Appeal No: SC/66/2008
Hearing Dates: 19-23 July 2010
Date of Judgment: 26th November 2010

IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE KEITH (Chairman)
SENIOR IMMIGRATION JUDGE JORDAN
MR C D GLYN-JONES CBE

- -

HALIL ABDUL RAZZAQ ALI AL-JEDDA **Appellant**
- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

- -

MR RICHARD HERMER QC AND **MR TOM HICKMAN** (INSTRUCTED BY **PUBLIC INTEREST LAWYERS**) FOR THE **APPELLANT**

MR JONATHAN SWIFT QC AND **MR RODNEY DIXON** (INSTRUCTED BY **THE TREASURY SOLICITOR)** FOR THE **RESPONDENT**

- -

Judgment

Mr Justice Keith:

Introduction

1. On 10 October 2004, the claimant, Halil Al-Jedda, was detained in Baghdad. He was suspected of being a member of a terrorist group involved in weapons smuggling and explosive attacks in Iraq. He was taken to a detention facility in Basra where he remained in the custody of British forces for almost three years. However, it was discovered that he had previously been granted British nationality, and eventually the Home Secretary decided to strip him of it. Mr Al-Jedda is appealing against that decision. It is possible that the Home Secretary was not advised at the time that you cannot be deprived of your British nationality if the consequence is to make you stateless, and one of Mr Al-Jedda's grounds of appeal is that depriving him of his British nationality did indeed make him stateless. This is the Commission's judgment following a preliminary hearing to determine that issue.

The relevant facts

2. 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 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 was granted indefinite leave to remain here, and shortly afterwards he applied for British nationality. He was granted British nationality on 12 June 2000.

3. That is where the story would have ended if Mr Al-Jedda had not returned to Iraq. However, in September 2004 he travelled to Iraq from the UK via Dubai, and his subsequent detention was justified on the basis that his internment – to use the language of letters annexed to Resolution 1546 of the Security Council of the United Nations – was "necessary for imperative reasons of security". Those reasons were that he was believed to have

    (i) recruited terrorists outside Iraq with a view to the commission of atrocities in Iraq,

    (ii) facilitated the travel into Iraq of a terrorist explosives expert known as Mounir,

    (iii) conspired with Mounir to attack coalition forces in the areas around Fallujah and Baghdad with improvised explosive devices, and

    (iv) conspired with Mounir and members of an Islamic terrorist cell in the Gulf to smuggle high-tech detonation equipment for improvised explosive devices into Iraq for use in attacks on coalition forces.

    Mr Al-Jedda was to challenge the legal basis for his detention in two sets of proceedings. The first of them went all the way to the House of Lords. All that needs to be said for present purposes is that those challenges failed, and although the factual basis for the belief that his detention was necessary was initially challenged in the second of these proceedings, the claim in those proceedings was reformulated

following the dismissal of his first claim simply to allege that his detention was unlawful under Iraqi law.

4. On 30 December 2007, Mr Al-Jedda was released from detention without charge. In January 2008 he went to Turkey where he was joined by his third wife and some of his children. He is still living there, but he wants to return to the UK. That is why he seeks the restoration of his British nationality.

The Home Secretary's decision

5. Prior to Mr Al-Jedda's release from detention, the Home Secretary considered whether to deprive Mr Al-Jedda of his British nationality. She was empowered to do so under section 40(2) of the British Nationality Act 1981 ("the Act"), which provides:

> "The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good."

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 what he was suspected of having done in similar terms to that set out in [3] above. He was invited to make such representations as he chose on the orders she was minded to make.

6. On receipt of that letter, Mr Al-Jedda's solicitors informed the Home Secretary that Mr Al-Jedda wished to challenge the proposed orders, and they asked a number of questions of the Home Secretary, the most important of which sought details of the factual basis on which it was thought that he had been engaged in terrorism. They said that it would not be possible to provide representations until answers to those questions had been received. The Home Secretary answered some of those questions, but she was not prepared to elaborate on the factual basis for her belief that Mr Al-Jedda had been engaged in terrorism. Mr Al-Jedda's solicitors responded by saying that without that information they could not make sensible representations on Mr Al-Jedda's behalf. The Home secretary disagreed, and on 12 December 2007 she wrote to Mr Al-Jedda informing him that she had decided to make the order depriving him of his British nationality. The order was in fact made on 14 December 2007. It was signed by the Home Secretary herself.

7. In this correspondence, the Home Secretary did not refer to section 40(4) of the Act, which provides:

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

That provision was enacted to ensure that the UK fulfilled its obligations under Art. 8.1 of the Convention on the Reduction of Statelessness, which provides:

> "A Capital State shall not deprive a person of his nationality if such deprivation would render him stateless."

It is fair to say that Mr Al-Jedda's solicitors did not refer to section 40(4) of the Act either, or to the fact that the proposed order would make him stateless. But when they made representations on 11 January 2008 regarding the proposed order to exclude him from the UK, they referred to section 40(4), and contended that the order depriving him of his British nationality had been void as its impact had been to make him stateless. The Home Secretary's response of 18 February 2008 said that she "remains" of the view that Mr Al-Jedda "remains" an Iraqi national, and that therefore the order depriving him of his British nationality was not void. The reference to the Home Secretary remaining of the view that Mr Al-Jedda was of Iraqi nationality implied that the Home Secretary *had* previously addressed whether depriving Mr Al-Jedda of his British nationality would make him stateless.

8. 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.

The course of the proceedings

9. Mr Al-Jedda's notice of appeal to the Commission under section 2B of the 1997 Act was lodged on 11 January 2008. A number of grounds of appeal were relied upon in addition to the ground that the order depriving Mr Al-Jedda of his British nationality made him stateless. Those grounds included the ground that there was insufficient evidence to support the conclusion that the removal of Mr Al-Jedda's British nationality was conducive to the public good. The hearings which addressed those grounds took place over a number of days early in 2009, and comprised both open and closed sessions. The hearings focussed on the contention made on Mr Al-Jedda's behalf that there was no sufficient evidential basis for the belief that he had engaged in terrorism. In its open and closed judgments given on 7 April 2009, the Commission concluded that none of the grounds of appeal had been made out. Grounds of appeal to the Court of Appeal in respect of some of the Commission's conclusions were lodged but subsequently withdrawn.

10. Those hearings did not address the one remaining ground of appeal which Mr Al-Jedda's appeal raises, namely whether the order depriving him of British nationality made him stateless. The Commission had previously ordered on 8 February 2008 with both parties' consent that this ground of appeal should be heard as a preliminary issue. The hearing took place on 19 and 20 May 2008, and by its judgment of 23 May 2008, the Commission held that the order depriving Mr Al-Jedda of his British nationality did not make him stateless. However, the Commission had a few weeks earlier refused an application made on Mr Al-Jedda's behalf that the hearing should not take place when it was due to start, and the Court of Appeal subsequently took the view that the application for the hearing date to be vacated should have been granted. The Court of Appeal therefore allowed Mr Al-Jedda's appeal, quashed the Commission's order following its judgment of 23 May 2008, and ordered that "the case [be] remitted for a fresh hearing on the whole issue of statelessness". That is the hearing to which this judgment relates.

Preliminaries

11. *An overview of the parties' cases*. 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

    (a) resolutions 111 and 117 of Iraq's Governing Council of 29 November 2003, or

    (b) Art. 11 of the Law of Administration for the State of Iraq for the Transitional Period, colloquially known as the Transitional Administration Law ("the TAL"), which came into force on 28 June 2004 when the Iraqi Interim Government was formed, or

    (c) Art. 18 of the new Iraqi Constitution which was accepted by a referendum on 15 October 2005 and came into force on 20 May 2006 when the TAL was annulled (save for some articles which are not material to this case), or

    (d) Arts. 3 and 10 of the Iraqi Law of Nationality (No. 26 of 2006) ("the 2006 Nationality Law").

    Although regulations issued by the Minister of the Interior in 1965 referred to an application for a certificate of Iraqi nationality, the Home Secretary's case is that such a certificate was merely confirmation that its holder was an Iraqi national, and its issue was not a pre-condition for the re-acquisition of Iraqi nationality by someone who had lost Iraqi nationality because of the previous prohibition on dual nationality. It simply enabled its holder to access housing, medical and educational benefits.

12. Mr Al-Jedda's case is that none of these instruments *automatically* restored Iraqi nationality to someone who had lost it under the previous law outlawing dual

nationality. Otherwise, hundreds of thousands of Iraqis in the diaspora would have automatically re-acquired Iraqi nationality whether they wanted it or not. Iraqi nationality had to be applied for (and Mr Al-Jedda never did), and it was only obtained when a certificate of Iraqi nationality was issued. That was not a mere formality, since its grant was discretionary and an application for it – even by someone who had been an Iraqi national before losing it as a result of the prohibition on dual nationality – could be refused. Mr Al-Jedda's alternative case is that if the TAL is found to have been capable of restoring Iraqi nationality automatically to Mr Al-Jedda, the TAL should be regarded as having been promulgated by the Coalition Provisional Authority, which in international law was an occupying power during its belligerent occupation of Iraq, and did not have power under international law to make fundamental changes to the domestic law of Iraq relating to nationality. In those circumstances, it is argued that, to the extent that Mr Al-Jedda's Iraqi nationality was restored under the TAL only, his Iraqi nationality would not be recognised as a matter of international law, and it is not capable of being asserted by or against the UK. This point was referred to in the hearing as "the international law point".

13. *The approach to foreign law*. 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, which is why the oral evidence before the Commission consisted of the evidence of Iraqi law from Iraqi lawyers. Their function was to assist the Commission in deciding what the Iraqi courts would decide if the issue arose for decision in Iraq. Neither of them cited any decision of the Iraqi courts on whether someone who had lost their Iraqi nationality because of the earlier prohibition on dual nationality automatically regained it or whether they had to apply for it, and their opinions on what the Iraqi courts would decide have to be considered in the light of the sources on which they each relied. The Commission is not permitted to conduct its own researches into Iraqi law, but since the Iraqi lawyers expressed different views on what the Iraqi courts would ultimately decide, it is necessary for the Commission to look at their sources in order to decide between their conflicting testimony.

14. To that, we add two things. First, although the Iraqi lawyers differed over what the Iraqi courts would ultimately decide, they agreed about many of the things which needed to be addressed on the way. The Commission is not entitled to reject their agreed evidence on these topics unless

> "… it is 'obviously false', 'obscure', 'extravagant', or 'patently absurd', or if '[the relevant expert] never applied his mind to the real point of law', or if 'the matters stated by [the expert] did not support his conclusion according to any stated or implied process of reasoning'; or if the relevant foreign court would not employ the reasoning of the expert even if it agreed with the conclusion. In such cases the court may reject the evidence and examine the foreign sources to form its own conclusions as to their effect. Or, in other words, a court is not inhibited from 'using its own intelligence as on any other

question of evidence'": Dicey, Morris & Collins, "*The Conflict of Laws*", 14th ed., para. 9-015.

Secondly, the effect of the legislative sources on which the Iraqi lawyers relied was primarily a matter of evidence for them to give. It was therefore for them to say what rules of construction the Iraqi courts would apply to them. To the extent that they did not do so, the Commission has to construe them in accordance with the English rules of statutory construction, since English law presumes that, in the absence of evidence to the contrary, the foreign rules of statutory construction are the same as the English rules: see Dicey, Morris & Collins, *op. cit.*, para. 9-018.

15. We should also voice a note of caution here. Some of the key documents are apparently contradictory, even within the space of the same sentence, and sometimes they lack the detail which one might expect to find in an English statute. This reflects, in part, the different nature of the drafting and promulgation of laws in Iraq and its legal system, as well as its different cultural traditions and the difficulty in law-making during military occupation. Moreover, we are dealing with translations, and sometimes nuances in the language of the original may be lost. We have borne all this in mind when considering the evidence.

16. *The experts*. We should also say something about the two Iraqi lawyers on whose views the parties' respective cases were based. Dr Abdul Rahman Mohsin was instructed by Mr Al-Jedda's solicitors. He has practised as a lawyer in Iraq since 1990, he lectures at universities and has published legal works. He has his own law firm in Baghdad, and has dealt with many cases involving Iraq's nationality laws. Mr Ammar Naji was instructed by the Treasury Solicitor on behalf of the Home Secretary. He has practised law in Iraq since 1997, and although he does not have practical experience in nationality cases, he has since 2004 been working full-time as the consultant to a consortium investing in Iraq. Since 2006 he has been the honorary legal adviser to the British Ambassador to Iraq.

17. Dr Mohsin gave evidence in Arabic through an interpreter. Mr Naji gave evidence in English. We have borne in mind that some parts of Dr Mohsin's evidence might not have got across quite as he intended, and that Mr Naji was giving evidence in a language which was not his first language. Having said that, the expertise of the witnesses (save for when it came to questions of international law) was not in doubt, and we are satisfied that they were doing their best to give their evidence impartially. No doubt for cultural reasons, Dr Mohsin had some difficulty in giving direct answers to the questions he was asked when his opinions were tested, and that undermined to some extent the value of the opinions he expressed.

18. The views of Dr Mohsin and Mr Naji were supplemented late in the day by an unexpected source. After a draft of this judgment had been written by Mr Justice Keith, but before it had been sent to Judge Jordan and Mr Glyn-Jones for their consideration, a passage in a textbook on Iraqi nationality law by Major-General Legal Yasin Al-Yasiri, Iraq's Director-General of Nationality, was brought to the Commission's attention by the Treasury Solicitor for the Home Secretary. Both parties thought that the passage supported their respective cases, and Mr Al-Jedda's solicitors wanted the whole of the textbook translated since there may have been other passages which might support Mr Al-Jedda's case. In a note which the Commission sent to the parties following this exchange of correspondence, I wrote:

> "The emergence of the textbook on Iraqi Nationality Law should not be regarded by the parties as an opportunity to re-visit all the issues on which the [Commission] has already been addressed. The textbook is in its second edition, and if Dr Mohsin (who has experience in nationality cases) thought that it was likely to contain material of use, he might be expected to have brought anything of relevance in the first edition to the attention of the [Commission]. To put everything on hold for what may be many weeks on an exercise which is entirely speculative and could produce nothing of use at all would not be sensible. In any event, the Commission is not permitted to conduct its own researches into Iraqi law, and the effect of that is that anything in the textbook which is regarded as being helpful on the issues which Mr Al-Jedda's case raises will have to be the subject of evidence from the experts. It may be that that evidence can be in written form, but it will still delay things unnecessarily."

19. It so happened that the previous week the Commission had sent a note written by me to the parties inviting further written submissions on a topic on which the parties might wish to make further submissions. Both parties submitted further written submissions, but attached to the submissions made on behalf of Mr Al-Jedda were (a) a further report from Dr Mohsin and (b) a copy of a letter from Major-General Al-Yasiri to Dr Mohsin. The Treasury Solicitor objected to the admission of this evidence, relying on the contents of my note, on Dr Mohsin's acknowledgement that he had known of Major-General Al-Yasiri's textbook at the time of the hearing but had not thought that it added anything to the debate, and on the fact that Major-General Al-Yasiri had not been cross-examined on his view. The Treasury Solicitor also argued that his views were inadmissible since he was doing no more than asserting what the position of Iraq's Ministry of the Interior was. We decided to take Dr Mohsin's further report and Major-General Al-Yasiri's letter into account for the time being.

The effect of Iraqi law

20. *The structure of laws in Iraq*. Iraq was part of the Ottoman Empire until it gained independence from Turkey as a result of the Treaty of Lausanne of 1923. Its legal system has a number of tiers: constitutional, legislative and regulatory. Laws passed by its legislative bodies must be compatible with the Constitution, but the implementation of legislative provisions is often left to regulations issued by the relevant minister. That is the case with its nationality laws.

21. *Nationality at the time of independence*. Art. 5 of the Iraqi Constitution of 21 March 1925 provided that Iraqi nationality was to be "defined by a special law", and would be acquired or lost in accordance with its terms. That special law was the Law of Nationality of 1924 (No. 42 of 1924) ("the 1924 Nationality Law"). Art. 3 provided that those who "used to have Ottoman nationality" and who "resided regularly" in Iraq on the date when the Treaty of Lausanne took effect (6 August 1924) were "considered" to be Iraqi nationals. Plainly, they did not have to apply for Iraqi nationality. Apart from anything else, there was no authority, said Dr Mohsin, for them to apply to. They acquired Iraqi nationality automatically.

22. Art. 8 dealt with those who did not automatically acquire Iraqi nationality under Art. 3. It "deemed" certain people to be Iraqi nationals through birth, parentage or naturalisation. It provided as follows:

> "A person shall be deemed to be an Iraqi national if:
>
> a. He/she was born, regardless of the place of birth, to an Iraqi father who was born in Iraq, or he/she obtained the Iraqi nationality by naturalization or by the means mentioned in Articles 3, 4, and 5.
>
> (b) He/she was born in Iraq and has attained the age of competency and his/her father was born in Iraq and had been regularly residing there when his child was born."

Dr Mohsin thought that Iraqi nationality could not be obtained automatically under Art. 8. He thought that it had to be applied for. He based that view on Art. 7, which provided:

> "Any person belonging to the Ottoman State who has attained the age of competency and who is not a resident of Iraq but was born there has the right to submit, on the 6th of August 1926 or before, a written request to express his/her interest in bearing the Iraqi nationality. Thereafter, such person becomes an Iraqi national upon the approval of the Iraqi government and under the agreement between the Iraqi government and the government of the country in which he/she resides, if such an agreement is necessary."

We are sceptical about the correctness of Dr Mohsin's view on this topic. We would have thought that Art. 7 applies to those who had not acquired Iraqi nationality under Arts. 3 or 8. That is because Art. 7 applies only to people who were born in Iraq, whereas one of the categories of people in Art. 8 – Art. 8(a) – includes those who were not necessarily born in Iraq. However, since Mr Naji did not express any view about Arts. 7 or 8, it is better to leave the issue to one side, especially as a similar issue arises more directly under a subsequent law relating to nationality – the 1963 Nationality Law.

23. Art. 13 is the provision in the 1924 Nationality Law which prohibited dual nationality. It provided:

> "Any Iraqi who gets naturalized with a foreign nationality of a foreign country by his/her choice shall lose the Iraqi nationality. His/her new nationality shall not be recognised in Iraq unless it is approved by the Iraqi government. If he/she returns to Iraq, the Iraqi government has the right to determine whether to consider him/her an Iraqi national or to exclude him/her from Iraq."

Dr Mohsin did not deal in his evidence with the effect of this provision, but on the face of it its effect was that if an Iraqi national acquired the nationality of another

country (presumably by choosing to live there and applying for nationality there), he lost his Iraqi nationality automatically and could not re-acquire it automatically if he returned to Iraq. It was up to the government to decide whether to treat him as an Iraqi national upon his return. Mr Naji was eventually to accept that this was correct, and that it was up to the returnee to apply for the restoration of his Iraqi nationality.

24. *Nationality prior to 2003*. The 1924 Nationality Law (and the amendments to it) were repealed by Art. 22 of the nationality law which was in force at the time of the fall of the Saddam regime. That was the Law of Nationality of 1963 (No. 43 of 1963) ("the 1963 Nationality Law"). Rather like Art. 8 of the 1924 Nationality Law, the 1963 Nationality Law deemed (the word it used was "considered") certain people to be Iraqi nationals through birth or parentage. They included those who had obtained Iraqi nationality under the 1924 Nationality Law (Arts. 2 and 3), but the 1963 Nationality Law also provided in Art. 4 that people who fell within the following categories would be "considered" Iraqi nationals, namely someone who

> "1- was born in Iraq or abroad for a father holding Iraqi nationality.
>
> 2- was born in Iraq for an Iraqi mother and a father with unknown nationality or not holding a nationality.
>
> 3- was born in Iraq for two unknown parents; the child with unknown parents who is found in Iraq will be considered as born in Iraq unless the evidence shall otherwise prove."

25. Like the 1924 Nationality Law, the 1963 Nationality Law prohibited dual nationality. Art. 11 provided:

> "1- Each Iraqi who has acquired a foreign nationality in a foreign country upon his free choice will be denied the Iraqi nationality.
>
> 2- If the person who lost the Iraqi nationality upon paragraph (1) has returned to Iraq in a legal manner and has lived in it for one year [that person] can be considered by the Minister as acquiring the Iraqi nationality after that year and as from the date of returning if submitting an application to retain the nationality before the lapse of said period of time."

The effect of this provision was that if an Iraqi national chose to acquire the nationality of another country, he lost his Iraqi nationality automatically. As with the 1924 Nationality Law, he could not re-acquire it automatically if he returned to Iraq. He had to return to Iraq lawfully, he had to live there for a year, and he had to apply for the restoration of his Iraqi nationality within that time. If he satisfied those conditions, he re-acquired Iraqi nationality from the date of his return to Iraq.

26. Looking at the language of Art. 11(2) literally, someone applying for the restoration of their Iraqi nationality under Art. 11(2) was only entitled to have that application "considered" by the Minister. That leaves open the question whether you were entitled to have your Iraqi nationality restored if you established that you had returned

to Iraq lawfully and had lived in Iraq for one year, or whether your application could still be refused on other grounds. On that issue, Dr Mohsin and Mr Naji were agreed that, subject to one important reservation which Mr Naji has, the application could be refused on national security grounds. Dr Mohsin thought that Art. 8.4(e) of the 1963 Nationality Law gave the Minister of the Interior the power to do that. It provided that the Minister had the right to grant Iraqi nationality to a foreigner (and Dr Mohsin regarded someone who had lost their Iraqi nationality under Art. 11(1) as a foreigner) if "[h]is presence in Iraq does not cause any harm to the safety and security of the Iraqi Republic". Mr Naji thought that the power came from a specific law relating to national security which he was unable to identify. Indeed, Dr Mohsin and Mr Naji agreed that the Minister's decision was subject to review by the courts, though Mr Naji disagreed with Dr Mohsin's view that the courts "would normally have to agree" with the Minister on the issue.

27. The important reservation which Mr Naji had was that the Minister's power to refuse an application under Art. 11(2) on national security grounds could well have been limited to former Iraqi nationals who had acquired Iraqi nationality otherwise than by birth, in effect naturalised Iraqis. It depended on whether the Iraqi Constitution at the time prohibited the withdrawal of Iraqi nationality from those who had acquired it by birth (as the 2006 Constitution did). However, there was no evidence about what the Iraqi Constitution provided at the time, and we cannot assume that it contained similar provisions to the 2006 Constitution – especially when the latter permitted dual nationality and presumably the former had not. On the evidence, therefore, we find that the Iraqi courts would decide that someone who had lost their Iraqi nationality under Art. 11(1) of the 1963 Nationality Law and who had applied for its restoration under Art. 11(2) could have had it refused on national security grounds even if he had been an Iraqi national by birth.

28. The 1963 Nationality Law contained an article relating to the implementation of its provisions. That provision was Art. 25, which provided:

> "Upon the provisions of the Law of the Iraqi nationality No. 42 for 1924 and its amendments, it shall be permissible to issue by-laws and regulations required to facilitate the operation of the provisions herein. These will be considered as enforced until being cancelled; or replaced with others."

It is not disputed that the Minister of the Interior issued regulations pursuant to Art. 25. These regulations were Regulation 1 of 1965 ("the 1965 Regulations"). The Commission was provided with three translations of the 1965 Regulations: one was from a textbook, and the other two were professional translations commissioned by each of the parties. For present purposes, the relevant regulation is Art. 2B, which provided (using the translation commissioned by the Home Secretary):

> "The Director-General may grant a certificate of Iraqi nationality as per [Form] No. 2 to persons who meet the conditions of Articles 5, 6, 17, 11(3) and 12(1) of the Iraqi Nationality Law, Article 3(1) of Law No. 206 of 1964 in amendment to the aforementioned law, following checks, the completion of Form No. 1 and issuance of an approval decision by the competent authority."

The reference to Art. 11(3) of the 1963 Nationality Law should be a reference to Art. 11(2), since there was no Art. 11(3), and the words "may grant" were translated in the other translations as "is entitled to grant" and "shall have the right to grant". Curiously, Art. 2B in the translation commissioned by Mr Al-Jedda's solicitors talked of *Iraqi nationality* being granted, rather than a *certificate* of Iraqi nationality, but since that is inconsistent with (a) Art. 2A, (b) the other translations of Art. 2B, and (c) Forms 1 and 2 annexed to the 1965 Regulations which refer to a certificate of Iraqi nationality, we have assumed that the other translations are correct. The effect of this provision – at any rate in respect of those who had lost their Iraqi nationality under Art. 11(1) of the 1963 Nationality Law and who applied for its restoration under Art. 11(2) of the 1963 Nationality Law – was that a certificate of Iraqi nationality could be granted to them.

29. An issue which was much debated before us related to what purpose this certificate served. Did it *confer* Iraqi nationality on its holder, so that until the certificate was issued the person applying for it was not an Iraqi national? Or was the certificate merely the documentary *evidence* that someone was an Iraqi national, so that Iraqi nationality could be acquired without the grant of the certificate? That is not an issue which would ever have come up at the time in respect of those who had lost their Iraqi nationality under Art 11(1). Either way, an application for the restoration of Iraqi nationality had to be made under Art. 11(2). If the application was refused, Iraqi nationality was not restored. If the application was granted, the issue of the certificate would follow.

30. Different considerations apply to Art. 2A of the 1965 Regulations. This provided (again using the translation commissioned by the Home Secretary):

> "The Director-General may grant a certificate of Iraqi nationality as per [Form] No. (2) annexed to these regulations to individuals who meet the conditions of Articles 2, 3, 4 and 13 and Article 12(2) of the Iraqi Nationality Law on completion of Form No. 6 annexed to these regulations in relation to the instance set out in Article 12(2), Form No. 7 annexed to these regulations concerning the instance set out [in] Article 13(2) and completion of Form No. 1 annexed to this regulation in relation to other instances."

Again, the words "may grant" were translated in the other translations as "is entitled to grant" and "shall have the right to grant", but this time the translation commissioned by Mr Al-Jedda's solicitors referred to a *certificate* of Iraqi nationality, rather than to Iraqi nationality. The effect of this provision is that the Director-General of Nationality had the power to grant a certificate of Iraqi nationality to those who were "considered" Iraqi nationals under Arts. 2, 3 and 4 of the 1963 Nationality Law. It is, in our view, inconceivable that such persons only acquired Iraqi nationality when a certificate of Iraqi nationality was issued. Otherwise, the overwhelming majority of the population would not be regarded as Iraqi nationals. It is rather like having a British passport. A British passport does not confer British nationality on its holder. You can be a British national even though you do not have a British passport. The passport is simply the documentary evidence of your British nationality to enable you to travel abroad.

31. It is true that Dr Mohsin and Mr Naji disagreed about the effect of the issue of a certificate of Iraqi nationality under the 1965 Regulations, Dr Mohsin saying that without it you do not enjoy Iraqi nationality, Mr Naji saying that it is merely the documentary evidence of your Iraqi nationality. But neither of them distinguished – initially at any rate – between a certificate issued under Art. 2A of the 1965 Regulations and one issued under Art. 2B of the 1965 Regulations. When Dr Mohsin was pressed for his view on whether someone who was "considered" an Iraqi national under Art. 4 of the 1963 Nationality Law had to apply for a certificate of Iraqi nationality under Art. 2A of the 1965 Regulations to acquire Iraqi nationality, his response as we understood him – once he had understood the question – was that the certificate represented the proof that you were an Iraqi national, and that such proof was needed in order to access the various benefits – welfare, educational and health – which the State offered. So if a certificate of Iraqi nationality issued under Art. 2A of the 1965 Regulations was merely proof of Iraqi nationality, and if someone could therefore be an Iraqi national without it, it would be very odd if the same did not go for a certificate of Iraqi nationality under Art. 2B of the 1965 Regulations. That is what we find the Iraqi courts would have decided about the effect of a certificate of Iraqi nationality under the 1965 Regulations.

32. For these reasons, we find that the Iraqi courts would have decided that someone who was "considered" an Iraqi national under Arts. 2, 3 and 4 of the 1963 Nationality Law did not need to apply for a certificate of Iraqi nationality to be an Iraqi national. However, anyone who lost Iraqi nationality as a result of the prohibition on dual nationality in Art. 11(1) of the 1963 Nationality Law could only re-acquire Iraqi nationality if they applied for it under Art. 11(2), provided that they had returned to Iraq lawfully and had lived in Iraq for a year. That application could be refused on grounds of national security, but if it was successful, the issue of the certificate of Iraqi nationality followed automatically. That was the consequence of Art. 11(2) rather than the effect of the 1965 Regulations. It is now accepted that Mr Al-Jedda lost his Iraqi nationality pursuant to Art. 11(1) on 12 June 2000 when he was granted British nationality. It is also accepted that no application was made by Mr Al-Jedda for the restoration of his Iraqi nationality under Art. 11(2) – whether while the 1963 Nationality Law remained in force or subsequently.

33. *The immediate aftermath of the 2003 war*. Coalition forces invaded Iraq in March 2003. Major combat operations were declared complete at the beginning of May 2003, and the Governments of the US and the UK informed the President of the Security Council of their intention to provide for the security and provisional administration of Iraq as occupying powers through the Coalition Provisional Authority ("the CPA"). By para. 9 of Resolution 1483 of 22 May 2003, the Security Council supported "the formation, by the people of Iraq with the help of [the CPA] …, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognised, representative government is established by the people of Iraq and assumes the responsibility of the [CPA]". In due course, the CPA recognised the formation on 13 July 2003 of the Governing Council as the principal body of the Iraqi interim administration pending the establishment of the internationally recognised, representative government envisaged by Resolution 1483. The Security Council was, by para. 4 of Resolution 1511 of 16 October 2003, to recognise the Governing Council and its ministers as the principal bodies of the Iraqi

interim administration for the time being, "embody[ing] the sovereignty of the State of Iraq" during this transitional period.

34. *Resolutions 111 and 117 of the Governing Council*. Resolutions 111 and 117 of the Governing Council are important because they are said by the Home Secretary to be the first instruments to have had the effect of automatically restoring Iraqi nationality to Mr Al-Jedda. Resolution 111 was in these terms:

> "1- All the decisions, regulations, instructions and directives entitled to withdraw and cancel nationality from Iraqis since 1958 shall be considered cancelled. The above mentioned Iraqis shall be considered as holders of the Iraqi nationality.
>
> 2- Any issue prevents the courts from viewing nationality lawsuits shall be cancelled. The Court shall work according to the general authorization granted to the legal authority.
>
> 3- All legal rights shall be returned accordingly."

Resolution 117 was in these terms:

> "1- All the decisions, regulations, instructions and directives entitled to withdraw and cancel nationality from Iraqis since 1958 should be considered cancelled.
>
> 2- Any one who his/her Iraqi nationality has been cancelled or withdrawn shall be considered as a holder of the Iraqi nationality and shall exercise all the legal authorities that he/she is entitled according to the nationality with retroactive effect.
>
> 3- Any legislation or administrative decision that shall prevent the Iraqi Judicial system from viewing nationality lawsuits shall be cancelled. The Court shall have the authority to view all these lawsuits according to its official authorizations.
>
> 4- This decision is considered valid effective from date of publishing in the official gazette.
>
> 5- Minister of Interior, Minister of Justice and all other competent bodies shall execute this decision."

These translations were by translators commissioned by the Home Secretary, and it is common ground that the translation of para. 4 of resolution 117 is incorrect. It should read: "This decision is considered valid effective from the date of issue and shall be published in the Official Gazette." Apart from when resolution 117 came into force, the difference between them is that the rights which resolution 117 restored had retrospective effect.

35. The Governing Council was, no doubt, seeking to wipe the slate clean by treating the nationality laws and regulations promulgated in the Saddam era as of no effect, but the prohibition on dual nationality, of course, had been part of Iraqi law ever since independence. Having said that, it is said on Mr Al-Jedda's behalf that these

resolutions never took effect for two reasons. The first is that for resolutions of the Governing Council to take effect as laws of Iraq, they had to be approved by the CPA. Dr Mohsin did not express a view on this topic since the Home Secretary's reliance on resolutions 111 and 117 emerged for the first time in Mr Naji's report. When Mr Naji was asked what in his view was the source in Iraqi law of the power of the Governing Council to promulgate new laws, he said that he did not know, and when it was put to him that the Governing Council only had the authority to promulgate laws which were approved by the CPA, he said that he would leave that question for the court to decide. We are left, therefore, with the views of various academic lawyers on the issue. We note that in the Commission's judgment of 23 May 2008, the Commission expressed the view at [25] that the Governing Council "had the capacity to promulgate law in areas where its power existed, and did so". The Commission took that view because of the Security Council's recognition of the Governing Council and its ministers as the body embodying the sovereignty of Iraq at the time. But that still begs the question whether the exercise by the Governing Council of any of its law-making powers was subject to the approval of the CPA. For example, Prof. Noah Feldman who served as a senior constitutional adviser to the CPA during 2003 thought that it was: see para. 21 of Prof. Guy Goodwin-Will's paper of 21 July 2008 submitted to the Court of Appeal when it was considering the appeal from the Commission's judgment of 23 May 2008.

36. We have not had to reach a definitive view on the topic, because the other reason for saying that resolutions 111 and 117 did not take effect is compelling. Art. 2 of the Law of Publication in the Official Gazette (No. 78 of 1977) provided that "what is published on the Official Gazette" came into force "since date of publication", and there is no evidence that either of those resolutions were ever published in the Official Gazette. However, this was subject to the proviso "unless the published law stipulated otherwise", which is said to have been the case with resolution 117. That depends on what the overall effect of Art. 2 really was. One reading of it is that publication in the Official Gazette was not a pre-condition for a particular law's entry into force if the law itself provided that it was to come into force without being published in the Official Gazette. Another reading of it – which is the one which Mr Richard Hermer QC for Mr Al-Jedda advanced – is that publication in the Official Gazette *was* a pre-condition for the law's entry into force, but that the law could stipulate that when it came into force on publication in the Official Gazette it was to be treated as having come into force on the date on which it was promulgated. Again, Dr Mohsin did not express a view on this topic. Mr Naji's reading of Art. 2 was the former, but he cited no authority for his view and gave no reasons for it. We are very sceptical about it. In our view, it is inherently unlikely that the requirement for publication in the Official Gazette could be by-passed – with the result that the usual publicity given to a newly enacted law could be dispensed with – simply because that was what the new law provided. It is for that reason that we conclude that the Iraqi courts would decide that resolutions 111 and 117 never took effect.

37. *The TAL*. The TAL was adopted on 8 March 2004. Its preamble stated that it was "established to govern the affairs of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being". The transitional period was the period from the formation of a "fully sovereign Iraqi Interim Government" (which was due to take power on 30 June 2004) until the formation of an Iraqi government

pursuant to a permanent constitution. In fact, the Iraqi Interim Government was formed on 28 June 2004, and on the same day the CPA was dissolved and the occupation of Iraq by coalition forces came to an end.

38. The TAL was drafted in English, though there is an Arabic version of it, and Dr Mohsin and Mr Naji agreed that if the Iraqi courts had to consider the TAL, they would use the Arabic version, rather than an Arabic translation of the English version. That is why we were provided, not just with the English version, but also with an English translation of the Arabic version of the critical article – Art. 11 – commissioned by Mr Al-Jedda's solicitors. Having said that, no-one suggested that there was any material difference between the English version of Art. 11 and the English translation of the Arabic version of it, and we have therefore used the English version.

39. Art. 11 of the English version provided as follows:

> "(A) Anyone who carries Iraqi nationality shall be deemed an Iraqi citizen. His citizenship shall grant him all the rights and duties stipulated in this Law and shall be the basis of his relation to the homeland and the State.
>
> (B) No Iraqi may have his Iraqi citizenship withdrawn or be exiled unless he is a naturalized citizen who, in his application for citizenship, as established in a court of law, made material falsifications on the basis of which citizenship was granted.
>
> (C) Each Iraqi shall have the right to carry more than one citizenship. Any Iraqi whose citizenship was withdrawn because he acquired another citizenship shall be deemed an Iraqi.
>
> (D) Any Iraqi whose Iraqi citizenship was withdrawn for political, religious, racial, or sectarian reasons has the right to reclaim his Iraqi citizenship.
>
> (E) Decision Number 666 (1980) of the dissolved Revolutionary Command Council is [annulled], and anyone whose citizenship was withdrawn on the basis of this decree shall be deemed an Iraqi.
>
> (F) The National Assembly must issues laws pertaining to citizenship and naturalization consistent with the provisions of this Law.
>
> (G) The Courts shall examine all disputes [arising] from the application of the provisions relating to citizenship."

Decision 666 of the Revolutionary Command Council related to the denial of Iraqi nationality to "each Iraqi of a foreign origin" if their loyalty to Iraq was suspect. It should be noted that the word "citizenship" in Arts. 11(B)-11(F) is translated as "nationality" in the English translation of the Arabic version of Arts. 11(B)-11(F), but

not in the Arabic version of Art. 11(A). However, that is a distinction without a difference, since no-one suggested that the terms were not synonymous.

40. The critical part of Art. 11 is Art. 11(C). The first sentence in Art. 11(C) repealed the prohibition on dual nationality. The second sentence in Art. 11(C) attempted to restore Iraqi nationality to those who had lost Iraqi nationality because of the prohibition on dual nationality. The question is whether the restoration of Iraqi nationality provided for in the second sentence of Art. 11(C) was automatic, or whether it had to be applied for. Mr Jonathan Swift QC for the Home Secretary says that when you compare Art. 11(C) with Arts. 11(D) and 11(E), the answer is obvious. Arts. 11(C), 11(D) and 11(E) all relate to the restoration of Iraqi nationality to different categories of people: (i) those who lost Iraqi nationality because of the prohibition on dual nationality (Art. 11(C)); (ii) those who had their Iraqi nationality withdrawn for political, religious, racial or sectarian reasons (Art. 11(D)); and (iii) those whose Iraqi nationality was removed by decision 666 of the Revolutionary Command Council (Art. 11(E)). Those in categories (i) and (iii) are "deemed" to be Iraqi, i.e. considered to be Iraqi nationals, without – so the argument goes – having to do anything to "reclaim" their Iraqi nationality. That contrasts with those in category (ii) who only have "the right to reclaim" Iraqi nationality. That was in effect Mr Naji's reason for concluding that the restoration of Iraqi nationality under Art. 11(C) to those who had lost it because of the prohibition on dual nationality was automatic – certainly in the case of those who had originally acquired Iraqi nationality through birth or parentage, such as Mr Al-Jedda, and possibly in the case of those who had originally acquired Iraqi nationality through naturalisation. When that marked difference in language was put to Dr Mohsin, he did not appear to understand the point which was being made, even though he had expressed the view in para. 63 of his supplemental report that the difference in language did not have any particular significance. Having said that, the difference in language becomes less marked when the English translation of the Arabic version is taken into account. That translates the relevant Arabic word in Art. 11(D) as "to regain" rather than "to reclaim".

41. In the normal course of events, we would have been reluctant to decide an issue of this kind on the basis of linguistic differences in the text of a document in a foreign language, because the difference in language may be the product of a difference in translation which a fair reading of the original text did not justify. For that reason, we place little reliance on Mr Hermer's point that you would expect the relevant phrase in Art. 11(C) to be "is an Iraqi" rather than "should be deemed an Iraqi" if Iraqi nationality was being restored automatically. But (a) we are considering a document which was *originally* drafted in English, and (b) the difference in language is reflected in the English translation of the Arabic version (though the translator appears to have failed to translate the second part of Art. 11(E)). In short, the difference in language is so marked that something of importance must have been intended. To that extent, we accept Mr Naji's evidence.

42. The question is what was intended. Was it intended that those who had lost their Iraqi nationality as a result of the prohibition on dual nationality should regain it automatically (as should those who had lost it by virtue of decision 666 of the Revolutionary Command Council), whereas those who had lost it for political, religious, racial or sectarian reasons had to apply for it? That was Mr Naji's position. Or was it intended that anyone who had lost their Iraqi nationality – for whatever

reason – had to apply for its restoration, the difference between those to whom Arts. 11(C) and 11(E) applied and those to whom Art. 11(D) applied being that the former were entitled to have it restored once they had established either that they had originally had Iraqi nationality but that they had subsequently acquired a foreign nationality, or that they had lost it by virtue of decision 666, whereas the latter could have their application refused on other grounds, for example, because they posed a threat to national security? Or could the distinction be that those who had their Iraqi nationality restored under Arts. 11(C) or 11(E) were to be regarded as having never lost it, whereas those who had it restored under Art. 11(D) were to be regarded as not having had it during the years when it had been withdrawn?

43. It was put to Mr Naji that it would be odd for those who had lost Iraqi nationality because they had chosen to acquire another nationality to have their Iraqi nationality *automatically* restored, when those who had lost their Iraqi nationality for political, religious, racial or sectarian reasons – perhaps for opposing the Saddam regime – had to apply for its restoration. We were not sure that Mr Naji satisfactorily answered that point, but for our part we do not find it strange at all. The loss of Iraqi nationality on the acquisition of another nationality followed automatically, and it may therefore have been thought to be appropriate to restore Iraqi nationality automatically to those who had lost it in that way. Similar considerations may have applied to those who had lost their Iraqi nationality by virtue of decision 666 of the Revolutionary Command Council. On the other hand, those who lost their Iraqi nationality for political, religious, racial or sectarian reasons may well have done so because of a decision to that effect, making it necessary for a decision to be made about whether Iraqi nationality should be restored to them.

44. Dr Mohsin sought to justify his stance that the restoration of Iraqi nationality under Art. 11(C) had to be applied for on the basis that the 1965 Regulations remained in force, and their effect was that those who had lost their Iraqi nationality as a result of the prohibition on dual nationality had to apply for the restoration of it. We do not follow this at all. Mr Naji did not doubt that the 1965 Regulations remained in force, but only those parts of the 1965 Regulations which were consistent with the TAL could have remained in force, since Art. 3(B) of the TAL provided that "[a]ny legal provision that conflicts with this Law is null and void". Art. 11(2) of the 1963 Nationality Law permitted those who had lost their Iraqi nationality as a result of the prohibition on dual nationality to have it restored only if they had returned to Iraq lawfully, had lived in Iraq for a year and had applied for its restoration within that time. That was inconsistent with the TAL which imposed no conditions on the entitlement of those who had lost their Iraqi nationality as a result of the prohibition on dual nationality to have it restored. It is difficult to see how Art. 2B of the 1965 Regulations could have survived the TAL to the extent that it applied to applications under Art. 11(2) of the 1963 Nationality Law, when Art. 11(2) could not have survived the TAL.

45. Dr Mohsin's reliance on the 1965 Regulations is said to be supported by Art. 11(F), which required the National Assembly to issue laws relating to nationality which were consistent with the provisions of the TAL. Although no such laws were issued by the National Assembly (at any rate, not until after the approval of the new Iraqi Constitution, and therefore pursuant to the Constitution rather than the TAL), it is said that Art. 11(F) shows the need for local laws to implement the requirements of the

TAL. We can go along with that without any difficulty. Indeed, section 5(2) of CPA Order No. 96 – which it is unnecessary to set out – proceeded on that assumption. But even though the 1965 Regulations remained in force until new laws and regulations were promulgated, the fact remains that those of the 1965 Regulations which were inconsistent with the TAL – and that includes Art. 2B of the 1965 Regulations to the extent that it applied to applications under Art. 11(2) of the 1963 Nationality Law – could no longer have remained in force.

46. A variant on this argument was advanced by Major-General Al-Yasiri in his letter to Dr Mohsin. He also noted that no laws were issued "to regulate" nationality in accordance with Art. 11 of the TAL. He added that as a result the Directorate of Nationality Affairs did not "apply" Art. 11 of the TAL, and those who had lost their Iraqi nationality as a result of the prohibition on dual nationality did not benefit from Art. 11 of the TAL. But just because the Directorate of Nationality Affairs did not give effect to Art. 11 did not mean that Art. 11 should not have been given effect to. The Iraqi courts would no doubt conclude that it should have been given effect to, because the 1965 Regulations remained in force (save to the extent that they were inconsistent with the provisions of the TAL) until new laws and regulations were promulgated.

47. In the interests of completeness, we should add that Mr Hermer argued that Dr Mohsin's stance was supported by the discussion about the recovery of Iraqi nationality and the prevention of statelessness in a report on Iraq produced in October 2005 by the United Nations High Commissioner for Refugees at pp. 119-120. We have not been able to discern how that discussion supports Dr Mohsin's view. Apart from anything else, we cannot tell whether an expert in Iraqi law had an input into the drafting of the relevant passage.

48. Dr Mohsin also sought to justify his stance by reference to CPA Order No. 92 which established the Independent Electoral Commission of Iraq. Section 5(3) of the Order related to members of the Commission's Board of Commissioners. It provided, so far as is material:

> "All voting members of the Board shall be Iraqi citizens and shall be chosen based on their reputation for impartiality, integrity, rectitude, professionalism and good judgment and must meet the criteria in Article 31(B) of the TAL. Persons who will be deemed an Iraqi citizen pursuant to Article 11 of the TAL, or who will be entitled to reclaim Iraqi citizenship pursuant to Article 11 of the TAL, shall fulfil the citizenship requirement for Board membership."

Dr Mohsin claimed that this provision "makes explicit the distinction between being considered an Iraqi citizen and being an Iraqi citizen. Voting members of the Board had to be Iraqi citizens. It was not sufficient that they were regarded as Iraqi citizens and were entitled to apply for a nationality certificate." We agree with Dr Mohsin that voting members of the Board had to be Iraqi citizens, but that did not exclude those who were deemed to be Iraqi nationals under Art. 11. Iraqi citizens were those who were entitled to reclaim Iraqi nationality under Art. 11, as well as those who were deemed to be Iraqi nationals under Art. 11. Indeed, the fact that the Order recognised the difference in language in Art. 11 between those who were deemed to

be Iraqis and those who had the right to reclaim Iraqi nationality is support for the distinction which Mr Naji makes.

49. We have not overlooked Dr Mohsin's point that hundreds of thousands of Iraqis in the diaspora – possibly as many as 1.5 million people – would on Mr Naji's view have automatically re-acquired Iraqi nationality – even if (a) they had no wish to have Iraqi nationality, and (b) the acquisition of Iraqi nationality would cause problems for them in their adopted country – without the completion of any administrative formalities whatsoever. If that had been the case, so Mr Hermer argued, the Ministry of the Interior would have issued press statements to that effect. We were not told about any press statements issued by the Ministry of the Interior, but we do not think that their absence supports the case advanced by Dr Mohsin. The Ministry of the Interior might be expected to have been just as likely to issue press statements inviting those who were entitled to have their Iraqi nationality restored following the repeal of the prohibition on dual nationality to apply for its restoration if that had been necessary. Nor do we think that any difficulties would have been caused to those who were having the restoration of their Iraqi nationality "thrust" on them. If they did not want it, they could renounce it, and we were not told of any insuperable problems which that might involve.

50. Nor have we overlooked a rather esoteric point made by Mr Hermer which relied on the distinction between the Iraqi *Interim* Government, which was formed on 28 June 2004, and the Iraqi *Transitional* Government, which was formed on 28 April 2005 after the elections to the National Assembly which took place on 30 January 2005. That distinction was recognised by Art. 2(B) of the TAL which provided that the transitional period consisted of two phases, the first of which was to begin with the formation of the Iraqi Interim Government, and the second of which was to begin with the formation of the Iraqi Transitional Government. It was only the Iraqi Transitional Government which the TAL entrusted with the task of removing the laws which had deprived Iraqi citizens of their nationality. That is because Art. 6 of the TAL provided:

> "The Iraqi *Transitional* Government shall take effective steps to end the vestiges of the oppressive acts of the previous regime arising from forced displacement, *deprivation of citizenship*, expropriation of financial assets and property, and dismissal from government employment for political, racial, or sectarian reasons." (Emphasis supplied)

If the point being made is that the TAL itself provided that laws such as the repeal of the prohibition on dual nationality were not within its remit, we disagree (subject, of course, to the international law point). The TAL clearly regarded the repeal of the prohibition on dual nationality as within its remit because that was what it provided for in Art. 11(C). Presumably, Art. 6 was addressing those "oppressive acts of the previous regime" which were not expressly repealed by the TAL.

51. We return, then, to the question which we posed in [40] above: what was intended by the difference in language between Arts. 11(C) and 11 (E) on the one hand and Art. 11(D) on the other? We are left with the language of the TAL, and its aim for those who had been deprived of their Iraqi nationality by the previous regime to have their Iraqi nationality restored. That would be inconsistent with some of them – those to

whom Art. 11(D) applied – having their application for the restoration of their Iraqi nationality refused on, say, national security grounds. It would also be inconsistent with some of them – again those to whom Art. 11(D) applied – not subsequently being treated as having been Iraqi nationals all along during the period when they had lost their Iraqi nationality. We are driven to the conclusion that the Iraqi courts would decide that the difference which the TAL intended between those to whom Arts. 11(C) and 11(E) applied and those to whom Art. 11(D) applied was that the former should regain their Iraqi nationality automatically, whereas the latter had to apply for its restoration.

52. How does this fit in with Dr Mohsin's evidence that his experience as an Iraqi lawyer who handles many nationality cases tells him that as a matter of practice someone who lost their Iraqi nationality as a result of the prohibition on dual nationality has to apply for its restoration. We shall come later on to current practice, but Dr Mohsin claims that this was the practice even during the time of the TAL, i.e. until 20 May 2006 when it was annulled. He gave as examples the cases of Nouri Al-Maliki, the Prime Minister of Iraq (whose paperwork Dr Mohsin prepared), Ahmed Chalabi, the former Deputy Prime Minister (whose case was handled by another lawyer to whom Dr Mohsin has spoken) and Yasim Muhammed Razouqi (whose case was handled by colleagues of Dr Mohsin). Dr Mohsin's evidence did not identify whether Mr Chalabi's application was made before 20 May 2006, but he confirmed that Mr Al-Maliki's application was made at the end of 2004 and before the elections to the National Assembly in January 2005, and he produced the documents which show that Mr Razouqi's application was made on 5 December 2004. Dr Mohsin did not say in so many words that Mr Al-Maliki had lost his Iraqi nationality because of the prohibition on dual nationality, and Mr Al-Maliki may have been applying for the restoration of his Iraqi nationality pursuant to Art. 11(D). Indeed, the paperwork in his case has not been produced. But that cannot be said for Mr Razouqi. The paperwork in his case refers to his loss of Iraqi nationality when he acquired New Zealand nationality, though he also lost his Iraqi nationality "in accordance with the decision of the dissolved Council of the Leadership of the Revolution", which could have been a reference to decision 666 of the Revolutionary Command Council.

53. But the real question is what Mr Razouqi (and Mr al-Maliki and Mr Chalabi for that matter) had been applying for. Even if Mr Razouqi thought that he was applying for the restoration of his Iraqi nationality, his application was treated as an application for *a certificate* of Iraqi nationality. That is apparent from the instructions issued to Mr Razouqi by the Directorate of Nationality Affairs informing him how his application was to be pursued. Having stated in para. 2 that "[t]he reason for the abrogation must be written, stating the abrogation date and also the date of the granting of the foreign nationality", the instructions continued in para. 8 as follows:

> "After completion of the measures in full, he shall be granted the Civil Status ID, and thereby *the certificate* of Iraqi nationality, provided that he is not wanted in relation to any crimes (nor in relation to any terrorism charges), otherwise he may not be granted Iraqi nationality if this is demonstrated at the Department of Criminal Evidence." (Emphasis supplied)

So if, as we have found, the Iraqi courts would decide that a certificate of Iraqi nationality was merely proof of Iraqi nationality, and that someone could be an Iraqi

national without it, the fact that the Iraqi authorities processed the applications of people like Mr Razouqi who had previously lost their Iraqi nationality as a result of the prohibition on dual nationality as applications for *a certificate* of Iraqi nationality would not be inconsistent with Iraqi nationality having been restored to them automatically.

54. We have not overlooked the fact that the instructions told Mr Razouqi that his application for a certificate of Iraqi nationality may be refused if he is "wanted in relation to any crimes … [or] … terrorism charges". This was presumably a hangover from the days when an application under Art. 11(2) of the 1963 Nationality Law could be refused on national security grounds. Whether an application for *a certificate* of Iraqi nationality could be refused on national security grounds for someone who had automatically regained their Iraqi nationality pursuant to Art. 11(C) of the TAL is an issue which no doubt would be decided by the Iraqi courts on an appeal against the refusal of a certificate of Iraqi nationality on those grounds. But whatever the answer to that question, it does not affect our view that the Iraqi courts would decide that Art. 11(C) automatically restored Iraqi nationality to those who had lost it as a result of the prohibition on dual nationality. Whether they could thereafter lawfully be refused a certificate of Iraqi nationality on national security grounds is another matter altogether.

55. For these reasons, we conclude that, subject to the international law point, Mr Al-Jedda automatically re-acquired Iraqi nationality pursuant to Art. 11(C) of the TAL on 28 June 2004 when it came into force.

56. <u>*The new Iraqi Constitution*</u>. A new Iraqi Constitution was approved by referendum on 15 October 2005, and it came into force on 20 May 2006 when the TAL was annulled. Art. 18 deals with citizenship and nationality. It provides, so far as is material:

> "(1) Iraqi citizenship is a right for every Iraqi and is the basis of his nationality.
>
> (2) Anyone who is born to an Iraqi father or to an Iraqi mother shall be considered an Iraqi. This should be regulated by law.
>
> (3) A. An Iraqi citizen by birth may not have his citizenship withdrawn for any reason. Any person who had his citizenship withdrawn shall have the right to demand its reinstatement. This should be regulated by a law.
>
> B. Iraqi citizenship shall be withdrawn from naturalized citizens in cases regulated by law.
>
> (4) An Iraqi may have multiple citizenships. Everyone who assumes a senior security or sovereign position must abandon any other acquired citizenship. This should be regulated by law."

It will be seen that these provisions have three important features. First, dual nationality is permitted. That is the effect of the first sentence in Art. 18(4).

Secondly, someone is entitled as of right to Iraqi nationality (wherever they were born) if one of their parents is an Iraqi (though whether he or she had to have been an Iraqi at the time of their child's birth is a moot point: Mr Naji's view was that he or she had to have been). That is the effect of Art. 18(2). Thirdly, if someone had Iraqi nationality, but had it removed for some reason (for example, if they lost it because of the prohibition on dual nationality), they have the right "to demand" the reinstatement of their Iraqi nationality. That is the effect of Art. 18(3)A. It was argued on behalf of the Home Secretary that the last two sentences of Art. 18(3)A relate to someone whose Iraqi citizenship is withdrawn after the Constitution came into force. We do not think that the Iraqi courts would accept that. Apart from the use of the past tense ("had") rather than the present tense ("has"), we have not been able to understand how, in the light of Arts. 18(1) and 18(2), an Iraqi citizen could have had their nationality withdrawn after the promulgation of the Constitution.

57. The provisions in Arts. 18(2) and 18(3)A were to be "regulated by law". At first blush, this means, we would have thought, that local laws had to be promulgated which identified how someone proves that one of their parents was an Iraqi at the time of their birth, or how they prove that they were an Iraqi national before their nationality was removed. Once they have proved one or other of those things, it would be inconsistent with the provisions of the Constitution for them to be denied Iraqi nationality on other grounds. But the fact that they have only the right "to demand" the reinstatement of their Iraqi nationality if they have previously lost it suggests that the Constitution envisaged something other than its automatic restoration. Having said that, the fact that they have the right to "demand" it, rather than just to apply for it, is significant. "Demand" is a strong word, and the Iraqi courts would conclude, we think, that it means that if an Iraqi citizen by birth had their Iraqi nationality withdrawn in the past, it *has* to be restored to them if they ask for it back. However, it was because they have to ask for it back that Mr Naji acknowledged in the course of his cross-examination – and confirmed to us at the end of it – that *if* Mr Al-Jedda had not acquired Iraqi nationality automatically under the TAL (or under resolutions 111 or 117 of the Governing Council), he could not have acquired it *automatically* under the Constitution.

58. How does this reading of Art. 18(3)A fit in with Mr Naji's opinion that the Iraqi courts would treat Mr Al-Jedda as having acquired Iraqi nationality automatically under Art. 11(C) of the TAL? At first blush, the answer would appear to be not well: if those who had lost their Iraqi nationality as a result of the prohibition on dual nationality automatically had it restored by Art. 11(C) of the TAL when the TAL came into force, where is there any room for an application of the type which the Constitution appears to have been envisaging? That was a question which Mr Naji was *not* asked, and it is plain that the point simply had not occurred to him when he acknowledged that the Constitution required Mr Al-Jedda to apply for the restoration of his Iraqi nationality if he had not already had it automatically restored under the TAL. The answer which the Iraqi courts would give has to be, we think, that the need envisaged by the Constitution to apply for the reinstatement of one's Iraqi nationality when it had previously been withdrawn applies only to those who had *not* had it automatically restored under the TAL. In other words, the need to apply for it applies to those who had their Iraqi nationality withdrawn for reasons other than the prohibition on dual nationality or decision 666 of the Revolutionary Command Council. These include, for example, those to whom Art. 11(D) of the TAL related,

i.e. those who had their Iraqi nationality withdrawn for political, religious, racial or sectarian reasons. So although Mr Naji was entirely correct to acknowledge that the Constitution envisaged the need to apply for the restoration of one's Iraqi nationality, he was wrong to acknowledge that that applies to someone like Mr Al-Jedda who had lost their Iraqi nationality as a result of the prohibition on dual nationality.

59. When we were questioning Mr Naji to check that we had understood the effect of his concession, we made it clear that we had reached no conclusion about whether his concession was correct (transcript of proceedings: day 4: page 12: lines 22-23). However, Mr Naji's concession may have been the reason why Mr Hermer and Mr Swift concentrated in their closing speeches on whether Mr Al-Jedda had automatically acquired Iraqi nationality under the TAL. Accordingly, we thought it appropriate to remind the parties following the hearing that we should not be taken as necessarily proceeding on the basis that Mr Naji's concession was correct. In the light of that, we suggested that counsel *may* wish to add such submissions as they had made on the meaning and effect on Mr Al-Jedda's case of the new Constitution and the 2006 Nationality Law. We have addressed those submissions in this judgment to the extent that we thought it necessary to do so.

60. *The 2006 Nationality Law*. The 2006 Nationality Law came into force on 7 March 2006. That was before the new Constitution came into force, but since the new Constitution had been approved many months earlier, we proceed on the basis that the provisions of the 2006 Nationality Law had to be compatible with the new Constitution. Neither Dr Mohsin nor Mr Naji suggested otherwise. We were provided with three translations of the 2006 Nationality Law – two commissioned by the Treasury Solicitor, the other by Mr Al-Jedda's solicitors. We have used one of the former (the one which appears at divider 47/15a of our bundle), and we will refer to the others only when there is a material difference between the three translations.

61. The purpose of the 2006 Nationality Law was explained in a provision at the end of it headed "Justifications" (or "Motives" in one of the other translations). It may be that this passage is the equivalent of an explanatory memorandum which in UK domestic law would not be part of the statute. Although Dr Mohsin referred to this passage in para. 46 of his supplementary report, he did not address its status. Nor did Mr Naji. In the circumstances, we simply set out the passage without further comment, emphasising the sentence which is relevant for present purposes:

> "In order to standardise the provisions relating to Iraqi nationality, to repeal the provisions relating to the forfeiture of Iraqi nationality by an Iraqi who acquires a foreign nationality, *to enable an Iraqi who has been arbitrarily deprived of Iraqi nationality to regain it in accordance with the regulations* and to bind an Iraqi to his homeland wherever he is in the world and encourage him to maintain his links with Iraqi soil despite having acquired another nationality, this law has been enacted."

It is unclear what "the regulations" is a reference to. It could be the 1965 Regulations, because Art. 21.1 of the 2006 Nationality Law provided that "the directives issued in accordance [with the 1963 Nationality Law. i.e. the 1965 Regulations] shall remain in force, to the extent that they do not conflict with the provisions of this law, until such time as they are replaced or repealed".

Alternatively, it could be a reference to future regulations, because Art. 22 of the 2006 Nationality Law provided that "[t]he Minister shall issue directives to facilitate enforcement of the provisions of this law".

62. Art. 3 of the 2006 Nationality Law (when read with Art. 1(b) which provides that the term "Iraqi" means "[a]ny person who enjoys Iraqi nationality") identified who are to be treated as Iraqi nationals. It provides:

> "The following shall be deemed to be Iraqi:
>
> A – Any person born to an Iraqi father or an Iraqi mother.
>
> B – Any person born in Iraq to unknown parents. A foundling discovered in Iraq shall be deemed to have been born there, unless there is evidence to the contrary."

In other words, Iraqi nationality can be acquired by parentage or birth. Plainly, such people do not have to apply for Iraqi nationality. They acquire Iraqi nationality automatically. Neither Dr Mohsin nor Mr Naji suggested otherwise.

63. But what about those who lose their Iraqi nationality for one reason or another? That is dealt with in Art. 10, which provides, so far as is material:

> "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."

64. Dr Mohsin's evidence was that Art. 10.3 applies to someone like Mr Al-Jedda who lost their Iraqi nationality as a result of the prohibition on dual nationality. That is also what Major-General Al-Yasiri appears to suggest in his letter to Dr Mohsin. Indeed, Dr Mohsin went further. His evidence was that any application for the restoration of their Iraqi nationality made under Art. 10.3 by someone who had lost it as a result of the prohibition on dual nationality could be refused by the Minister even if the applicant had satisfied the conditions of lawful entry into, and residence in, Iraq. The application could be refused on the ground, for example, that the applicant was a danger to national security. Dr Mohsin cited Art. 15 of the 2006 Nationality Law in support of this view. That provides:

> "The Minister may, following issuance of a final court judgment in relation to him, withdraw Iraqi nationality from a non-Iraqi who has acquired it, if he is shown to have committed

> or attempted to commit an act deemed to endanger the security and integrity of the state or he provides false information about himself for his family on submitting the application."

When it was put to him that Art. 15 applied only to a naturalised Iraqi – bearing in mind the reference to the provision of false information about himself or his family on submitting the application – Dr Mohsin's response was that *anyone* who had lost Iraqi nationality would be regarded as "a non-Iraqi who has acquired [Iraqi nationality]". We think that an Iraqi court would be very sceptical of Dr Mohsin's reading of the words "a non-Iraqi who has acquired [Iraqi nationality]", and as Mr Naji said, the suggestion that someone who originally had Iraqi nationality by parentage or birth but who had lost it because of the prohibition on dual nationality might not be able to acquire it if it was thought that he was a threat to national security is inconsistent with his right under the Constitution to have his Iraqi nationality restored to him.

65. But this is to digress. The critical question is whether Art. 10.3 applies to someone like Mr Al-Jedda who lost their Iraqi nationality as a result of the prohibition on dual nationality. On that issue, Mr Naji disagreed with Dr Mohsin. He thought that Art. 10.3 did not apply to someone like Mr Al-Jedda. Here, we prefer the evidence of Mr Naji. Art. 10.3 is all about someone who *renounces* their Iraqi nationality, i.e. people who give it up of their own accord. That is the natural meaning of the word "renounce", and we think that Mr Naji's view is fortified by one of the other translations of Art. 10.3 which translates the relevant Arabic word as "relinquished". Indeed, despite what he said in his letter to Dr Mohsin, that was what Major-General Al-Yasiri was asserting in his textbook, when commenting on the circumstances in which Art. 10.3 applies. In case 1 of topic 5, he wrote:

> "A person shall relinquish Iraqi nationality voluntarily after he acquires another nationality. This is the essence of the matter, since we are talking about an Iraqi who has lost his Iraqi nationality *voluntarily* and *of his own accord* acquired the nationality of another state and resided there. He has subsequently returned to Iraq wishing to regain his Iraqi nationality." (Emphasis supplied)

Dr Mohsin said in answer to that that someone who acquires a foreign nationality would be treated as having renounced his Iraqi nationality. He did not explain why, and we do not believe that the acquisition of a foreign nationality could be treated as the renunciation of Iraqi nationality, simply because the consequence of the acquisition of a foreign nationality was the loss of Iraqi nationality. In this respect, we agree with the evidence of Mr Naji that the Iraqi courts would decide that Art. 10.3 does not apply to those who had their Iraqi nationality withdrawn without their consent.

66. The restoration of Iraqi nationality to those who had their Iraqi nationality withdrawn without their consent is dealt with in Arts. 17 and 18. They provide, so far as is material:

> "17. Decision No. 666 of 1980 issued by the (defunct) Revolutionary Command Council shall be repealed and Iraqi nationality shall be restored to any Iraqi who has forfeited his

> Iraqi nationality in accordance with that decision and all the unjust decisions issued by the (defunct) Revolutionary Command Council in that respect.
>
> 18.1 An Iraqi who forfeits his Iraqi nationality on political, [racial] or sectarian grounds may regain it by submitting an application to that effect. In the event of his death, his children, who have lost their Iraqi nationality on account of their father or mother, may submit an application to regain Iraqi nationality."

67. These two provisions mirror Arts. 11(E) and 11(D) of the TAL. For those who lost their Iraqi nationality as a result of decision 666 of the Revolutionary Command Council, their Iraqi nationality "shall be restored" under Art. 17 of the 2006 Nationality Law, which is equivalent to them being "deemed an Iraqi" under Art. 11(E) of the TAL. But the effect of Art. 18.1 of the 2006 Nationality Law is that those who lost their Iraqi nationality for political, racial or sectarian reasons had to apply for its restoration, which is equivalent to their right "to reclaim" their Iraqi nationality under Art. 11(D) of the TAL. Indeed, since Art. 11(E) of the TAL uses similar language to Art. 11(C) – "should be deemed an Iraqi" – the difference between Arts. 17 and 18 of the 2006 Nationality Law strongly supports Mr Naji's reasoning in respect of the TAL that the difference in language was intended.

68. It is necessary, then, to return to Art. 10.1 of the 2006 Nationality Law. That permits those who acquire a foreign nationality to retain their Iraqi nationality, unless they renounce their Iraqi nationality in writing. Major-General Al-Yasiri, no doubt focussing on the word "retain" ("keep" in one of the other translations), thinks that Art. 10.1 is dealing with those people who have not previously lost their Iraqi nationality as a result of the now repealed prohibition on dual nationality. The effect of Art. 10.1 is that in the future the acquisition of a foreign nationality was not going to result in the loss of Iraqi nationality. In other words, Art. 10.1 is not dealing with the position of those like Mr Al-Jedda who had *previously* lost their Iraqi nationality as a result of the prohibition on dual nationality. Such a literal reading of Art. 10.1 would produce the highly surprising result that their position would not have been dealt with anywhere in the 2006 Nationality Law, and therefore when "the explanatory memorandum" referred to the purpose of the 2006 Nationality Law being, amongst other things, "to enable an Iraqi who has been arbitrarily deprived of Iraqi nationality to regain it", it was referring only to those who had lost it as a result of decision 666 of the Revolutionary Command Council or for political, racial or sectarian reasons, and not to those who had lost it as a result of the prohibition on dual nationality.

69. In our view, Art. 10.1 has to be considered from the standpoint of the Iraqi courts, and in the absence of any evidence about the rules of construction which the Iraqi courts would apply to it, Art. 10.1 should be construed in accordance with the English rules of statutory construction, one of which is that the construction which best avoids an anomalous result should be adopted. Mr Naji's evidence in effect was that the Iraqi courts would decide that Art. 10.1 *did* apply to someone like Mr Al-Jedda (transcript of proceedings: day 4: page 5: lines 6-8) – presumably reading the words "[a]n Iraqi who acquires a foreign nationality" as including "[a]n Iraqi who acquired a foreign nationality and therefore lost his Iraqi nationality", and reading the words "shall retain

his Iraqi nationality" as including "shall have his Iraqi nationality restored to him". Such a construction of Art. 10.1 would not offend against the presumption against retrospectivity in Iraqi law to which Major-General Al-Yasiri referred to in his letter: it would simply be restoring nationality to someone who had previously lost it. We accept Mr Naji's evidence, because it would be astonishing if Art. 10.1 looked only to the future, and did not also seek to rectify the injustices of the past. Dr Mohsin did not deal with the effect of Art. 10.1 – no doubt because he regarded Art. 10.3 as decisive – but the fact remains that Dr Mohsin did not express a view about the effect of Art. 10.1 if the court preferred Mr Naji's evidence on whether Art. 10.1 was the provision which applied to someone like Mr Al-Jedda.

70. The next question is whether Art. 10.1 required someone like Mr Al-Jedda to apply for a certificate of Iraqi nationality under Art. 2B of the 1965 Regulations, bearing in mind that Art. 21.1 of the 2006 Nationality Law provided that the 1965 Regulations were to remain in force to the extent that they did not conflict with the provisions of the 2006 Nationality Law. However, Art. 2B of the 1965 Regulations *was* inconsistent with the provisions of the 2006 Nationality Law to the extent that it applied to applications under Art. 11(2) of the 1963 Nationality Law, because Art. 11(2) was inconsistent with the 2006 Nationality Law which imposed no conditions on the entitlement of those who had lost their Iraqi nationality as a result of the prohibition on dual nationality to have it restored. The consequence is that in our opinion the Iraqi courts would decide that someone like Mr Al-Jedda would not have to apply for a certificate of Iraqi nationality under Art. 2B of the 1965 Regulations to have his Iraqi nationality restored to him.

71. How does that fit in with Dr Mohsin's evidence that as a matter of *current* practice someone who lost their Iraqi nationality as a result of the prohibition on dual nationality has to apply for its restoration – just as he claims they had to do while the TAL was in force? Dr Mohsin gave as an example the case of Mohammed Ridha Mohammed Jawad, whose case was handled by colleagues of Dr Mohsin, and who had lost his Iraqi nationality on becoming an Iranian national. Mr Jawad made his application on 14 October 2006, and the real question once again is what he had actually been applying for.

72. Even if Mr Jawad thought that he was applying for the restoration of his Iraqi nationality, it looks as if his application may have been treated as an application for a certificate of Iraqi nationality. That is one view which could be taken of instructions issued to him by the Directorate of Nationality Affairs informing him how his application was to be pursued. Having stated in para. 3 that "[h]e should write down the reasons for his loss of nationality and the date it was taken away together with the date he was granted the foreign nationality", the instructions continued in para. 7 as follows:

> "After meeting all the conditions, he should take the matter to (1) Abrogation, (2) Cancellation and (3) Expelled Persons and, following completion thereof by these three branches, he should be granted a status identity card. Once he has been issued with the status identity card and *a decision to restore his nationality* has been issued, *a Certificate* of Iraqi Nationality should also be issued to him, provided: (1) he is not wanted for any crime or on any charge of terrorism, otherwise it shall not

be permissible to grant him Iraqi nationality, if that is known to the Criminal Evidence Department." (Emphasis supplied)

73. This language is not quite to the same effect as para. 8 of the instructions Mr Razouqi got. Mr Jawad's instructions referred, in addition to the certificate of Iraqi nationality, to "a decision to restore his nationality". This appears to reflect the consequence of another document produced by Dr Mohsin, which was an "announcement" from the Directorate of Nationality Affairs which, though not dated, related to a time after the promulgation of the 2006 Nationality Law. It was addressed to "all citizens willing [*sic*] to restore their stripped-off nationalities", and said that they were required to be present personally when their "nationality restoration application form" was submitted. It added that once a decision had been made – presumably to restore Iraqi nationality – a request should be made to the Directorate of Nationality Affairs for a new certificate of Iraqi nationality to be issued.

74. These documents do not paint an entirely consistent picture, but one cannot exclude the possibility that the authorities currently treat someone who has lost their Iraqi nationality as a result of the prohibition on dual nationality as having to apply for its restoration, and not merely as having to apply for a certificate of Iraqi nationality if they want such a certificate following the automatic restoration of their Iraqi nationality. However, the fact that that may be what the authorities currently do does not mean that that is what the law requires to be done for Iraqi nationality to be restored to those who have lost it as a result of the prohibition on dual nationality. Whether the law requires that to be done depends on the proper interpretation of Art. 18 of the new Constitution and Art. 10 of the 2006 Nationality Law. For the reasons we have given, we have concluded that the Iraqi courts would decide that someone who lost their Iraqi nationality as a result of the prohibition on dual nationality does not have to apply for a certificate of Iraqi nationality to have their Iraqi nationality restored to them. The consequence is that Mr Al-Jedda did not have to apply for a certificate of Iraqi nationality to have his Iraqi nationality restored to him. It was restored to him automatically, though under Art. 10.1 of the 2006 Nationality Law he was entitled to renounce it in writing. Since he had not done so by 14 December 2007 when he lost his British nationality, he was still an Iraqi national on that date.

Conclusion

75. In the light of this conclusion, it has not been necessary for us to consider an alternative argument advanced by Mr Swift, namely that even if Mr Al-Jedda had not had his Iraqi nationality automatically restored to him under Art. 10.1 of the 2006 Nationality Law, it would not have been the Home Secretary's decision to deprive him of his British nationality which made him stateless, but his own failure to apply for the restoration of his Iraqi nationality. Our conclusion also makes it unnecessary for us to consider the international law point. This is not a case in which Mr Al-Jedda's Iraqi nationality was restored to him under the TAL only. If it had been, it would have been necessary to consider whether his Iraqi nationality would have been recognised as a matter of international law, and therefore capable of being asserted by or against the UK. For the reasons we have given, we have concluded that it was restored to him under Art. 10.1 of the 2006 Nationality Law if international law would not have recognised its restoration under the TAL. We have not overlooked Mr Naji's concession that if Mr Al-Jedda had not regained Iraqi nationality automatically

under the TAL, he could not be regarded as having regained it automatically under the new Constitution or the 2006 Nationality Law. However, that concession was made on the footing that Mr Al-Jedda had not regained his Iraqi nationality under the TAL as a matter of *domestic* law, not *international* law.

76. Accordingly, on the preliminary issue which the latest hearing before the Commission addressed, we have concluded that the Home Secretary's order of 14 December 2007 depriving Mr Al-Jedda of his British nationality did not make him stateless. Since that issue is the only ground of appeal remaining following the Commission's earlier judgments, it follows that Mr Al-Jedda's appeal must be dismissed.