Appeal No: SC/120/2012
Hearing Dates: 14 and 15 October, 2014
Additional written submissions received on 21 and 29 October 2014
Date of Judgment: 22nd January 2015

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE IRWIN
UPPER TRIBUNAL JUDGE J PERKINS
SIR BRIAN DONNELLY

Mahdi Mohamed HASHI (H2)

APPELLANT

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

RESPONDENT

JUDGMENT ON PRELIMINARY ISSUES

BARONESS KENNEDY QC and **MR F SAIFEE** (instructed by **HMA Solicitors**) appeared on behalf of the Appellant

MS L GIOVANNETTI QC and **MS K GRANGE** (instructed by **The Treasury Solicitor**) appeared on behalf of the Secretary of State

MS J FARBEY QC (instructed by **The Special Advocates' Support Office**) appeared as Special Advocate

Introduction

1. The Appellant is of Somali origin. He came with his parents to the United Kingdom in 1995. He was granted United Kingdom citizenship on 16 April 2004 at the age of 14.

2. In December 2009, the Appellant left the United Kingdom. During May/June 2011 he was in Somalia. In early to mid 2012, his case is that he was detained by the Al Shabaab, the militant Islamist group in Somalia. On 15 June 2012 a Notice of Intention to deprive the Appellant of his British citizenship was issued. There is a dispute as to service. The Order was made on 18 June 2012. The Appellant claims the Order was invalid, since it rendered him stateless. Since the Appellant was abroad at the time, he had 28 days in which to launch an appeal. He did not appeal within 28 days of 15 June 2012 or 18 June 2012. His notice of appeal was dated 5 October 2012.

3. On the Appellant's case, after 20 July and before late August, he was apprehended and detained in prison in Djibouti. From Djibouti he was removed to the United States. He was charged with terrorism charges, and awaits trial. He has been held under "Special Administrative Measures" which have inhibited communication with his English lawyers.

4. On 8 October 2012, Mitting J sitting in SIAC identified three preliminary issues in the case: (1) whether the Appellant had given valid Notice of Appeal; (2) whether time should be extended to permit his appeal; and (3) whether deprivation would render him stateless. In June 2013 a further preliminary issue was identified: whether the service by the Secretary of State on the Appellant was good service.

5. SIAC heard evidence and argument in relation to the first three issues on 25 July 2013. The issue as to valid Notice of Appeal became academic, for reasons we explain below. Following representation on behalf of the Appellant to the effect that his prospects of showing that he would be stateless were relevant to the extension of time, the Commission ruled that we would adjourn without ruling on the other issues, so as to hear the case on statelessness. There followed a long delay. It was hoped that better communications could be established with the Appellant. That has been so only to a limited degree. Counsel for the Appellant indicated nevertheless that the Commission could properly proceed to deal with the issue of statelessness. That matter was listed for June 2014, but that hearing date had unavoidably to be vacated and the matter resumed before us for hearing on 14 October 2014.

6. Since the purpose of the adjournment was to consider statelessness, as possibly affecting the outcome of the application to extend time, we begin by addressing statelessness.

The Issue of Statelessness

7. The Appellant contends that he automatically lost his Somali citizenship by the operation of Somali law, when he was registered as a British citizen on 16 April 2004. Hence, he suggests that the decision on 18 June 2012 to deprive

him of British citizenship was unlawful as rendering him stateless. The Secretary of State contends that Somali law permitted the Appellant to be a dual national and therefore that the acquisition of British citizenship did not, as a matter of Somali law, remove his citizenship. The respondent further argues that, in the context of Somali history and current circumstances, even if the Appellant were held in strict law to have been deprived of his Somali citizenship in 2004, he will in fact be able to acquire Somali identity documents, a Somali passport and will for all purposes be treated as possessing Somali citizenship by the Somali authorities.

8. It is agreed that it is for the Commission to determine for itself whether or not the decision of the Secretary of State made the Appellant stateless. The burden is on the Appellant and he must prove to the balance of probabilities that he would be made stateless. The inquiry is as to whether the Appellant held another nationality at the date of the Order, see *Al-Jedda v Home Secretary* [2014] AC 253, per Lord Wilson at paragraph 32.

9. In a separate argument, the Appellant submits that on a true interpretation of Section 40 of the British Nationality Act 1981, the Respondent did not have power to deprive a British national of his citizenship whilst he was outside the United Kingdom and dependent territories.

10. We remind ourselves of the relevant chronology. The Appellant was born on 18 August 1989 in Somalia. It is agreed that both his parents were Somali citizens resident at the time. The family left Somalia in 1991 and arrived in the UK on 8 September 1995. The Appellant was granted British citizenship on 16 April 2004 when he was 14. The notice of deprivation of citizenship was posted on 15 June 2012 and the order made on 18 June. The dates in 2012 may be of importance when considering the applicable law in Somalia.

11. Following World War II, Britain retained control of British Somaliland. The United Nations granted Italy trusteeship of Italian Somaliland. Independence came about in 1960 when the Somali Republic was formed. The expert witnesses called before us, Mr Haji for the Appellant and Professor Ahmed for the Respondent, both emphasised the importance of Italian law and legal experts in drafting the Somali Citizenship Law. In addition we observe that the Somaliland Citizenship Law annexed to the record of the Somaliland Protectorate Constitutional Conference is in very similar terms, drafting likely to have been done in the Colonial Office.

12. Somali Law Number 28 of 1962 reads in its material parts as follows:

> "**Article 2. Acquisition of Citizenship by Operation of Law**
>
> Any person:
>
> a) whose father is a Somali citizen;
>
> b) who is a Somali residing in the territory of the Somali Republic or abroad and declares to be willing to renounce any status as citizen or subject of a foreign country

shall be a Somali Citizen by operation of law.

Article 3. Definition of "Somali"

For the purpose of this law, any person who by origin, language or tradition belongs to the Somali Nation, shall be considered a "Somali".

Article 4. Acquisition of Citizenship by Grant

Somali citizenship may be granted to any person who is of age and makes application therefore, provided that:

…

c) he declares to be willing to renounce any status as citizen or subject of a foreign country.

…

Article 6. Renunciation of Foreign Citizenship

1. Any person who, in accordance with articles 2 and 4 of this law, declares that he is willing to renounce any status as citizen or subject of a foreign country, shall make such declaration before the President of the District Court of the district where he resides or, if he resides abroad, before a Consulate of the Somali Republic.

…

Article 10. Renunciation of Citizenship

Any Somali citizen who:

a) having established his residence abroad, voluntarily acquires foreign country (sic);

…

c) …shall cease to be a Somali citizen."

13. There can be no doubt that the intention and policy behind the 1962 law was to inhibit Somali citizens from acquiring dual nationality. The law does not, on the face of it, preclude Somali citizens from holding dual nationality whilst resident in Somalia. It seems likely that this provision was thought to meet the conditions of the day, where a new country was being formed from different constituent parts and where ethnic Somalis who would satisfy the definition in Article 3 were living in considerable numbers in neighbouring territories outside the boundaries of the new Republic.

14. Somalia had a difficult history between independence and 1991. Then, in that year the northern portion of the country, which had been the British protectorate, declared its independence as Somaliland. It has been *de facto* independent since, although not recognised as a state internationally. In the same year, civil war broke out in the remainder of Somalia and central authority broke down. Early United Nations attempts to create stability ended in failure in 1995. The region of Puntland proclaimed itself an autonomous state within Somalia in 1998.

15. The US Department of State country report on human rights in Somalia, of March 4 2002, picks up the story as follows:

> "Following the U.N. intervention, periodic attempts at national reconciliation were made, but they did not succeed. In September 1999, during a speech before the U.N. General Assembly, Djiboutian President Ismail Omar Guelleh announced an initiative to facilitate reconciliation under the auspices of the Inter-Governmental Authority for Development (IGAD). In March 2000, formal reconciliation efforts began with a series of small focus group meetings of various elements of Somali society in Djibouti. In May 2000, in Arta, Djibouti, delegates representing all clans and a wide spectrum of Somali society were selected to participate in a "Conference for National Peace and Reconciliation in Somalia." More than 900 delegates, including representatives of nongovernmental organizations (NGOs), attended the Conference. The Conference adopted a charter for a 3-year Transitional National Government (TNG) and selected a 245-member Transitional National Assembly (TNA), which included 24 members of Somali minority groups and 25 women. In August 2000, the Assembly elected Abdiqassim Salad Hassan as Transitional President. Ali Khalif Gallayr was named Prime Minister in October 2000, and he appointed the 25-member Cabinet. Administrations in the northwest (Somaliland) and northeast ("Puntland") areas of the country do not recognize the results of the Djibouti Conference, nor do several Mogadishu-based factional leaders. In October the TNA passed a vote of no confidence in the TNG, and Gallayr was dismissed as Prime Minister. In November Abdiqassim appointed Hassan Abshir Farah as the new Prime Minister. Serious interclan fighting continued to occur in parts of the country, notably in the central regions of Hiran and Middle Shabelle, the southern regions of Gedo and Lower Shabelle, and in the Middle Juba and Lower Juba regions. No group controls more than a fraction of the country's territory. There is no national judicial system."

16. The African Union Mission in Somali ["AMISOM"] is the peacekeeping force authorised by the United Nations Security Council. The AMISOM history placed before us summarises the story from 2004 as follows:

> "The Transitional Federal Government (TFG) of the Republic of Somalia is the most recent attempt to restore national institutions to Somalia. Established in 2004 and internationally recognized, its support in Somalia was waning until the United States-backed 2006 intervention by the Ethiopian military, which helped drive out the rival Islamic Courts Union (ICU) in Mogadishu and solidify the TFG's rule. Following this defeat, the ICU splintered into several different factions. Some of the more radical elements, including Al-Shabaab, regrouped to continue their insurgency against the TFG and the Ethiopian military's presence in Somalia.
>
> In February 2007, the United Nations Security Council authorised the African Union to deploy a peacekeeping mission in support of Somalia's Transitory Federal Institutions (TFIs). Two months later, the AU mission in Somalia (AMISOM) began deploying in Mogadishu and, at present, roughly 6,000 peacekeepers are currently deployed with AMISOM out of a total authorized strength of 8,000.
>
> Throughout 2007 and 2008, al-Shabaab scored military victories, seizing control of key towns and ports in both central and southern Somalia. At the end of 2008, the group had captured Baidoa but not Mogadishu. In January 2009, the Ethiopian troops withdrew from the country, leaving behind the underequipped African Union (AU) peacekeeping force as the only protector for the TFG."

17. Also before SIAC is a copy of the letter of 27 June 2012 from the UN Monitoring Group on Somalia addressed to the Chairman of the Security Council. This document brings the picture conveniently up to the date of deprivation. The initial summary from the letter reads as follows:

> "The final year of the Transitional Federal Institutions' (TFIs) term of office is due to expire in August 2012. But the transfer of power to a more effective, legitimate and broad-based national authority is threatened by the efforts of diverse Somali political leaders and their supporters to hijack or derail the transitional process – outcomes that would fuel continued instability and conflict, potentially reviving the fortunes of an embattled Al-Shabaab. While such 'spoiler' behaviour is partly an expression of legitimate political competition, it is also symptomatic of pervasive corruption within the TFIs. Since the collapse of the Somali government in 1991, successive generations of Somali leaders have engaged in corrosive political and economic practices that have aggravated the conflict and helped thwart the restoration of peace and security in the country. Under the Transitional Federal Institutions, the systematic misappropriation, embezzlement and outright theft of public resources have essentially become a system of

> governance, embodied in the popular Somali phrase "Maxaa igu jiraa?' ("What's in it for me?").
>
> A May 2012 report commissioned by the World Bank found US$131 million in TFG revenues unaccounted for in 2009-10; 68 per cent of total recorded income for that period. The Monitoring Group's own investigations suggest that the real scale of corruption is probably even higher, since millions of dollars of revenue go unrecorded. In other words, out of every US$10 received by the TFG in 2009-10, US$7 never made it into state coffers. In 2011, almost one quarter of total TFG expenditure (over US$12 million) was absorbed by the offices of the three top leaders – the President, Prime Minister and Speaker of Parliament. This represented roughly half of the TFG's domestic income and almost as much as the government spends on security in a time of conflict. TFG leaders find other ways to profit from their official positions as well. The Monitoring Group has learned that production and issuance of national passports has been quietly awarded to TRG cronies, resulting in extensive corruption and fraud since 2007. In 2010-11 alone, almost US$1.5 million in passport revenues went missing.
>
> Despite the TFIs shortcomings, Al-Shabaab has suffered dramatic reverses over the past year, experiencing military defeats, the loss of territory and the erosion of its revenue base – setbacks that have exacerbated rifts within the Group's senior leadership and may yet push them to the point of rupture. Recent military successes against Al-Shabaab have mainly been delivered by foreign military forces, but international investment in Somali security sector institutions – notably the Somali National Security Force (NSF) is also beginning to produce results in the battlefield.
>
> …
>
> Al-Shabaab continues to represent a serious threat to peace, security and stability, not only in Somalia but also on the broader international scene. In February 2012, the group announced a merger with Al-Qaida and has been actively strengthening its ties with other foreign extremist groups, including the Muslim Youth Centre (MYC) in Kenya, the Ansaar Muslim Youth Centre (AMYC) in Tanzania and Al-Qaida in the Arabian Peninsula (Yemen). Monitoring Group investigations reveal that the MYC in particular seeks to use its sanctuaries in Somalia as springboards for terrorist acts in Kenya deploying several operational cells to Kenya in recent months for this purpose."

18. The complex and difficult history summarised above forms a necessary context when considering the formation and enforcement of law in Somalia.

However, it does not mean that Somalia has at any stage ceased to exist as a state. As the author of *Shaw's International Law* (Sixth Edition) notes, it is rare "… for states to become extinct. This will not happen … as a consequence of internal upheavals within a state…" The specific example cited is the state of Somalia since the early 1990s and the author notes the various resolutions of the Security Council underpinning the point. Clearly, in such conditions the enforcement of law may be very weak or non-existent, a fact which may condition the response of a state to a law which has remained unenforced. Clearly also, how laws are formed, adopted and accepted in such conditions may be problematic. We now focus on two successive Charters which are said by the Secretary of State to have changed the law of Somalia, setting aside or amending Law 28 of 1962.

The Transitional National Charter of 2000

19. As the State Department report quoted above indicates, in June and July 2000, delegates from Somalia met in the town of Arta, Djibouti. The preamble to the Transitional National Charter ["TNC"] adopted by them recites that:

> "We, the delegates representing all the Somali people, and their power; fulfilling the decisions of the traditional elders' conference at Arta town, Republic of Djibouti on 6 June 2000; considering the destruction and agony of the Somali people and the need to re-establish a national government ….
>
> DO HEREBY ADOPT this Transitional Charter."

20. Alongside the TNC, the delegates resolved to establish a Transitional National Government ["TNG"]. The TNG was to be the vehicle by which authority was to be restored, the provisions of the Charter carried into effect and Somalia rebuilt as an effective state. The Appellant argues that the Charter never attained the quality of law. The Secretary of State argues that it did.

21. The provisions of the TNC are some of them aspirational and some declaratory. Examples of the aspirational include Article 13(3), whereby the new Transitional Government "shall encourage, support and provide full guarantee to foreign investment in the country as specified by law", and Article 14(1) where the Charter stipulates that the government "shall give priority to the promotion, expansion and propagation of public education". By Article 1(3) addressing the "new government system of the Republic", it is provided that:

> "The Transitional Government shall prepare the Federal System and in the meantime regional administrations shall be in place. The administrations shall be managed fairly and democratically. The Transitional Government shall prepare the laws and system of federal governance and shall be the constitution of the Somali republic."

22. Other provisions appear to be declaratory. Article 2 reads in its material parts:

"THE PEOPLE, RELIGION AND LANGUAGES

1. The People of Somali Republic consists of all the citizens.

…

3. Parliament of Somalia shall enact a special law that shall define how to obtain, suspend or lose [citizenship]. *Every citizen of the Somali Republic shall be entitled to retain their citizenship notwithstanding the acquisition of the citizenship of any other country*." (Emphasis added)

23. Article 4 reads as follows:

"SUPREMACY OF LAW

1. The Charter is supreme law of the country.

2. The organisation of the State and the relationships of the States and other persons, public or private, shall be governed by law.

3. The International Law recognised globally and International treaties signed by Somali Republic are part of the laws of the country.

4. The Islamic Shari'ah shall be the basis of all laws of the country, no law which is not compliant with the general principles of Shari'ah can be enacted.

5. *Any law which is inconsistent with this Charter is invalid*." (Emphasis added)

24. Some relevant issues are addressed in Article 38:

"Article 38

…

8. The Transitional Government shall prepare the Federal System.

9. The present Charter shall be the basis for the National Constitution and be adopted by popular referendum.

10. The three year term of the Transitional Government shall start from the closing day of the National Reconciliation Conference.

…

> 12. The 1960 Somalia Constitution and other national laws shall apply in all matters not covered and not inconsistent with this Charter.
>
> …
>
> 14. This Charter shall be effective after the endorsement of the Delegates of National Reconciliation Conference and shall be in use during the Transitional period until a new constitution is prepared."

25. The Secretary of State argues that the TNC is expressed in such terms that it is clear it is intended to be declaratory of the law with immediate effect from its adoption, at least in certain respects. For our purposes the most important is the statement in Article 2(3) which entitles the citizen to retain Somali citizenship notwithstanding the acquisition of the citizenship of any other country, a provision which under Article 4(5) would render invalid the contrary provision in Law 28 of 1962.

26. In support of her case, the Secretary of State called evidence from Professor Aubkar Hassan Ahmed. Professor Ahmed is a Somali lawyer taking his first degree in 1970. He subsequently acquired a Masters Degree in Law in Italy and a PhD in The Hague. He is a former Professor of Law at the Somali National University in Mogadishu. His practice is in constitutional law and international public law and since 2010 he has been working as a legal adviser to the current Somali President. He is clearly a distinguished man. He was awarded the Human Rights Award of the International Bar Association for 2013. As a matter of interest, he is also himself a dual national, having acquired UK nationality in 2005.

27. Professor Ahmed considers that Law Number 28 of 1962 was overturned with immediate effect by Article 2(3) of the Transitional National Charter. In the context of the TNC and the subsequent Transitional Federal Charter of 2004, Professor Ahmed explained in his report and oral evidence the policy underlying the change of law (as he said it was). In his report he put it this way:

> "… during the civil war millions of Somalis fled the country. A great number of them became citizens of foreign countries. Towards the end of the civil war, during the transitional phase, there was a need to encourage these people with dual nationality to return to the country to participate in its leadership as well as economic investment. Consequently, the Somali Diaspora got its national identity as well as the guarantee that they would be entitled to dual citizenship. It was fundamental to the post-conflict reconstruction of the country that people would be entitled to retain the citizenship they had acquired in another country alongside their Somali citizenship."

28. In oral evidence, Professor Ahmed emphasised that this principle extended not merely to individuals forming part of the political elite or government

leadership, but to citizens returning for business and who would be needed to revitalise the economy. The latter group, he said, were much the larger.

29. In paragraph 23 of his report, Professor Ahmed makes a further point relevant both to the Transitional National Charter and to the Transitional Federal Charter of 2004. He says Article 25, paragraph 2 of the Somali Civil Code provides that "for a Somali citizen to lose their citizenship, it is necessary for the case to be submitted to a competent court". Article 25 is located in a part of the Civil Code addressing the applicable or "governing" law in different situations: Articles 22, 23 and 24 address various problems of choice of law. Article 25 reads:

> "Art. 25. *Stateless*
>
> 1) In the case of stateless person or persons with dual nationality, the law to be applied is determined by the Judge.
>
> 2) Furthermore, will be applicable Somali Law if the person possesses Somali Nationality with regard to Somalia, and, with respect to one or more foreign states, the law of those States."

30. Article 13(3)(b) of the Law 34 of 1974 provides that it is the Supreme Court which has the power to hear claims against "definitive administrative decisions". There was no evidence of such a decision here, which Professor Ahmed suggests there should be before citizenship could be revoked. Professor Ahmed goes on to point out (and he was uncontradicted on this point) that there is no recorded decision from the Somali courts relating to Article 10 of the 1962 law, or to its effect in depriving a Somali of Somali citizenship.

31. Evidence was given on behalf of the Appellant by Mr Abdiwahid Osman Haji. Mr Haji has been a Somali lawyer since 1983. He has served as an Associate Professor at the Somali National University and has a Master of Law degree from the University of Ottawa. He has been a practising lawyer in Somalia both before and after the civil war, and serves on the National Conference on Justice and Rule of Law in Somalia. In May of this year, he was appointed by the director of the Directorate of Immigration and Nationality in the Somali Government to be one of three lawyers to review and "upgrade … to modern standards" law number 28 of 1962 on nationality, and law number 9 of 1966 on immigration. The Appellant relies on this appointment both to establish the authority of Mr Haji and as evidence that the law of 1962 is regarded by the authorities as being still in force.

32. In his first report of April 2013, Mr Haji did not mention the TNC of 2000 at all. Having seen the report from Professor Ahmed, Mr Haji disagrees that the Charter of 2000 had the force of law. Fundamental to his disagreement is his view of the delegates to, and thus the authority of, the Arta Conference. He suggests many of the delegates were self-appointed and the majority of the 245 members of the assembly present were drawn from the Parliament of the long-deposed leader Siyaad Barre. Relying upon *A Modern History of the Somali, Fourth Edition*, Lewis (2002), Mr Haji points out that members of the

Assembly were based on clan and gender quotas and made up by "random townspeople or selected placemen". The delegates from Puntland did not sign the agreement. The Somalilanders were not present. The TNG he says gained minimal recognition and by 2003 was defunct, its three year mandate expired "without becoming minimally operational". Mr Haji also argues that the language found in Article 2(3) and Article 4(5) of the Charter suggests that a Somali citizen who had automatically lost citizenship before the Arta Agreement was signed, and equally the citizen who acquired a foreign citizenship after the Charter was signed, would in each case need to apply to a court so as to retain their Somali citizenship.

33. Mr Haji gave no evidence to contradict the points Professor Ahmed made as to the policy behind the changes in 2000 (and 2004), nor to address the point made by Professor Ahmed that there would be a requirement for proceedings before citizenship was lost save to disagree with the proposition. Nor did Mr Haji suggest that there were any reported cases dealing with deprivation of citizenship.

The Transitional Federal Charter of 2004

34. As the US Department of State report extracted in paragraph 15 above makes clear, the Transitional National Government provided for in the TNC of 2000 did not acquire control of the country in the course of its three year chartered life. Mr Haji, in his report, acknowledged that the TNG secured –

> "… a measure of international recognition, enabling Somalia to re-occupy its seat at the UN and in regional bodies. However, the TNG was not unanimously recognised as a legitimate government. Not only did the northern Somali clans not recognise the TNG, but it was unable to control its intended capital city of Mogadishu. Therefore the TNG had very little effect within Somalia during the period between its inception and 2004. None of its initiatives established an effective national administration, in-country …. The 2000 Charter was not implemented by the TNG on any significant level." (Haji supplementary report, page 12)

35. As the AMISOM report quoted in paragraph 16 above makes clear, the next move to restore national institutions was through the Transitional Federal Charter and Transitional Federal Government ["TFG"] in 2004. It is necessary to consider the genesis and authority of the TFC, as well as the date when it came into force.

36. The UN yearbook for 2004 confirms that a draft Transitional Federal Charter was devised by 15 September 2003. Between 9 and 29 January 2004 a Somali leaders' consultation took place in Nairobi, Kenya. The leaders amended the draft Charter and on 29 January signed the declaration adopting the TFC. Mr Haji, on page 12 of his first report, sets out what happened next. The dates are

of significance given the grant of British citizenship to the Appellant on 16 April 2004.

37. On 4 February 2004 a number of members of the Somali Restoration and Reconciliation Council ["SRRC"] contested the validity of the declaration. The Kenyan conference had taken place under the auspices of an organisation for neighbouring states with a concern for Somalia, known as the Intergovernmental Authority on Development ["IGAD"]. The objection was that only two of the six IGAD country representatives were present. There was no objection to the provisions affecting citizenship. In spite of their objections the draft Transitional Federal Charter ["TFC"] was endorsed in a plenary session of the conference by the remaining Somali delegates (apparently the great majority) on 23 February 2004.

38. The TFC is explicit as to its nature and its commencement. Article 71, in its material parts reads:

> "**ARTICLE 71. TRANSITIONAL PERIOD**
>
> 1. The Charter shall have legal effect pending the eventual enforcement of the National Federal Constitution.
>
> 2. The 1960 Somalia Constitution and other national laws shall apply in respect of all matters not inconsistent with this Charter.
>
> …
>
> 12. For the avoidance of doubt, this Charter shall come into force on the date the delegates at the Somali National Reconciliation Conference in Kenya approve it and continue to be operational until the approval and enforcement of the Federal Constitution."

39. The Charter itself in its frontispiece gives the date "February 2004, Nairobi". Given the terms of the document as to commencement and the fact, acknowledged by Mr Haji on page 12 of his report, that the controversy arose after the signing of the 29 January declaration, the Secretary of State argues that the TFC was in force as a matter of law by at least February 2004. Mr Haji relies on the objections to the conduct of the plenary session. Mr Haji also suggests that official documentation from IGAD, AMISOM and the United Nations suggest that the TFC was adopted in August 2004 and Mr Haji cites the relevant documents in his report. He suggests that:

> "The most likely reason for this date has to do with the fact that the Transitional Federal Parliament was unanimously inaugurated on 22 August 2004. The delegates of the Somali National Reconciliation Conference disputed the draft Transitional Federal Charter due to disagreements regarding the selection process of the Transitional Federal Parliament, however this was resolved upon inauguration of the new

> Parliament. It cannot be said, in any meaningful sense, that the delegates of the National Reconciliation Conference approved the Charter before August 2004."

40. Professor Ahmed in his report simply recites the adoption of the TFC "in Nairobi on 23 February 2004". In oral evidence Professor Ahmed gave his view that the TNC of 2000 "continued to function" until the adoption of the TFC in 2004. He confirmed that he was present in the UK in 2003 but travelled in that year to Somalia and became one of the drafters of the 2004 Charter. His view, he maintained, was that the TFC was in force from February despite the difficulties of the process.

41. Professor Ahmed was taken to a number of documents in cross-examination to test his view as to the date when the TFC came into force. In the report by the Secretary-General of the UN to the Security Council of 9 June 2004 the agreement of 29 January was recited, but it is said that "the reconciliation process was effectively stalled from early February until it resumed recently". The endorsement of the TFC on 23 February was recited in paragraph 5 of the report, but subject to the dissent of the Puntland leader with others. The report goes on to spell out the twists and turns in the peace negotiations through to June. Next Professor Ahmed was taken to a document in the name of AMISOM, IGAD and the United Nations, setting out their strategy to support the Transitional Federal Government signed in February 2011. In the course of this document, the Transitional Federal Charter is described on page 7 as being "adopted in August 2004". That date is also given in the UN's "Timeline of the Somali Constitutional Process: 2004-2012". Professor Ahmed's response was that the timeline is very truncated and leaves out a good deal of important information. AMISOM became involved after the establishment of the Somali government and the joint report of 2011 is retrospective. The "roadmap" for progress, mentioned in another passage from the IGAD, AMISOM, UN report, also came later. Professor Ahmed maintained his view that the TFC was adopted in February.

42. The TFC also contains provisions which on the face of some of them are aspirational, and others declaratory of the law. Similar examples of the aspirational to those found in the 2000 Charter could be quoted here. Provisions intended to have the force of law include the following:

> "**ARTICLE 3. SUPREMACY OF LAW**
>
> 1. The Transitional Federal Government of the Somali Republic shall be founded on the supremacy of the law and shall be governed in accordance with this Charter.
>
> 2. This Charter for the Transitional Federal Government shall he the supreme law binding all authorities and persons and shall have the force of law throughout the Somali Republic. If any law is inconsistent with this Charter the Charter shall prevail.

3. The validity, legality or procedure of enactment or promulgation of this Charter shall not be subject to challenge by or before any court or other State organ.

ARTICLE 4. INTERPRETATION OF THE CHARTER

1. The Charter shall be interpreted in a manner:-

(a) That promotes national reconciliation, unity and democratic values;

(b) That promotes the values of good governance;

(c) That advances human dignity, integrity, rights and fundamental freedoms and the Rule of Law.

2. A person may bring an action in the Supreme Court for a declaration that any Law or action of the state is inconsistent with, or is in contravention of this Charter.

3. The Supreme Court shall determine all such applications on a priority basis.

…

ARTICLE 10. CITIZENSHIP

1. Every person who at the time of the coming into force of this Charter was a citizen of the Somali Republic shall be deemed to be a citizen of the Somali Republic.

2. Every person of Somali origin shall be entitled to citizenship of the Somali Republic provided that: -

(a) He/she was born in the Somali Republic; or

(b) His/her father is a citizen of the Somali Republic;

3. A person who is a citizen of Somalia under this Article cannot be deprived of that citizenship.

4. Every Citizen of the Somali Republic shall be entitled to retain their citizenship notwithstanding the acquisition of the citizenship of any other country.

5. Parliament shall within twelve months pass legislation regulating matters relating to citizenship."

Those provisions must be read in conjunction with those parts of Article 71 set out in paragraph 38 above.

43. Article 10 is important for this case. If Article 10 represented the law of the Somali Republic on 16 April 2004, then in acquiring British citizenship the Appellant was merely exercising a right granted to him under Article 10(4), and the contrary provisions of Law 28 of 1962 were set aside by Article 3(2). If on the other hand the TFC cannot have acquired the force of law before adoption by the Transitional Federal Parliament in August 2004, then the Appellant argues he lost his Somali citizenship by operation of the 1962 Statute.

Did the Transitional Federal Charter Constitute Law At All?

44. Mr Haji argues in his report prepared for this case that the TFC never constituted law in any event. In his first report, Mr Haji argues that the Appellant would certainly be considered stateless, even if the TFC applied to him, since –

> "…there is no legislation, a regulatory regime, or administrative body, with the authority to manage citizenship in Somalia, neither is there a harmonised approach to identifying citizens…. Furthermore Somalia was a failed State when the 2004 TFC was enacted … The TFC did not receive ascension from all the legally recognised territories of Somalia and its legitimacy as a constitutional document was challenged at its inception and remained controversial until its eventual expiration."

45. It is common ground that the expiration of the TFC came about at the point of adoption of the provisional federal constitution in August 2012.

46. In his supplementary report, Mr Haji extends this line of argument. He recites a number of criticisms of the Transitional Federal Government as being both corrupt and ineffective. He suggests that "the 2004 Charter was not implemented by the TFG on any significant level". His description of the TFC is that it was "nothing more than a 'peace accord' among warring parties".

47. Mr Haji's evidence on this point was, in our view, very significantly weakened when he was confronted with the report he wrote in a different case, that of *Mohamed v Secretary of State for the Home Department*, June 2012. That case concerned the alleged arrest and deportation of that Claimant from Somaliland. Mr Haji's task there was to consider whether the arrest and deportation breached what he there described as "the law and legal process in Somaliland and Somalia. I have been asked principally to explain to the court the relevant law and legal processes that are currently in force in Somaliland/Somalia".

48. In the course of the Mohamed report, Mr Haji advises that Somaliland is, and always has been, part of the national territory of Somalia. He describes the "Transitional Federal Government of Somalia" as "the only lawful government of Somalia and is recognised internationally as being such". He continues that theme as follows:

> "The legality of the TFG derives from Somalia being an official member of the United Nations and has an official permanent representative of Somalia to the United Nations. The TFG of Somalia is internationally recognised….
>
> Approved in 2004, the Transitional Federal Charter of the Somali Republic (TFC) is the principal organising document of Somalia, distinct from the 1960 Somali constitution, and deals with a number of personal civil rights. The Charter establishes the Transitional Federal Government as the sovereign government of Somalia (Article 1), explicitly defining the territory of Somalia…. and establishes the Charter as the supreme law binding all authorities (Article 3). The 1960 Somali constitution governs all matters not addressed by the Charter (Article 71)."

Thus according to this view the legitimacy of the TFG and the constitutional and legal force of the TFC are mutually dependent, and were established from 2004.

49. When Mr Haji came to deal with Mr Mohamed's arrest he reached the conclusion that it "violates and is contrary to the Transitional Federal Charter" and cites the text of Articles 16, 17 and 56, concluding that "the above Articles provide evidence that his arrest was unlawful and consequently his deportation was equally unlawful".

50. When Mr Haji was tasked with this report in cross-examination, his only answer to the suggestion of flagrant inconsistency was that the *Mohamed* report arose from a different context. We do not find this explanation to be remotely sufficient. A consistent position was open to Mr Haji by placing his reliance on the 2012 constitution. He did not do so, but relied explicitly and heavily upon the TFC as representing the law of Somalia, as Professor Ahmed has done all along. We regret to say that we regard this part of the evidence as significantly weakening the authority of Mr Haji as an expert witness in this case.

The 2012 Constitution

51. On 1 August 2012, the Somali National Constituent Assembly adopted a Provisional Federal Constitution. Professor Ahmed agrees that this is too late to have legal effect in Mr Hashi's case, given that the deprivation decision came in June 2012. However, it is worth noting that Article 8(3) provides that: "a person who is a Somali citizen cannot be deprived of Somali citizenship, even if they became a citizen of another country: It follows that the policy behind the 2000 and 2004 Charters has been embodied in very clear terms in the latest constitutional document.

As at the date of deprivation, would the Appellant be <u>treated</u> as a Somali citizen by the Somali authorities?

52. In the case of *B2 v SSHD* [2013] EWCA Civ 616, the Court of Appeal were considering an appeal from SIAC in respect of a British citizen of Vietnamese origin. B2 claimed that the decision to deprive him of British citizenship would render him stateless on the basis that the Vietnamese authorities would not accept him as a Vietnamese national. SIAC in effect agreed. The Secretary of State appealed and her principal ground of appeal was that the decision made B2 *de facto* stateless but not *de jure* stateless. The Court of Appeal examined Vietnamese law and concluded that, on a proper application of Vietnamese nationality law, B2 had retained his Vietnamese nationality throughout. The fact that the Vietnamese government might "ride roughshod over its own laws" (paragraph 88) and had "decided to treat B2 as having lost his Vietnamese nationality" (paragraph 91) was immaterial. In such circumstances, the court was persuaded that if "under the law of a foreign state an individual is a national of that state then he is not *de jure* stateless". On those grounds the Court allowed the Secretary of State's appeal.

53. The question that may arise in this case is the mirror image of that pertaining in B2's case. There is a considerable body of evidence that in 2012 someone such as this Appellant, who was born a Somali national and had acquired British nationality in 2004, would be treated as a Somali national by the Somali authorities. We have already recited the evidence of Professor Ahmed that considerable numbers of Somalis hold dual nationality. He does himself. So does Mr Haji, holding Canadian as well as Somali nationality. Professor Ahmed told us that the Prime Minister of Somalia holds Canadian nationality and the Chief Justice holds British nationality. Dual nationality and foreign passports are widespread amongst the political elite, and many of those fulfilling the definition of "Somali" under the 2000 or 2004 Charters acquire and use Somali identity documents and/or passports despite having acquired foreign nationality.

54. Mr Haji gave evidence that he had not yet acquired a Somali passport, but without giving up his Canadian nationality, he has acquired two successive identity cards, of which copies were provided to the Commission. The earlier was acquired from the Mogadishu municipality and is dated 27 July 2013, therefore something over a year later than the decision to deprive. However, there was evidence before the Commission that such identity cards had been issued by the Mogadishu municipality for quite a period. The card reads in English "This National Identity Card belongs to the Somali Government and is proof of Somali Citizenship. If found please return to nearest Somali Government office". Despite the fact that in practice it was issued by the Mogadishu municipality, the card recites that it was issued by the Somali government. The later card was issued on 13 March 2014 and contains exactly the same legend. Mr Haji told us that he had not yet been able to acquire a passport and was having to pay significant fees for visas on his Canadian passport.

55. There is no doubt that there has been a considerable degree of corruption and maladministration over the years up to 2012 in relation to the issuing of

passports. The Commission was given a copy of a United Nations Security Council report dated 13 July 2012 which establishes that. In the middle of the decade the report observes that:

> "The Somali passport has long lost most of its value as a travel document. As early as 2004…. Somali passports could be bought on the open market, and the integrity of the document collapsed … The restoration of a widely acceptable travel document for Somalis is thus a priority of any national government …. But corrupt Transitional Federal Government officials and their business associates have neatly transformed a noble objective into a corrupt money-making scheme. "

The report confirms that the:

> "normal procedures established in 2006 require that the staff at an enrolment centre question the applicant in order to confirm his Somali identity. They normally ask him questions related to his family, clan and Somali areas where he claims to have been born or lived. They could also ask him to bring elders who can testify and swear … that the applicant is Somali."

56. That last extract from the UN report chimes closely with the evidence of Professor Ahmed, who suggested that, even setting aside any corruption, an applicant for a passport or identity document had straightforwardly to assert his Somali birth and parentage and would normally be accepted as a Somali national and given a passport. If there was doubt in the matter, it could be resolved by bringing an elder or other clan member to vouch for the truth of what is said.

57. Whatever may have been the position *vis-à-vis* corruption, there was no evidence before the Commission to suggest that the Appellant would be excluded from acceptance as a Somali national, or from the acquisition of a passport or identity card which, as we understand it, were being issued by the Mogadishu municipality in 2012. The facts here suggest not that the existing authorities in Somalia would have deprived him of *de facto* nationality to which he was truly entitled by law, but rather that he would have been accepted, both legally and practically, as a Somali national, even if it were on a strict construction legally correct that he should have been treated as having lost his Somali nationality by the acquisition of British nationality in 2004.

Conclusions on Statelessness

58. Questions of foreign law are treated in English proceedings as matters of fact, which must be proved in evidence: see *Mostyn v Fabrigas* (1774) 1 Cowp 161, and *Bumper Development Corporation v Commissioner of Police* [1991] 1 WLR 1362 (CA). As Leggatt J recently observed in *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB).

> "As with any expert evidence, the court is permitted to use its own intelligence and is not bound to accept an expert's opinion. But it would not be permissible nor in accordance with procedural fairness to adopt an analysis which has no foundation in the expert evidence and has not at least been canvassed with an expert witness on each side so that the court has the assistance of their opinions. "

Law 28 of 1962

59. The terms of Law No 28 of 1962 are clear. The intention was to inhibit a Somali citizen from acquiring dual nationality. The terms of Article 10 can have no other meaning than an automatic loss of Somali citizenship, on the voluntary acquisition of foreign citizenship, provided the individual has established his residence abroad. Here we accept the evidence of Mr Haji.

60. We are not convinced by the evidence of Professor Ahmed that there is or was a requirement for Court proceedings before such a loss of citizenship. The language of the 1962 law militates against such an interpretation. The absence of any such reported case also points in that direction.

61. Professor Ahmed's view that Article 25 of the Somali Civil Code requires such a hearing, appears problematic. Firstly, the wording is not at all clear as requiring a hearing before nationality is lost. Secondly, although the Article presupposes the existence of a Somali with dual nationality, that does not seem to us to represent an irreconcilable conflict within Law 28 of 1962. The dual nationality might pre-date that law. The Somali citizen might acquire foreign nationality whilst remaining resident in Somalia, facts which would not fulfil the test for automatic loss of citizenship.

62. In short, on that aspect of the case we were not persuaded by Professor Ahmed's evidence. The evidence as a whole would sustain the interpretation of the 1962 law advanced by Mr Haji. If that law applied when the Appellant became a British citizen, we would find that the Appellant lost his Somali citizenship automatically, and the absence of any court hearing or order was immaterial.

The Transitional National Charter of 2000

63. The language of the TNC demonstrates, in our view, that some of its provisions were intended to represent the law of Somalia, with immediate effect. Articles 2(3) and 4(5) have that effect. That part of Article 2(3) which presupposes the promulgation of a citizenship law does not, in our view, remove the intended immediate effect of the right to retain Somali citizenship set out in the Second Sentence of Article 2(3), and Article 4 was undoubtedly intended to give primacy to the Charter with immediate effect. The live question is whether the Charter can be regarded as having become the law of Somalia.

64. As the short summary of facts we have incorporated above demonstrates, the Transitional National Government never established control of Somalia. It was never in control of the capital, Mogadishu. No national judicial system operated between 2000 and 2004. That was the reason for the fresh attempts at a settlement in 2003 and 2004, which led to the Transitional Federal Charter and the Transitional Federal Government. As Mr Haji concedes, the TNG did acquire a degree of international recognition, being as he says "accredited by the United Nations (UN) and a number of regional organisations such as the African Union (AU) and the League of Arab States. The United States and the European Union did not rush to legitimise the TNG".

65. The United Kingdom government ceased to accord recognition to governments, as opposed to States, in 1980, see: *Somalia v Woodhouse Drake S.A.* [1993] QB 54, at 62C to 63A. In *SSHD v CC and CF* [2012] EWHC 2837 (Admin), the legal status of the Somaliland authorities was a relevant issue. In addressing that point, Lloyd Jones LJ made reference to a letter written explaining the position of the Government of the United Kingdom in relation to the TFG. Paragraph 124 of his judgment reads in part:

> "In response to the question "Whom does the Government of the United Kingdom recognise as the *de jure* Government of the State of Somalia?", the FCO letter of 16 July 2012 states that it is a long standing policy of Her Majesty's Government to recognise States and not governments. The letter continues:
>
> > "Our policy has long been that the Somali people themselves should determine their future relationship and that their neighbours and other African countries should take the lead in recognising any new arrangements. We appreciate the aspirations of the Somalilanders, and have encouraged them to engage with the Somali peace process, including resolving their differences with the Transitional Federal Government (TFG).""

Although that case was concerned with the TFG, it follows in relation to the TNG that there can be no question of United Kingdom recognition.

66. Mr Haji's evidence is that the TNG achieved only a "fantasy existence" and by 2003 it was "defunct … without becoming minimally operational". In our view this accords with the authoritative independent evidence. Professor Ahmed gave little or no support to a contrary view, either in his written or his oral evidence. The TNC and the TNG were closely connected. The proposition that the TNC was regarded as the law of Somalia, although the TNG never achieved anything like control of the country, is in our view highly doubtful. As Hobhouse J observed in *Somalia v Woodhouse S.A.*:

> "… where, as here, the region exercises virtually no control at all in the territory of the state, international recognition of an unconstitutional regime should not suffice [to demonstrate the regime was a sovereign government]." (see paragraph 67G)

67. It was on that basis, applying the test laid down by Lord Atkin in *The Arantzazu Mendi* [1939] AC 256, that Hobhouse J concluded that in 1991/1992, "the Republic of Somalia has no government". The test laid down by Lord Atkin recites as incidents of the formation of a sovereign government "instituting and maintaining courts of justice, adopting or imposing laws": *The Arantzazu Mendi*, p.264/5. For these purposes, the executive and legislative functions of government may be closely entwined, particularly in systems with traditions as different to ours as those of Somalia.

68. In our view, the better view of the TNC is that it was intended to create law but, for the reasons set out above, never did so.

The Transitional Federal Charter of 2004

69. The evidence here bears on two issues: firstly, did the TFC represent the law of Somalia, before the substitution of the 2010 Constitution? Secondly, if it did, when was the TFC in force as law?

70. As with the TNC of 2000, we regard it as clear that the intention was the TFC of 2004 would, in some of its provisions and without further steps, constitute the law of Somalia. We have set out above Articles 3, 4 and 10 of the Charter. Taken with Article 71, it is clear that the TFC was intended to have immediate legal effect from "the date the delegates at the Somali National Reconciliation Conference in Kenya approve it" (Article 71.12) and to have primacy over the 1960 Somali Constitution and other national laws (Article 71.2; Article 3.2).

71. Professor Ahmed's evidence is straightforward: the TFC was the law of Somalia from its adoption at the conference in February 2004. For the reasons we have already indicated, we regard the evidence of Mr Haji on this point as fatally weakened: he has given directly contradictory evidence in two different cases on this point. The difference cannot be explained by context as Mr Haji has attempted to do.

72. Baroness Kennedy draws to our attention two Canadian cases, in which she says the High Court treated the 1962 law as the law of Somalia: see *Sheikh-Awais v Canada (Citizenship and Immigration)* (1977) CanLII 4721 (FC) and *Hogjeh v Canada (Ministry of Citizenship and Immigration)* (2011) FC 665. In the earlier case, we are unable to see how the Canadian Court relied on the 1962 law at all: the question there turned on fact, and Ethiopian law. The later case involved brief consideration of what was termed the "Somali Citizenship Act". However there was no consideration of the questions at issue here. We find these cases of no persuasive value.

73. We have also considered the position of the TFG, as an indicator of the status of the TFC as part of Somali law. As will be clear, the TFG was not in control of the national territory when the Charter was adopted in February 2004. The process of establishing effective government in Somalia took more difficult years. However progress was made, and from 2006 onward, as the AMISOM report terms it, the rule of the TFG was "solidified". The fact that there were serious criticisms of corruption and poor administration under the TFG is

immaterial. The TFG achieved recognition, and a sufficient degree of control over the capital and swathes of the country such that they could credibly be regarded as the government of Somalia, however imperfect might be the conditions of their rule. In our view, none of this should be taken to undermine the proposition of Professor Ahmed, supported by Mr Haji in his report in the *Mohamed* case, that the TFC became the law of the Republic of Somalia.

74. We also conclude that the preferable view is that the TFC was adopted in February 2004 and should be regarded as the law of Somalia from then. It is also pertinent to say that, in both 2012 and 2014, we conclude the Somali authorities would regard the law as having been in force since 2004. Firstly, the Charter itself gives that date: in its frontispiece and in Article 71.12. Secondly, the objections raised at the end of the Nairobi meeting did not bear on these provisions, or on the "commencement" provisions, or indeed on any of the contents of the Charter at all. These objections appear to have been raised after agreement had been reached on the substantive points in the Charter, and to have been raised by a small minority of delegates.

75. The point is not straightforward. We recognise that the proposed National Assembly was not in being in February and that the ratification of the Assembly in August was sought and obtained. We also recognise that at the time when the Charter was adopted, the TFG was not in control of the national territory, although it is relevant that the great majority of the national territory was under the control of the delegates who signed the Charter.

76. For those reasons, we favour the conclusion that the TFC was incorporated into the law of Somalia by February 2004. If that is correct, then the Appellant did not lose his Somali citizenship when he acquired UK citizenship on 16 April 2004. The Respondent submits this interpretation is consistent with custom and practice in Somalia as identified by Professor Ahmed. We accept this. It is significant there is no case within Somalia, so far as either expert or party is aware, where a Somali citizen has lost their citizenship because of the 1962 provisions. As Richards LJ made clear in the *Al-Jedda* case, custom and practice can be a helpful interpretive guide (see *Al-Jedda*, paragraph 84).

77. It is worth emphasising that, in his original report in this case, Mr Haji agreed that "the Transitional Federal Charter is a constitutional document, and would thus take precedence over the 1962 statute on citizenship so far as that is incompatible with the Charter", although he added, in our view confusingly, "However this would not render the 1962 provisions invalid, as they have not been repealed by a legislature or rendered invalid by any court of law". Mr Haji's evidence is that a new citizenship law requires to be drafted, as his own appointment to that task makes clear. It may very likely be correct that a reform of the statute to make it consistent with the "constitutional document" is needed. However, on this point Mr Haji's evidence appears to us to confirm the primacy and effectiveness of the TFC.

Further Considerations

78. In *B2 v SSHD* the Court was addressing a case where the Vietnamese authorities "rode roughshod" over their own laws so as to deny the Claimant of the rights of citizenship. In *Al-Jedda v SSHD* SC/66/2008, a decision of SIAC of 18 July 2014, the Iraqi authorities accepted the Appellant as an Iraqi national, although the Appellant argued that on a proper construction and application of Iraqi law, he was not entitled to citizenship. In the instant case, there has been no expressed acceptance by the Somali authorities of the Appellant as a citizen. However it seems very likely that, even if our principal conclusion was in error and the 2004 Charter was not in force by June 2004, the Somali authorities would respond to the Charters, and to the consistent provisions laid down in the 2012 Constitution, by taking the view that the Appellant was *de jure* a Somali citizen. It seems clear that, in order to obtain an identity card and a passport, he would require to make an application and to be interviewed by the police. However this process, as described by Professor Ahmed, is the process for acquiring documents on the basis of citizenship, not acquiring citizenship itself.

79. The Appellant seeks to emphasise that it is *de jure* citizenship we are concerned with, following *Al-Jedda*, *B2 v SSHD* [2013] EWCA Civ 616 and *Abu Hamza v SSHD* SC/23/2003, 5 November 2010. In approaching that issue, the Appellant relies on the remarks of Leggatt J in *Serdar Mohammed v Ministry of Defence* (supra) at paragraph 68, when he said:

> "It is essential to keep in mind that the English court is not engaged in an exercise in sociology. Its task is not to try to predict what on any particular issue the Afghan Supreme Court would actually in practice decide: it is to attempt to identify, so far as possible, the correct answer in Afghan law – in other words, what an ideal Supreme Court applying purely legal norms would decide. "

80. We see some tension between those remarks and the principle that foreign law is a question of fact, not the product of English juridical process applied to foreign statute. As counsel for the Appellant fairly pointed out, that point was emphasised by Lord Hailsham in *Oppenheimer v Cattermole* [1976] AC 249, at 261H/262A, and (we add) in his disapproval of the reasoning of Lord Denning MR, expressed at paragraph 263H/264A. Counsel for the Appellant goes on to concede that the strict application of foreign law may be disproved by the "foreign state's actual determination of the individual's nationality… Nonetheless, cogent proof of a determination by the foreign state is necessary before a Court may depart from the ordinary application of a foreign country's laws".

81. This situation it seems to us is to be distinguished from that of *B2* and that of *Al-Jedda*. We have already made clear we are not concerned with *de facto* citizenship. There is no positive evidence that the State has accepted the Appellant, but an indication that they would accept him as already being a citizen *de jure*. The Respondent emphasises that "a state's own interpretation of its nationality laws, in accordance with its own legal culture and traditions,

should normally be respected", a proposition supported by the Convention Relating to the Status of Stateless Persons 1954, which provides that:

> "For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law."

82. We conclude it is probable that the Appellant would be regarded by the Somali authorities as the possessor *de jure* of Somali citizenship, even if as a matter of strict construction the 2004 Charter was not in force in June 2004; and that in addition, he is likely to be able to achieve possession of a passport, as indicated by Professor Ahmed. This conclusion further weakens his claim to have been rendered stateless.

83. At the conclusion of argument we asked the parties to consider a rather different problem, which on close analysis approximated to *de facto* citizenship. Grateful as we are for the submissions which followed, we have concluded that situation does not arise here. If it did, then we would have concluded it was insufficient to prevent the Appellant being regarded as stateless. He would then be in much the same position as was *Al-Jedda* when that case was considered by the Supreme Court in 2013.

84. With those conclusions in mind we return to the other preliminary issues.

Notice of Intention to Deprive

85. Notice of Intention to deprive was despatched by means of two identical letters on 15 June 2012. According to the evidence of Philip Larkin, the relevant Home Office Official, one was sent by recorded delivery and one by first class post. Both letters enclosed a copy Notice of Intention to deprive the Appellant of UK citizenship. The letters were both addressed to the address of Mr Farah, the Appellant's father. He lives in central London, as he has done for many years. He is divorced from the Appellant's mother, although they remain in contact.

86. It was Mr Farah's address at which the Appellant was living before he left the UK, and thus this was the Appellant's "last known address".

87. The key provision is Regulation 10 of the British Nationality (General) Regulation 2003 which provides:

> "**Notice of proposed deprivation of citizenship**
>
> 10(1) Where it is proposed to make an order under section 40 of the Act depriving a person of a citizenship status, the notice required by section 40(5) of the Act to be given to that person may be given—
>
> (a) in a case where that person's whereabouts are known, by causing the notice to be delivered to him personally or by sending it to him by post;

> (b)in a case where that person's whereabouts are not known, by sending it by post in a letter addressed to him at his last known address."

88. The Secretary of State submits that a literal interpretation of the Rule must mean that "whereabouts" refers to a location where a person can be served and "known" imports a reasonable degree of certainty as to the whereabouts of the individual. The Secretary of State submits that on a purposive interpretation the Regulations have a dual intention, firstly to ensure that reasonable steps are taken to bring the notice to the intention of the person concerned and secondly to ensure the proposed deprivation is not frustrated because of practical difficulties in effecting either personal or postal service.

89. In the course of the OPEN evidence, Baroness Kennedy explored whether there was any evidence that the Secretary of State at the material time knew the whereabouts of the Appellant in Somalia. There is no such OPEN evidence.

90. We address this issue in the CLOSED judgment, and our conclusions are reinforced by the CLOSED material.

91. We reject the suggestion, insofar as it was made, that there existed some obligation in law on the Secretary of State to search for the Appellant for the purpose of service under Regulation 10(1)(a), rather than effecting service under Regulation 10(1)(b). There may well be circumstances in which the "whereabouts" of an Appellant could be easily determined and if determined would permit personal service to be readily effected. This case is very far from such a situation.

92. The Appellant's father's address was the last known address for the Appellant. There is nothing to suggest otherwise. It is of note that this was the address the Appellant himself gave when he was detained in Djibouti to officials of the FBI.

93. We therefore have no doubt that the Notice was properly served by 18 June.

Section 40 British Nationality Act 1981

94. The Appellant submits that the Secretary of State has no power to deprive a British national of his citizenship whilst he is outside the United Kingdom (and dependent territories). This proposition is based on Sections 53(4) and (5) of the Act which extend the provisions of the Act to Northern Ireland, "the Islands" as defined and British Overseas Territories, but no wider. The Appellant also relies on the general statement in *Bennion on Statutory Interpretation 6th Edition*, Sections 106, 314, where the editors write:

> "Unless the contrary appears Parliament is taken to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom."

95. In our view this argument is misconceived. The Respondent is correct in identifying the confusion between the extent of an Act and its application. A provision such as that relied on by the Appellant defines the jurisdiction within which the provision has effect, but does not curtail its application to the same bounds, see for example *FT v Bishop* [2003] UKEAT 0147 03 2511. There is ample authority that English law can apply to British subjects who are abroad at the time of application, see for example *The Zollverein* (1856) Swab 96, 98, *Ex Parte Blair and another* (1879) 12 ChD 522. The editors of *Bennion* are relied on by the Respondents to the same effect. At Section 131, p357, they write that the presumption that an enactment is taken not to apply to UK citizens outside the territory is easily displaced. Here the logic is clear: this statute is intrinsically concerned with the status as citizen. It would be odd indeed if the United Kingdom could not legislate in respect of its own citizenship even where the individual was physically outside the jurisdiction.

96. Moreover provisions of the Act and Regulations make it clear that the application may indeed be to those physically outside the jurisdiction: see sections 2 and 35 of the Act. Regulation 10(3) of the 2003 Regulations refers expressly to giving notice of proposed deprivation outside the United Kingdom. Rule 8 of the SIAC (Procedure) Rules 2003 provides for extended time limits for appeal for those outside the country. If the Appellant's contentions on this point were correct, those provisions would be in direct conflict with the principal legislation.

97. This power has been employed on a number of occasions in reported cases, without the point being taken, see: *Al-Jedda* (supra); *Hicks v SSHD* [2006] EWCA Civ 400; *G1 v SSHD* [2013] QB 1008; *L1 v SSHD* [2013] EWCA Civ 906.

98. Perhaps the clearest expression of the law on this point is that from Lord Wilberforce in *Clark v Oceanic Contactors* [1983] 2 AC 130, relied on by the Respondent. He there formulated the key question as being "who, it is to be asked, is within the legislative grasp, or intendment, of the statute under consideration?" In the context of deprivation of citizenship it is a compelling answer to reply "citizens" rather than "citizens who remain physically within the jurisdiction". The latter outcome would be absurd. It would, for example, permit an individual to avoid deprivation by crossing the Channel, employing EU free movement rights based on the very citizenship which would otherwise have been lawfully removed.

99. For these reasons, we reject this argument roundly.

Validity of the Notice of Appeal

100. This issue became effectively academic. The Appellant's family entered a Notice of Appeal on his behalf on 5 October 2012. He entered Notice of Appeal himself on 9 January 2013. However, as indicated elsewhere in this judgment, the Secretary of State takes no point on time in relation to any point after the Appellant's detention in Djibouti, on or around 5 August 2012. In the face of that undertaking, the Appellant elected to rely on the Notice of Appeal of January 2013. The validity of the earlier Notice of Appeal is therefore

irrelevant. Its timing remains relevant when we come to consider whether time should be extended.

When did the Appellant know of the Deprivation?

101. Mr Farah first dealt with the events surrounding service in a statement of 25 October 2012, some four months after the service. In that statement, Mr Farah recalled receipt of a letter with the Notice of Deprivation. He remembered his daughter reading out the letter, and it is clear they understood the significance of the Notice.

102. Mr Farah then recounts, in his first statement, how "a few minutes later" he got a telephone call from Philip Larkin, the Home Office official. Mr Larkin's evidence is that was on 18 June, and there is no reason to doubt it. Mr Larkin says he identified himself to Mr Farah, explained that he was calling in relation to the notice which had been delivered, emphasising its importance. Mr Larkin pointed out to Mr Farah that his son was no longer a UK national, and had a discussion with Mr Farah as to the consequences. Mr Larkin also says that he explained to Mr Farah that there was a right of appeal from the decision, but that any appeal had to be lodged within 28 days. The Notice contained the appeal forms. Mr Larkin emphasised that it was important that the Appellant should read them. Mr Larkin stated in his witness statement that he emphasised these points clearly to Mr Farah. After this conversation a further letter was sent to the same address, including a copy of the Order of 18 June.

103. None of that evidence was challenged when Mr Larkin was cross-examined by Baroness Kennedy.

104. On 27 June, Mr Larkin says he received back the recorded delivery letter which had been sent on 15 June: that is to say the second letter sent on that day. In contrast with the letter which had been sent by first class mail, and which had been the subject of discussion between Mr Larkin and Mr Farah on 18 June, that letter was marked "refused", and there was a handwritten note on the envelope "unknown". There is no credible explanation for that response.

105. In paragraph 9 of Mr Farah's first witness statement, he stated that he "had not spoken to the Appellant for a long time and have not been in contact with him since": that is to say, between 18 June 2012 and 25 October 2012. In his third witness statement which remains unsigned and undated, and in his oral evidence, Mr Farah gave a directly contradictory account on this point. His evidence in this version, was that the family made intensive efforts to contact the Appellant following the discussion with Mr Larkin. On this account, the family found it very difficult to make contact, but did so "in July". According to Mr Farah, when the Appellant was told of the decision he immediately indicated that he wanted to appeal, and indeed wanted the family to appeal on his behalf.

106. Mr Farah was cross-examined on the discrepancy between these two accounts. In our view he was able to give no credible explanation for the inconsistency. We are unable to rely on his credibility as a witness as a consequence.

107. Mrs Kaltum Abdullahi Mohamud is the Appellant's mother. In her witness statement she outlines the difficulty she had in speaking to her son in Somalia. She would on occasion be able to speak to her daughter-in-law, Nasra, the Appellant's wife, but was reassured that the Appellant was "busy" or "out". She did speak to her son in early June. It was a "short time later", around 18/19 June that "we did receive the letter" from the Home Office. She then tried to call her son, by calling her daughter-in-law. Ms Mohamud's account is that she did not speak to her son until between 10 and 20 July. In her first witness statement she stated that the conversation was after 15 July, but in her later witness statement, sworn after sight of the Appellant's statement, this witness says she finds it difficult to remember dates. She states that her son may be right that they spoke before the expiry of the time to appeal. The mother's account is that the Appellant asked her to "appeal for me".

108. In his witness statement of 15 April 2013, the Appellant gives an account which differs somewhat from that of his mother. He explains that he was for a period detained in Somalia by Al Shabaab, and was released by them on 1 June 2012. He was released in the Somali city of Merca, and remained there for "an entire month". He says he had acquired a new mobile phone and number. He was in contact with his wife, and was told his mother had been trying to contact him, and he then spoke to his mother "a few hours after … release". That is inconsistent with his mother's account.

109. The Appellant goes on to say that his mother made several unsuccessful attempts to contact him, they spoke again "in early July" and it was on this occasion that she mentioned the revocation of UK citizenship. He then says:

> "My mother said she would appeal this and I agreed. This was all said during this call. I assumed my mother was going to appeal and I had no option but the leave it to them to deal with."

110. The Appellant does not give evidence as to whether his wife informed him of the Home Office letter, before he spoke to his mother.

111. The family did lodge Notice of Appeal on behalf of the Appellant, but only on 5 October 2012. By then, there had been other developments in the Appellant's story.

112. The Appellant's own account of events is that he left Merca on 15 July. He set off on a journey that took him north through Somalia into Somaliland and then Djibouti. His account is that he was planning to travel to Yemen and then into Saudi Arabia.

113. The Appellant says that he spoke to his father briefly on 15 July and that his father informed him that the family would appeal and "would not allow the deprivation to happen". The Appellant says he was "very upset about the whole matter" of the deprivation of citizenship.

114. The Appellant travelled through Somalia north to Adado, where his wife was now living. When the Appellant reached Adado he phoned his wife on a

mobile phone. He then joined her in a hotel. Whilst he was with his wife in Adado, his mother phoned, demonstrating that the mother could contact the wife. However, the Appellant declined to speak to his mother and told his wife not to let his mother know that they were together "because I did not want to be monitored by Al-Shabaab". On the Appellant's account he left Adado on 25 July. He describes his journey north into Djibouti, where he and his companions were looking for smugglers to take them to Yemen. The Appellant was arrested by the authorities in Djibouti on 4 August. The Appellant was then detained in Djibouti. Through all this time, there is no evidence he sought to appeal, or pressed his family as to an appeal.

115. On his own account, the Appellant was informed on about 12 November 2012 by American officials that he was to be taken to New York. On the night before travel, representatives of the FBI came to the Appellant with papers to be signed. He says he was told they were immigration papers and his account goes on:

> "I did not sign them. I did not sign anything, all I gave them was an address and I put my last known address as Babbington Court."

He was then taken to the USA.

116. The account of the Appellant's mother in her witness statement of 25 October is that she did not have contact with her son after the phone conversation in July and before he reached Djibouti. It is said that the Appellant's mother-in-law received news in late August, from a third person, that the Appellant was in prison in Djibouti. Ms Mohamud's statement goes on:

> "About one week after she received the call, and after looking for him in Somalia because she didn't want to unduly alarm people, the Appellant's mother-in-law called me some time in September. She and the Appellant's wife told me what happened, and for the first time about my son having been in Al-Shabaab detention."

117. The Appellant's mother first went to lawyers on 5 October. The appeal was lodged the same day.

118. In her witness statement of 20 April 2013, the Appellant's mother suggests that there may have been a misunderstanding between mother and son. In the conversation in July, Ms Mohamud suggests that she was telling her son that he needed to appeal, as her son may have thought that she was to appeal on his behalf. She emphasises the difficulty of communications with Somalia. Shortly afterwards, she says she spoke to the Appellant's wife and tried to make further contact with him. She never heard back from him. She did not try to call back but waited for the Appellant to call. She goes on as follows:

> "I did not appeal until October because I did not hear back from him. It was not confirmed that he had been detained … until September… I did not appeal because for all I knew Mahdi had

> appealed for himself. We did not know where he was. We assumed that he may have managed to leave the country and appeal. … Once we realised that he had been detained … we also wanted to find out whether he had appealed. When we could not get these answers we … decided that the matter of his citizenship had become all the more relevant because of his disappearance and because we realised that Mahdi could not do anything for himself."

119. On the Appellant's case, he knew of the decision to deprive in early/mid July 2012, either just before the expiry of the 28 day period or just after. Even accepting the evidence of the Appellant and his family, neither he, nor they on his behalf, treated the matter with any urgency. This alone would make us sceptical of the claim that the Appellant was highly concerned by the deprivation and insistent on appeal. If that evidence was right, an appeal would surely have been lodged on behalf of the Appellant much earlier.

120. We have already expressed our concern as to the credibility of the Appellant's father and as to conflicts within the Appellant's case. Taking just the OPEN evidence into account, we would conclude that the family were able to be in contact with the Appellant rapidly once the Notice was served. There was no sensible reason given as to why that message could not have been passed to him by telephone. The proper conclusion on the OPEN evidence alone would be that the Appellant probably knew quickly of the decision but was not concerned to lodge a timely appeal.

121. That conclusion is firmly supported by the CLOSED evidence.

Conclusions

122. We have concluded that the Notice of Intention to Deprive was properly served. We conclude the appellant knew quickly of the Order, giving him an opportunity to initiate an appeal in time, or for his family to do so on his behalf. He did not do so until after his detention in Djibouti and his removal to New York. His family did not do so on his behalf until early October, nearly four months later. There are strong indications that, contrary to his case, he did not have a high level of concern about the matter. That latter point is strongly supported by the CLOSED evidence, as we point out in the CLOSED judgment.

123. We have examined the case on statelessness with great care. We did so before reaching a conclusion on the extension of time, precisely because our decisions on that issue might be affected if the Appellant had a strong case that he would be stateless. As was observed by Mr CMG Ockleton, Vice President of the Upper Tribunal, in *BO and Others v (Extension of time for application) Nigeria* [2006] Imm AR 441 [2006] UKAIT 00035:

> "… good grounds of appeal cannot be a substitute for timeliness. If there is an explanation for the delay, however, the strength of the grounds of appeal may help to compensate for a bad excuse."

124. Having gone into statelessness in depth, whilst acknowledging the complexity of the issue here, we have concluded the Appellant cannot demonstrate that he has a strong case. On the contrary, he has a highly uncertain case on statelessness.

125. It is recognised by domestic courts and by the European Court of Human Rights that proper respect must be paid to domestic time limits, which may preclude consideration of the substantive case where time limits are breached. That is so, for example, even in a case of expulsion, where Article 3 ill-treatment is in point, see: *Bahaddor v Netherlands* 26 EHRR 278. Such time limits are not to be dismissed as mere technicality.

126. Rule 8(5) of the SIAC (Procedures) Rules 2003 states:

> "The Commission may extend the time limits in this rule if satisfied that by reason of special circumstances it would be unjust not to do so."

As Mitting J observed in *E2 v SSHD* SIAC SC/117/2012, of 2 August 2012, the burden rests on the Appellant to show, on the balance of probabilities, that it would be unjust not to extend the statutory time limit. We endorse that approach.

127. The explanation of delay is the starting point, see *BO* (supra). Here we find the explanation for the delay to be that the Appellant was unconcerned about the decision, treating it lightly. This conditioned his family's response as well. If the matter had simply arisen from family inactivity after the Appellant's detention in early August, then we might have taken a different view. That is not the picture here. The picture is essentially one of indifference by the Appellant.

128. In those circumstances, and against the backdrop of a highly uncertain case on statelessness, we find that the Appellant fails to show it would be unjust not to extend time for the appeal. We decline to do so. His appeal is out of time and is therefore dismissed.