's construction of Article 11.1 were correct, one is still faced with the curiosity that the Minister does not seem to have issued a decision in relation to which on this hypothesis he had no discretion. It follows that, even if the Commission

accepted Mr Dawood's evidence, it does not seem to us to support the Secretary of State's case that, as a matter of construction of the 1963 Law, Mr Al-Jedda did not lose his Iraqi nationality. The question whether, in practice, the Iraqi authorities enforced the Law is a separate question which we have addressed in the previous section of this judgment.

140. In any event, whilst if it were simply a question of whether we preferred the expert evidence of Ms Daloye or that of Mr Dawood, given our conclusion that Ms Daloye's reasoning as to the automatic effect of Article 11.1 does not bear close scrutiny, we would prefer the evidence of Mr Dawood, the fact is that this evidence cannot be viewed in isolation. The evidence of Judge Al Saedi, albeit not tested in cross-examination, was very clear that Mr Al-Jedda had lost his nationality automatically when he acquired British nationality in 2000. Likewise Major-General Al Yasiri, then Director General of Nationality wrote a letter dated 21 October 2010 to Dr Mohsin, the expert instructed by Mr Al-Jedda for the second hearing before the Commission in his official rather than some private capacity in which he stated that pursuant to Article 11.1 Mr Al-Jedda lost his Iraqi nationality when he acquired British nationality willingly in 2000. Like the Commission in its judgment of 23 May 2008 we have misgivings about the expertise of Mr Edge and the extent to which Professor Daudi was really addressing the precise point now under consideration. It seems to us that the weight of the expert evidence favours the conclusion that the effect of Article 11.1 of the 1963 Law is that Mr Al-Jedda lost his Iraqi nationality automatically upon obtaining British nationality in June 2000 and that is the conclusion we would have reached even if issue estoppel or abuse of process had not applied.

The third preliminary issue

141. Logically, it seems to us that the issue of procedural unfairness raised by the third preliminary issue should be considered next. That preliminary issue is: Was the deprivation of citizenship unfair by failing to provide the appellant with an adequate opportunity to make representations to the Secretary of State before it was made?

142. Mr Hickman relied upon the fact that, unlike in the case of the first deprivation order where notice was given of an intention to make a deprivation order before the order was made so that representations could be made on behalf of Mr Al-Jedda, the Secretary of State gave formal notice under section 40(5) of the 1981 Act on the same day as notice of the deprivation order was given. He submitted that because as the Court of Appeal has said (at [71] of Hooper LJ's judgment) this is an "anxious scrutiny" case and because an appeal from a deprivation order does not suspend the effect of the order, the giving of prior notice is particularly important in enabling the individual affected to draw the attention of the Secretary of State to matters relevant to her decision.

143. Section 40(5) of the 1981 Act provides as follows:

> Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—
>
> (a) that the Secretary of State has decided to make an order,
>
> (b) the reasons for the order, and
>
> (c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997.

144. In addition to the complaint about lack of notice, Mr Hickman relied upon fundamental principles of public law that the decision maker is under a duty of sufficient enquiry and that there has to be a fair and adequate presentation to the decision maker so that a properly informed decision is made. We will return to that point when we have dealt with Mr Hickman's notice point.

145. Mr Hickman relied upon the recent restatement of the principles by the Supreme Court in the context of the imposition of financial restrictions against a bank under the Counter-Terrorism Act 2008 in *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39; [2013] 3 WLR 179. The main judgment was that of Lord Sumption JSC. He concluded at [32] that unless the Act expressly or impliedly excluded any duty of consultation, fairness required that the Bank should have an opportunity to make representations before the relevant direction was made. At [33] he then said:

> "In these circumstances, the only ground on which it could be said that the Treasury was not obliged to consult Bank Mellat in advance, was that such a duty, although it would otherwise have arisen at common law in the particular circumstances of this case, was excluded by the Act in cases such as the present one. It was certainly not expressly excluded. But the submission is that it was impliedly excluded on two overlapping grounds: (i) that the statutory right of recourse to the courts after the making of the direction, which is provided by section 63 of the Act, is enough to satisfy any duty of fairness, or at least must have been intended by Parliament to be enough; and (ii) that consultation is not in law required before the making of subordinate legislation, especially when it is subject to the affirmative resolution procedure. Mitting J and the majority of the Court of Appeal rejected the Bank's procedural case on both grounds."

146. Lord Sumption then set out the applicable principles at [35] to [37]:

"35. The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute. But the fact that the statute makes some provision for the procedure to be followed before or after the exercise of a statutory power does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise….

36. It does not of course follow that a duty of prior consultation will arise in every case. The basic principle was stated by Lord Reid forty years ago in *Wiseman v Borneman* [1971] AC 297, 308, in terms which are consistent with the ordinary rules for the construction of statutes and remain good law:

> 'Natural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances, and I would be sorry to see this fundamental general principle degenerate into a series of hard-and-fast rules. For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.'

37. Leaving aside, for a moment, the fact that the direction was required to be made by statutory instrument subject to Parliamentary approval, it is not in my view implicit in section 63 that the right of recourse to the courts is the sole guarantee of fairness. Nor is it implicit that what the common law would otherwise require to achieve fairness is excluded. I say this for three reasons. The first is that section 63 largely reproduces the rights which a person affected by the direction would have anyway. It confers on him the right to apply to the High Court for an adjudication based on the principles of judicial review, and on the court such powers as could be made on judicial review. The only difference which section 63 makes is that permission is not required for such an application. The express provision of a right of recourse to the courts is essentially a peg on which to hang the various procedural provisions in sections 66-72. It would I think be surprising if the mere fact that the right of persons affected to apply for judicial review had been superseded by a statutory application with substantially the same ambit, were to make all the difference to the content of the Treasury's common law duty of fairness. Whatever else Parliament may have intended by enacting section 63, it cannot in my view have intended to reduce the procedural rights of

> those affected by the Treasury's orders. Second, the statutory right of recourse will not be sufficient to achieve fairness in every case and is certainly not enough to achieve it in cases like this one, falling under Schedule 7, paragraph 13. This is because a direction may take effect, as it did in this case, immediately or almost immediately and, subject to Parliamentary scrutiny, will remain in effect unless and until it is set aside by the Court…"

147. Mr Hickman also relied upon the decision of the Court of Appeal in *R v Secretary of State for the Home Department ex parte Fayed* [1996] EWCA Civ 946; [1998] 1 WLR 763. In that case the Secretary of State had refused the applicant's application for naturalisation under section 6 of the British Nationality Act 1981 and in reliance on section 44(2) declined to give reasons for his decision. That sub-section provided that in the case of decisions to which the section applied the Home Secretary was not 'required to assign any reason for the grant or refusal of any application under' the Act and the decisions 'shall not be subject to appeal to, or review in, any court'. Mr Al Fayed applied for judicial review of the decision of the Secretary of State. The majority of the Court of Appeal (Lord Woolf MR and Phillips LJ) held that although section 44(2) relieved the Secretary of State of the obligation of giving reasons in respect of decisions made in the exercise of his discretion, he was not relieved of the obligation to act fairly and in the context of the case, fairness required that before reaching his decision, he should inform the applicant of the nature of any matters weighing against the grant of the application and afford him an opportunity of addressing them. In failing to adopt that course, his decision had been reached unlawfully: see per Lord Woolf MR at 773F-H; 774D-775B and Phillips LJ at 789E-790A.

148. Mr Hickman submitted that because the effect of the deprivation order was immediate and an appeal against it did not suspend the order which could have a significant effect on the person, in circumstances where the SIAC proceedings could go on for a long time, the Secretary of State should have given notice before the order was made to enable representations to be made. Whilst there might be cases where advance notice of a decision could not be given for example in the case of the freezing of assets, this was not such a case. The fact that there was a statutory right of appeal did not mean that the common law principle of fairness did not require prior notice to enable representations to be made.

149. The primary submission of Mr Swift on behalf of the Secretary of State was that in the light of section 40(5) of the 1981 Act there was no room for the implication that Mr Hickman contended for. That sub-section requires notice that the Secretary of State has decided to make a deprivation order, so there was no room to read in an opportunity to make representations prior to the decision. The sub-section sets out an express procedural framework which should be regarded as exhaustive.

150. In support of those submissions Mr Swift relied upon the decision of the Court of Appeal in *R (BAPIO Action Limited) v Secretary of State for the*

Home Department [2007] EWCA Civ 1139 and specifically the judgment of Sedley LJ. The case concerned the lawfulness of the alteration without consultation of the Immigration Rules so as to abolish permit-free training for doctors with no right of abode in the United Kingdom. The particular question of relevance for present purposes was whether in the absence of either an implicit bar on consultation or an established practice of consultation, fairness called for consultation with the applicant before the rule change was made.

151. Sedley LJ dealt with that issue at [41]-[47] of his judgment. At [43] he referred to the difficulty of propounding a principle which reconciles fairness to an adversely affected class with the principles of public administration. In rejecting any duty to consult at common law, Sedley LJ said this at [45] to [47]:

> "45. The proposed duty is, as I have said, not unthinkable – indeed many people might consider it very desirable - but thinking about it makes it rapidly plain that if it is to be introduced it should be by Parliament and not by the courts. Parliament has the option, which the courts do not have, of extending and configuring an obligation to consult function by function. It can also abandon or modify obligations to consult which experience shows to be unnecessary or unworkable and extend those which seem to work well. The courts, which act on larger principles, can do none of these things.
>
> 46. It is here, I think, that the respondents' conspectus of statutory provisions for consultation is relevant and revealing. While it is not, for reasons I have given, an aid to the construction of the Immigration Act 1971, it illustrates very clearly the need for specificity in a requirement of consultation. The variety of statutory provisions, a list of which is appended to this judgment, shows how the legislature will sometimes specify whom it requires to be consulted; will sometimes prescribe consultation with those members or representatives of a named class, or with those representative organisations, who appear to the minister or body to be appropriate or (what is not the same thing) to be representative; will sometimes dispense with the requirement in cases of urgency or where the consultee agrees not to be consulted; will sometimes make consultation discretionary; will sometimes make consultation obligatory but leave the choice of consultees to the discretion of the minister or body concerned; will sometimes require consultation with those appearing to the minister to represent interests substantially affected or otherwise defined; and may combine consultation with specified bodies with publication of a general invitation to make submissions…
>
> 47. For all these reasons I am not prepared to hold that there was at common law an obligation to consult those affected or their representatives before introducing the material changes to

> the Immigration Rules. I do not seek to elevate this to a general rule that fairness can never require consultation as a condition of the exercise of a statutory function; but in the present context it seems to me that a duty to consult would require a specificity which the courts, concerned as they are with developing principles, cannot furnish without assuming the role of a legislator…"

152. Mr Swift submitted that that case demonstrated why the courts should be cautious not to imply any more general procedural requirement than provided by the relevant statute, because even if it was possible to formulate some form of procedural protection at common law, Parliament had turned its mind to the question and decided in the present case to go no further than section 40(5).

153. Reliance was also placed in the context of alleged unfairness by reason of absence of prior consultation on the speech of Lord Mustill in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 560F-G which indicates that the requirement of fairness may be satisfied by consultation after a decision is taken, not only before:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

154. In the context of section 40(5) Mr Swift relied upon the decision of the Court of Appeal in *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867; [2013] QB 1008 where the Court rejected an

attempt to import into the notice of a deprivation decision an obligation to inform the appellant of an in-country right of appeal. Laws LJ rejected that argument in these terms at [55]-[56]:

> "55. Mr Southey has raised a fresh argument in his skeleton, for which he does not have permission. It is put thus:
>
> 'The notice of the decision to make an order to deprive the appellant of his citizenship did not, contrary to the rights of a foreign national identified in *E1 v Secretary of State* [2012] EWCA Civ 357, inform the appellant that he may appeal from within the United Kingdom until he has been deprived of citizenship by order and/or excluded.'
>
> 56. In my judgment this is unarguable. Regulations 4 and 5 of the Immigration Notices of Regulations 2003 which were critical to the decision in *E1*, have no application to a decision to deprive someone of British citizenship because, as I have already indicated, it is not an "immigration decision" within the meaning of s.82 of the 2002 Act. The only notice requirements which do apply to such a decision are those provided for in s. 40(5) of the 1981, which I have read, and which were fulfilled in this case in conformity with Regulation 10 of the of Nationality Regulations which I need not set out.

155. Mr Swift points out that both *Bank Mellat* and *ex parte Fayed* were cases where there was no right of appeal against the relevant decision, only a right of recourse by way of judicial review or its equivalent. However, in the present case there is a full merits right of appeal under the 1997 Act equivalent to consultation after the decision to which Lord Mustill referred. The existence of that right of appeal renders a duty to consult before or after the decision was made unnecessary. Mr Swift submitted that any alleged failure to consult would be overtaken by the decision of the Commission. If the Commission decided that the deprivation order rendered the appellant stateless then the appeal would succeed and the absence of consultation would be superfluous. Equally, if the Commission decided that the appeal failed on the merits, there would be no basis for overturning the decision of the Secretary of State on procedural grounds since any reconsideration by the Secretary of State would serve no purpose because she would inevitably reach the same conclusion given that, on this hypothesis, the Commission would have decided that the decision was right as a matter of law.

156. In our judgment, Mr Swift is right that there is no duty to consult before the deprivation order such as contended for on behalf of Mr Al-Jedda, for the reasons advanced by the Secretary of State. First, as the citation from *G1* makes clear, section 40(5) circumscribes the notice requirements before a deprivation order is made, which do not include any obligation to give notice so that representations can be made. The sub-section does provide an exhaustive procedural framework and we agree that where Parliament has prescribed the relevant limits of the notice to be provided,

the courts should not intervene for precisely the reasons identified by Sedley LJ in *BAPIO*.

157. Although Mr Hickman relied upon the judgment of Lord Neuberger PSC in *Bank Mellat* at [191] to submit that the right to be consulted will only be abrogated by implication by a statute where the implication is very clear, we consider section 40(5) is such a case. If Parliament had intended that, before a deprivation order was made, the Secretary of State should consult the appellant and provide an opportunity to make representations, it could and should have been written into section 40(5). The fact that it was not makes it very clear, by implication, that Parliament did not intend that there should be such a wider duty to give notice and consult than recognised by the sub-section.

158. Second, we consider that the duty to consult identified by Lord Sumption in *Bank Mellat* and by the majority of the Court of Appeal in *Ex parte Fayed* is one which arises in cases of judicial review or its equivalent. That is really made clear by the passage in [37] of Lord Sumption's judgment which we quoted above, where he says: "It would I think be surprising if the mere fact that the right of persons affected to apply for judicial review had been superseded by a statutory application with substantially the same ambit, were to make all the difference to the content of the Treasury's common law duty of fairness."

159. In our judgment, he is not purporting to deal with cases where there is a full merits right of appeal. We agree with Mr Swift that the procedural rights and obligations which the common law has recognised in the case of judicial review such as the obligation on the decision maker to consult before a decision is made arise precisely because judicial review is not a merits right of appeal. Where there is a full right of appeal on the merits such as in the present case, in our judgment the absence of prior consultation does not render the decision procedurally unfair.

160. Mr Hickman contended that the fact that there was a right of appeal was not a complete answer because the bringing of an appeal was not suspensive of the order and so the order continued to have a prejudicial effect, including on Mr Al-Jedda's youngest daughter born in February 2014 who is currently stateless as a consequence of the order. Mr Hickman relied upon [187] of the judgment of Lord Neuberger PSC in *Bank Mellat*:

> "As to the Treasury's second argument, it may be that, in some cases, the fact that the statute granting the power in question gives a specific right of challenge subsequent to its exercise can be enough to dispense with any prior obligation to consult. However, in my view, it is by no means a sufficient answer in many cases. As a matter of logic, the two rights are a long way away from being mutually inconsistent or even duplicative. Indeed, if it were otherwise, the right to be consulted would be very rare, because, as Lord Sumption points out in para 37, there is almost always a right to challenge a decision of the executive as a matter of public law."

161. However, the context of that statement, as the reference to [37] of the judgment of Lord Sumption JSC makes clear is not a statutory right of appeal but a right of review akin to judicial review. The first sentence of that paragraph also recognises that, in some cases where the statute gives a specific right of challenge, that will dispense with any prior obligation to consult. We consider that the case of a statutory right to a full merits appeal, such as under the 1997 Act in the present case, is an *a fortiori* example of where a prior obligation to consult should not arise. Even if we are wrong about that, the alleged obligation to consult before the decision is implicitly excluded by section 40(5) for the reasons we have given.

162. In relation to the case on behalf of Mr Al-Jedda that the Secretary of State was in breach of a duty of sufficient enquiry and in breach of the obligation that there has to be a fair and adequate presentation to the decision maker so that a properly informed decision is made, Mr Hickman cross-examined Mr Douglas, the senior official who signed the deprivation Order and the notice giving reasons for the decision on behalf of the Secretary of State. From that evidence it was clear that the information obtained from the Iraqi government in the Note Verbale of 24 October 2013 that they regarded the 2008 passport which he was using as authentic was regarded as a very compelling point, although Mr Douglas said it was not the only point. When pressed as to other points relied upon Mr Douglas referred to the fact that there had been advice from lawyers in the Home Office and based upon that they gave advice to the Secretary of State.

163. Mr Douglas accepted that the findings of the Courts in the first SIAC proceedings and the evidence in those proceedings were relevant to the decision the Secretary of State was making but Mr Douglas said that they considered the issue of statelessness could be determined by the Iraqi national laws when it was confirmed by the Iraqi Government that Mr Al-Jedda had a valid Iraqi passport and was using it. They thought that he was a real danger to the United Kingdom and that the deprivation order would not be making him stateless because he had an Iraqi passport.

164. Mr Hickman suggested that, in the notice of reasons, the findings of the Commission and of the Court of Appeal were not taken into account. Mr Douglas said that they had felt that the laws of Iraq were misunderstood by the Courts because they had confirmation that Mr Al-Jedda was in possession of an Iraqi passport and that Lord Wilson had said they might make another deprivation order. He thought that the lawyers advising had explored the question of issue estoppel. Mr Hickman put that when the proceedings commenced, the Home Office had no idea what their expert evidence on Iraq law would be. Mr Douglas said he was not an expert, but he would say the position had changed. Mr Hickman suggested it was important to alert the Secretary of State to the fact that the position of the Iraqi authorities might be wrong. Mr Douglas said that they had taken the information they were given by the Iraqi authorities in good faith and he did not think that the information was wrong.

165. Mr Hickman submitted that it appeared from that evidence that it was only the existence of the Iraqi passport which was relied upon. No Iraqi law advice had been obtained and there was no consideration of the fact that the position of the Iraqi Government might not be correct as a matter of Iraqi law. He submitted that it was striking how little Mr Douglas knew. There was a failure to take account of relevant considerations and an absence of a full statement from Mr Douglas, despite the indication from Mr Swift QC at the hearing on 27 March 2014 that such a statement would be provided.

166. Although Mr Douglas' personal knowledge may have been limited, as Mr Swift pointed out by reference to the Open Summary of the Submission which he had prepared to which we have referred at [41] above, it is clear that the information which the Secretary of State received was more detailed than Mr Hickman had suggested and not limited to the passport and that legal advice had also been received for which privilege was obviously claimed.

167. Mr Swift submitted that, even if Mr Hickman was right that in some way the Secretary of State had not been properly informed, the same analysis applied as in the case of the alleged duty to consult. This was another example of a procedural right developed by the common law for cases of judicial review, precisely because in such cases there is no enquiry into the merits. Such procedural rights had no place where there was a statutory right of appeal on the merits.

168. In our judgment, Mr Swift is correct in his submissions on this point. We are, in fact, far from convinced that Mr Hickman has made out a case that the Secretary of State was not properly informed, but in any event it seems to us the alleged obligations have no place in the case of a full merits appeal. They are overtaken and rendered redundant by the decision of the Commission. The matter can be tested this way: if the Commission decided that Mr Al-Jedda was rendered stateless then the deprivation order will be quashed, irrespective of what information the Secretary of State received before making the order. Equally if the Commission decided that he was not rendered stateless by the deprivation order, then there would be no basis for suggesting that the order should nonetheless be quashed because the Secretary of State had received insufficient information before making a decision which, on this hypothesis, was fully justified. Even if she subsequently received all the information which Mr Hickman says she should have done, the Secretary of State could and would reach the same conclusion and make a deprivation order which is legally justified.

The second preliminary issue

169. The second preliminary issue asks whether the Secretary of State is required to provide a minimum level of disclosure and information about the case against the applicant pursuant to the requirements of the European Convention on Human Rights and/or European Union law. It was agreed at the hearing that, at present, we should deal with the issue of principle not

with what a minimum level of disclosure and information would require if we found the Secretary of State was required to provide it.

170. Mr Hickman accepts that, before the Commission, he is bound by higher authority to the effect that Articles 6 and 8 of the ECHR do not confer a right to a core irreducible minimum of disclosure in immigration or deprivation proceedings: see the cases reviewed in *D2 v Secretary of State for the Home Department* [2014] UKSIAC. He simply reserves his position to argue the point at a higher level. He also accepts that the Court of Appeal in *G1 v Secretary of State for the Home Department* [2012] EWCA Civ 867; [2013] QB 1008 has determined that deprivation of citizenship per se does not engage EU law, but reserves his position on that point, since *G1* will be considered by the Supreme Court in November this year in the context of the appeal in *B2*.

171. It follows that the starting point for the consideration of this preliminary issue is the decision of the Court of Appeal in *G1*. In that case, the appellant was born in the Sudan. He came to the United Kingdom as a child and was granted indefinite leave to remain as the child of a refugee. He became a naturalised British citizen in 2000. In 2009 he was charged with a public order offence arising out of his participation in a protest against Israeli military action in Gaza. He failed to surrender to bail and fled to the Sudan. In June 2010, the Secretary of State made a deprivation order under section 40(2) of the 1981 Act. The appellant lodged an appeal to the Commission under section 2B of the 1997 Act but also sought judicial review of the deprivation decision on the grounds, inter alia, that it prevented him from conducting an effective appeal, in contravention of the principles of natural justice and fairness. That application was dismissed by Mitting J.

172. Before the Court of Appeal, one of the grounds of appeal was that the deprivation decision prevented him from conducting an effective appeal, which violated his right to an effective remedy guaranteed by EU law. In support of his case that European law was engaged, the appellant relied upon the decision of the CJEU in *Rottmann v Freistaat Bayern* (Case C-135/08) [2010] QB 761. In that case, an Austrian by birth moved to Germany and obtained German citizenship by naturalisation, thereby losing his Austrian citizenship. However, it emerged that he had concealed from the German authorities criminal proceedings against him in Austria. His German citizenship was withdrawn with retroactive effect, with the result that he was stateless and lost his citizenship of the European Union. The European Court stated in its judgment that member states when exercising their powers in the sphere of nationality must have due regard to European law: [45] and [47].

173. In the Court of Appeal in *G1*, Laws LJ indicated at [37] of his judgment that he had some difficulties with the reasoning in *Rottmann* and the scope of the decision. Then at [38] he stated clearly that the distribution of national citizenship is not within the competence of the European Union, before stating at [41]:

> "In these circumstances I consider with respect that the *Rottmann* decision has to be read and applied with a degree of caution. It cannot in my judgment be applied so as to require that in a case such as this the adjudication of a decision to deprive an individual of citizenship must be conducted subject to any rules of law of the European Union. On the facts, as Mr Eicke submitted, there is no cross-border element whatever. There has been no actual, attempted or purported exercise of any right conferred by EU law. From first to last this is a domestic case. Quite aside from the difficulties as to the scope of EU competences,
>
> > 'it is settled case-law that the Treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to situations which have no factor linking them with any of the situations governed by European Union law and which are confined in all relevant respects within a single Member State...'(*McCarthy v Secretary of State for the Home Department* (Case C-434/09); [2011] All ER (EC) 729, paragraph 45)."

174. That decision is, as Mr Hickman accepts, binding on the Commission. However, he seeks to distinguish it and contends that EU law is engaged on the specific facts of Mr Al-Jedda's case for two reasons: (i) on the basis that Directive 2004/38 (the so-called "Citizens' Directive") is applicable because Mr Al-Jedda is effectively excluded from the United Kingdom, so that he has a right to the minimum amount of disclosure recognised by the CJEU and Court of Appeal in *ZZ v Secretary of State for the Home Department* (Case C-300/11); [2013] QB 1136 and [2014] EWCA Civ 7; [2014] 2 WLR 791; and (ii) on the basis that the principle in *Zambrano v Office National d'Emploi* (Case C-34/09) [2012] QB 265 applies because the effect of the deprivation decision is to exclude Mr Al-Jedda and his dependent children entirely from the territory of the EU depriving them of the "genuine enjoyment of the substance of rights conferred by virtue of their status as citizens of the union" ([42] and [45] of *Zambrano*).

175. Article 3 of the Citizens' Directive headed "Beneficiaries" provides: 'This Directive shall apply to all Union citizens <u>who move to or reside in a Member State other than that of which they are a national</u>, and to their family members as defined in point 2 of Article 2 who accompany or join them.' (our emphasis). This provision was most recently considered by the Grand Chamber of the Court of Justice of the European Union "CJEU") in *Dereci v Bundesministerium fur Inneres* [2011] (Case C-256/11); [2012] 1 CMLR 45 at [54]-[55] and [58]:

> "54 The Court has already had occasion to state that, in accordance with a literal, teleological and contextual interpretation of that provision, a Union citizen, who has never exercised his right of free movement and has always resided in a Member State of which he is a national, is not covered by the

> concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him (*McCarthy*, paragraphs 31 and 39).
>
> 55 Similarly, it has been held that, in so far as a Union citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, their family member is not covered by that concept either, given that the rights conferred by that directive on the family members of a beneficiary of that directive are not autonomous rights of those family members, but derived rights, acquired through their status as members of the beneficiary's family (see, so far as concerns spouses, *McCarthy*, paragraph 42, and the case-law cited).
>
> 58. It follows that Directives 2003/86 and 2004/38 are not applicable to third country nationals who apply for the right of residence in order to join their European Union citizen family members who have never exercised their right to free movement and who have always resided in the Member State of which they are nationals."

176. Mr Al-Jedda's case is that the deprivation decision has effectively excluded him from the United Kingdom, of which he had nationality. However, the Citizen's Directive simply does not address such a case. Mr Al-Jedda has not sought to exercise his rights of free movement within the European Union or to reside in a different member state, so he is simply not a beneficiary within the meaning of the Directive, nor are his dependent children.

177. Mr Hickman relies upon the decision of the CJEU in *ZZ (France) v Secretary of State for the Home Department* (Case C-300/11); [2013] QB 1136 to submit that the European Court has decided that, in deprivation cases, European law requires that a person in the position of Mr Al-Jedda is entitled to a minimum of disclosure. He relies in particular upon [64]-[65] of the judgment, where the Court recognises that full disclosure may not be possible given the requirements of national security, but that the essence of the grounds upon which a decision to exclude has been taken must be disclosed:

> "64…if it turns out that State security does stand in the way of disclosure of the grounds to the person concerned, judicial review, as provided for in Article 31(1) of Directive 2004/38, of the legality of a decision taken under Article 27 thereof must, having regard to what has been stated in paragraphs 51, 52 and 57 of the present judgment, be carried out in a procedure which strikes an appropriate balance between the requirements flowing from State security and the requirements of the right to effective judicial protection whilst limiting any interference with the exercise of that right to that which is strictly necessary.

> 65 In this connection, first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective."

178. However, as Ms Karen Steyn QC, who dealt with this preliminary issue on behalf of the Secretary of State, pointed out, the basis upon which the European Court decided that an irreducible minimum of disclosure was required was Article 30(2) and 31 of the Citizens' Directive, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union. This is clear from the judgment of Richards LJ in the Court of Appeal when *ZZ* was remitted: *ZZ (France) v Secretary of State for the Home Department* [2014] EWCA Civ 7; [2014] 2 WLR 791. ZZ had dual French and Algerian nationality. He had resided in the United Kingdom for fifteen years and was then excluded when he returned from abroad. Clearly, in that case the Citizens' Directive was engaged and, specifically, the procedural protections in Articles 30 and 31.

179. As Richards LJ said at [2] of his judgment: "The refusal to admit him into the United Kingdom restricts the rights of free movement and residence that he enjoys as a citizen of the European Union by virtue of his French nationality. SIAC decided that the restriction was justified on imperative grounds of public security. The essential question is whether in the SIAC proceedings the appellant had sufficient disclosure of the case against him to comply with the procedural requirements of EU law." He then goes on at [3]-[4] to refer to the procedural protections in Articles 30 and 31 of the Directive and their interpretation by reference to Article 47 of the Charter.

180. It is on the basis of the applicability of those provisions in the context of restrictions on the free movement and residence of European Union citizens under European Union law that the Court of Appeal concludes that the European Court has laid down that the essence of the grounds on which the decision was based must be disclosed. This is clear from [18] of the judgment of Richards LJ:

> "Although the submissions of both counsel took us into related fields, it seems to me that the resolution of the issue before us depends on a straightforward reading of the CJEU's judgment. In my view that judgment lays down with reasonable clarity that the essence of the grounds on which the decision was based must always be disclosed to the person concerned. That

> is a minimum requirement which cannot yield to the demands of national security. Nor is there anything particularly surprising about such a result in the context of restrictions on the fundamental rights of free movement and residence of Union citizens under EU law." (our emphasis)

181. As we have held, in the case of Mr Al-Jedda the Citizens' Directive is not engaged, since neither he nor his family are beneficiaries within the meaning of Article 3. We agree with Ms Steyn that in those circumstances the procedural protections in Articles 30 and 31 of the Directive are not relevant. EU law is not engaged here by virtue of *ZZ*, since Mr Al-Jedda has not exercised and is not seeking to exercise his right of free movement between member states. He simply says that the deprivation decision has excluded him from the country of which he had nationality. However, the Citizens' Directive does not address such a case.

182. *Zambrano* concerned Colombian nationals living in Belgium whose children were Belgian nationals. Mr Zambrano lost his employment for which he did not have the required work permit and was refused unemployment benefit. Before the Belgian courts he sought to argue that Articles 20 and 21 of the Treaty on the Functioning of the European Union ("TFEU") required Belgium as a member state as the relative upon whom minor children who were EU citizens depended, an exemption from the obligation to hold a work permit.

183. On a reference from the Tribunal du Travail de Bruxelles, the Grand Chamber of the CJEU stated as follows at [41]-[45]:

> "41 As the Court has stated several times, citizenship of the Union is intended to be the fundamental status of nationals of the Member States…
>
> 42. In those circumstances, Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union (see, to that effect, *Rottmann*, paragraph 42).
>
> 43 A refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.
>
> 44 It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. Similarly, if a work permit were not granted to such a person, he would risk not having sufficient resources to provide for himself and his family, which would also result in the children, citizens of the Union, having to leave the territory of the Union. In those circumstances, those citizens of the

> Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.
>
> 45 Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen."

184. Mr Hickman submitted that the principle to be derived from that case is that, if the effect of a deprivation decision on an individual is that his children who are nationals of a member state can have no practical enjoyment of their EU rights, then EU law is engaged. Here, Mr Al-Jedda's dependent minor children live with him and their mother (a Jordanian national) in Turkey. The practical effect of the deprivation decision is that they are not only excluded from the United Kingdom but from the European Union, since they have had to stay in Turkey. Accordingly, Mr Hickman submits, this case is within [45] of the *Zambrano* judgment and, if anything, is a stronger case.

185. Ms Steyn QC relied upon the limits of the *Zambrano* principle as explained in the subsequent decision of the CJEU in *Dereci v Bundesministerium fur Inneres* [2011] (Case C-256/11); [2012] 1 CMLR 45 at [59]-[68], specifically at [65]- [68] where the European Court said:

> "65 Indeed, in the case leading to that judgment, the question arose as to whether a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside and a refusal to grant such a person a work permit have such an effect. The Court considered in particular that such a refusal would lead to a situation where those children, who are citizens of the Union, would have to leave the territory of the Union in order to accompany their parents. In those circumstances, those citizens of the Union would, in fact, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union (see *Ruiz Zambrano*, paragraphs 43 and 44).
>
> 66 It follows that the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.

> 67 That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.
>
> 68 Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted."

186. The scope of the *Zambrano* principle was also considered by the Court of Appeal in *Harrison v Secretary of State for the Home Department* and *AB v Secretary of State for the Home Department* [2012] EWCA Civ 1736; [2013] 2 CMLR 23. It is not necessary to set out the facts of those cases in detail in this judgment. It is sufficient to note that, in each case, the appellant was a non-EU national who had been living with a British national with whom he had children. The appellants were excluded from the United Kingdom but the mothers and children remained. The question for decision was whether the *Zambrano* principle applied where an EU citizen was not forced, as a matter of substance, to follow the non-EU national out of the European Union, but where their continuing residence in the European Union was affected, for example by diminished quality of life.

187. In holding that the *Zambrano* principle was not engaged in these circumstances, Elias LJ said at [63]-[65] of his judgment:

> "63. I agree with Mr Beal QC, counsel for the Secretary of State, that there is really no basis for asserting that it is arguable in the light of the authorities that the *Zambrano* principle extends to cover anything short of a situation where the EU citizen is forced to leave the territory of the EU. If the EU citizen, be it child or wife, would not in practice be compelled to leave the country if the non-EU family member were to be refused the right of residence, there is in my view nothing in these authorities to suggest that EU law is engaged. Article 8 Convention rights may then come into the picture to protect family life as the Court recognised in *Dereci*, but that is an entirely distinct area of protection.
>
> 64. In my view none of the authorities has engaged with the possibility that the doctrine might extend in the manner suggested by Mr Drabble. The actual formulation of the

> *Zambrano* principle by the Court, when read in a context where only the potential deprivation of the right to residence was in issue, do not in my view lend support to the argument that the Court was leaving open the possibility that the doctrine might apply more widely and loosely.
>
> 65. Nor do I accept that the other passages relied upon by Mr Drabble support his case. As to the observations in paragraph 49 of *McCarthy*, it is talking about the right to move and reside in another member state; it is well established that the right to free movement may indeed be infringed by action which impedes that right, albeit falling short of actually depriving the citizen of that right. It does not, however, follow that the same principle applies with respect to this particular right which is highly exceptional precisely because it does not require any exercise of the right to free movement."

188. Elias LJ went on to consider the point which had been considered in *Dereci* at [68], saying at [68] of his judgment:

> "In my judgment, it is also highly pertinent that the CJEU has confirmed in *Dereci* (paras 67-68) that the fact that the right to family life is adversely affected, or that the presence of the non-EU national is desirable for economic reasons, will not of themselves constitute factors capable of triggering the *Zambrano* principle. In practice these are the most likely reasons why the right of residence would be rendered less beneficial or enjoyable. If these considerations do not engage this wider principle, it seems to me extremely difficult to identify precisely what will. What level of interference with the right would fall short of de facto compulsion and yet would constitute a form of interference which was more than simply the breakdown of family life or the fact that the EU citizens are financially disadvantaged by the removal of the non EU national family member? The scope for this right to bite would be extremely narrow and in my judgment there would be very real uncertainty as to the nature and scope of the doctrine. That legal uncertainty would itself be inconsistent with fundamental principles of EU law. I do not accept that the language of the CJEU in *Dereci* is deliberately seeking to leave open this grey area where *Zambrano* may bite."

189. Accordingly, Ms Steyn QC submitted that what had to be established by Mr Al-Jedda, for him to be able to rely on the *Zambrano* principle, was that the effect of the deprivation decision on the minor dependent children who were British nationals and thus citizens of the European Union was to force them to leave the entire territory of the European Union. She submitted that there were three reasons why Mr Al-Jedda could not show that and therefore why the *Zambrano* principle does not apply: (i) the decision did not deprive him of the right to live elsewhere in the European Union and there was no evidence to that effect; (ii) the deprivation

decision does not have the effect of excluding the children's mother who could come to live here with the children and (iii) the minor children have close family ties to their adult siblings (Mr Al-Jedda's older children from his first marriage) who live in the United Kingdom. There is nothing to show that it would be impossible for the minor children to live here with them, even if their parents are not here.

190. Mr Hickman submitted that *Harrison* was a very different case where the children were already in the United Kingdom and would remain here even though their fathers would have to leave. Here the practical effect of the deprivation orders could be seen from the history: Mr Al-Jedda had to live in Turkey, outside the European Union and the dependent children had to stay in Turkey with him. Accordingly, the *Zambrano* principle was applicable and European law was engaged.

191. In our judgment, it is important to have in mind that the *Zambrano* principle is, as Elias LJ said in *Harrison* "highly exceptional" and limited to the case where the effect of the deprivation decision is that the EU-national dependent children are forced to leave the territory of the European Union. The principle will encompass a case where at the time of the decision, the EU-national children reside outside the European Union but the effect of the decision is to exclude them completely from the territory of the European Union and force them to reside outside it: see the decision of the Upper Tribunal (Immigration and Asylum Chamber) in *MA* and *SM* [2013] UKUT 00380 (IAC) at [44]. However, beyond that, as *Harrison* demonstrates, the principle should not be extended and will not be regularly engaged: see also per Hickinbottom J in *Jamil Sanneh v Secretary of State for Work and Pensions* [2013] EWHC 793 (Admin) cited at [41] of *MA* and *SM*.

192. As that citation shows, it is for the national courts, here this Commission, to determine as a question of fact on the evidence before us whether the EU-national dependent children of Mr Al-Jedda will be compelled to remain outside the European Union. Nothing less than such compulsion will engage the principle or the relevant European law in Articles 20 and 21 of the TFEU. In our judgment and despite the strenuous submissions of Mr Hickman to the contrary, the evidence in this case falls some way short of establishing any such compulsion, essentially for the reasons given by Ms Steyn.

193. To begin with, although the evidence is that Mr Al-Jedda lives in Turkey and has done for some six and a half years since the first deprivation decision, there is no evidence that he has been compelled to do so or that he could not go to another country which is a member of the European Union other than the United Kingdom. Accordingly, even if the dependent children are compelled to live with Mr Al-Jedda, there is no evidence that they are compelled to reside outside the European Union. We agree with Ms Steyn QC that this is not a formalistic point: there is a complete absence of the sort of evidence that would be required for the *Zambrano* principle to apply.

194. Furthermore, there is no evidence that the dependent children and their mother could not come to live in the United Kingdom or elsewhere in the European Union. Whilst it may be desirable to keep the family together, as *Dereci* makes clear, that is not sufficient to establish that the children are compelled to live outside the European Union. In addition, the dependent children have an adult sister Khadijah, who is married and (at least at the time of her witness statement dated 16 June 2014) lived in London with her husband and baby son who is a British national. Her adult brother Abdullah also lived in London with her according to his witness statement dated 13 June 2014. Khadijah said in her statement that she was divorcing her husband and flying to Istanbul to be with her family on 14 June 2014. That was in fact two days before she signed the witness statement giving a London address. Even if that evidence were true (and we have considerable scepticism about it) she has substantial connections with the United Kingdom, which is where she was brought up and educated as child. There is no reason why she should not return, nor why her brothers and sisters who are British nationals should not come to live with her here. Once again, whilst they may want to keep the family together in Turkey for emotional or economic reasons, that is not evidence of compulsion to remain outside the European Union.

195. It follows that, in our judgment, the *Zambrano* principle does not apply and European law is not engaged. Echoing the words of Laws LJ in *G1*, from first to last this is a domestic case.

Conclusion

196. The answers to the three preliminary issues are:

(1) The deprivation order of 1 November 2013 did not render Mr Al-Jedda stateless contrary to section 40(4) of the 1981 Act.

(2) The Secretary of State is not required to provide a minimum level of disclosure and information about the case against Mr Al-Jedda either pursuant to the ECHR or European Union law.

(3) The deprivation of citizenship was not unfair by failing to provide Mr Al-Jedda with an adequate opportunity to make representations to the Secretary of State before it was made.