Appeal No: SC/112/2011
Hearing Date: 9th & 10th May 2012
Date of Judgment: 18th May 2012

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
UPPER TRIBUNAL JUDGE ESHUN
SIR BRIAN DONNELLY

'Y1'

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant:	Mr D Gottleib & Mr F Saifee HMA Solicitors
For the Respondent:	Mr J Swift QC & Mr P Greatorex (instructed by the Treasury Solicitor)

PRELIMINARY ISSUE
OPEN JUDGMENT

MR JUSTICE MITTING :

Facts

1. The appellant was born in Kabul on 6th July 1972 of Afghan parents. On 16th or 18th September 1998 he arrived at Heathrow and on 13th October 1998 claimed asylum. Exceptional leave to remain was granted to him on 14th December 1998, later renewed until 14th December 2002. By a form dated 21st November 2002 sent under cover of a solicitor's letter dated 19th December 2002 he applied for indefinite leave to remain. His application was accompanied by an Afghan passport number OR448416 issued on 24th October 2001 in London. The passport was issued in his name and stated his correct date of birth. It bears a photograph which we have no reason to doubt is of the appellant. Indefinite leave to remain was granted on 18th May 2003. An appropriate visa stamp was made in his passport.

2. On 20th January 2004 the appellant applied on Form AN (new) for naturalisation as a British citizen. He described his present nationality as Afghan and gave correct details about his date and place of birth and parents. On 25th August 2004 he was granted British citizenship.

3. In a witness statement dated 20th October 2011, the appellant states, and we have no reason to doubt, that in the autumn of 2006 he married M in an Islamic and subsequently civil ceremony in London. They conceived a son, born in 2008. Before then their relationship had broken down and the appellant has never seen his son. He divorced her under Islamic law, but their civil marriage has not yet been dissolved. On 31st December 2009 he married MS in an Islamic ceremony.

4. In August 2010 he and MS travelled to Kabul and then to Waziristan. They returned to Afghanistan in July 2011. Soon afterwards they were both detained by British soldiers. Both were released on 30th July 2011.

5. On 30th July 2011 the Secretary of State signed a notice to the appellant that she intended to have an order made to deprive him of his British citizenship under section 40(2) of the British Nationality Act 1981. The reason for the decision was that he was considered to be involved in terrorism-related activities and to have links to a number of Islamist extremists. She certified that pursuant to section 40A(2) of the 1981 Act her decision had been taken in part in reliance on information which should not be made public because its disclosure would be contrary to the public interest. Accordingly, she notified him that any appeal against her decision would be to SIAC. On the same date, an official on behalf of the Secretary of State signed an order depriving him of his British citizenship on the grounds that it was conducive to the public good to do so. Both the notice and order stated that the Secretary of State was satisfied that the decision would not render him stateless. The documents were handed to the appellant on 30th July 2011 by a British officer. On 15th

August 2011, the Secretary of State notified him that she had personally directed that he should be excluded from the United Kingdom on conducive grounds for reasons of national security. That decision was taken under prerogative powers and there is no right of appeal against it as such. By a notice of appeal dated 23rd August 2011, given in time, the appellant appealed to SIAC against the Secretary of State's decision to deprive him of British citizenship. One of the grounds upon which he appeals is that the decision has made him stateless. On 12th September 2011 SIAC directed that there be a preliminary hearing to determine the question whether the Secretary of State's decision and order had the effect of making the appellant stateless and so was prohibited by section 40(4) of the 1981 Act. This is the judgment of SIAC on that issue.

Law

6. Section 40(4) of the 1981 Act provides that the Secretary of State may not make an order under section 40(2) "if he is satisfied that the order would make a person stateless". For the reasons given in paragraph 5 of SIAC's decision in *Abu Hamza* SC/23/2003 5th November 2010 we are satisfied that the reference in section 40(4) is to *de jure* statelessness as defined in Article 1.1 of the Convention relating to the status of stateless persons done at New York on 28th September 1954:
"*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".*

In this case, we are concerned with the law of Afghanistan. The issue is whether or not, when the appellant acquired British citizenship on 25th August 2004, he thereby and thereupon immediately lost his Afghan citizenship.

7. We have been referred to the provisions of two Constitutions – those of 1964 and 2004 – one international agreement – the Bonn Agreement of 5th December 2001 – and three laws of citizenship, of 1936, 1991 and 2000. We have heard evidence from two knowledgeable independent experts on Afghan law, Mr. Shajjan and Dr. Lau on the meaning and effect of these instruments. Both have fulfilled their duty to the Commission as expert witnesses and we have been assisted by their evidence. It is common ground that our task is to ascertain and give the answer which an Afghan Court would give on the single issue identified above. We will attempt to do so. There is, however, something unrealistic about the exercise. Afghanistan has been in turmoil for over 40 years, as the following potted history based partly on that given by Mr. Shajjan demonstrates. King Zahir Shah, who had ruled for 40 years, was overthrown and exiled by his cousin, Daoud, in 1973. Daoud was overthrown and killed in a communist coup in 1978. From 1978 to 1991 a series of communist regimes ruled in Kabul: initially under Taraki, who was ousted by Amin, who was ousted and killed in a coup supported by the Soviet invasion of 1979, to be replaced by Babrak Karmal, who was in turn replaced by Najibullah. Najibullah was ousted in 1991 by the Mujahiddin, first under Mujaddedi, then after two months under Rabbani. He was ousted in 1996 by the Taliban, who were in turn overthrown at the end of 2001 by the Northern Alliance supported by NATO. Hamid Karzai has been President ever since the Bonn Agreement, at first interim and then elected. The nationality laws which we have had to consider were passed under the King, the communist

regime and the Taliban. The Afghan state has not yet adopted a new citizenship law, possibly because, as Dr. Lau suggested, of the difficulty in securing agreement upon its detailed terms. The laws which we have to interpret are the citizenship law passed by the Taliban, the relevant provisions of which exactly mirrored the citizenship law passed by the communist regime, and the modern Constitution adopted by the Loya Jirga summoned in 2003 after the defeat of the Taliban. It is unsurprising that, as both experts acknowledge, laws thus passed contain provisions which appear to contradict each other, do not deal with every relevant question expressly and are not readily susceptible to analysis in accordance with the principles of private international law expounded by distinguished academics. When Dr. Lau first visited Afghanistan in 2002 to collect information on behalf of the International Commission of Jurists in Geneva, he found a destroyed legal system: there were no windows in the Ministry of Justice and no text of the laws was available. Even after extensive attempts to gather and reconstruct the laws were made by him and his colleagues, knowledge of what the laws were is still incomplete. There was no western analysis or commentary upon the laws of Afghanistan between 1979 and his own efforts in 2002.

Citizenship Laws

8. It is common ground that the appellant became an Afghan citizen at birth under Article 2 of the 1936 law:

   "All persons born of Afghan mothers and fathers, whether inside or outside Afghan territory shall be considered Afghans and shall hold Afghan citizenship."

   There is a similar provision in Article 9 of the 1991 and 2000 laws.

9. All three laws contain detailed provisions governing the acquisition of Afghan citizenship, set out in a section dealing only with that topic, which it is unnecessary to set out here. The first eight articles of the 1991 and 2000 laws, unlike the 1936 law, set out general and interpretive provisions. Apart from the wording of Article 1 and the reference to "*the Republic of Afghanistan*" in the 1991 law and to "*the Islamic Emirate of Afghanistan*" in the 2000 law, the text of Articles 1 -8 in the official languages – Pushto and Dari – is identical. We have differently worded English translations, but the meaning is clearly intended to be the same and can be discerned. As a matter of language, Articles 1 – 8 do not contain any operative provision, unlike the provisions that deal with the acquisition and loss of citizenship. We are only concerned with Articles 3, 4 and 7, which, in the translations supplied to us, provide,
   1991

   "Article 3

   The following terms in this law shall have the meaning set out below:

   4. Forfeiture of citizenship: relinquishment or lapse of citizenship of the Republic of Afghanistan

   Article 7

No person who is citizen of the Republic of Afghanistan under the provisions of this law may hold dual citizenship"

2000

"Article 3

The expressions below in this statute have the following interpretations,

4. Losing the citizenship: abandoning or the citizenship of the IEA being forfeited

Article 7

Anyone who, according the orders of this law, is citizens of the IEA cannot hold a double citizenship position."

10. It is common ground that Article 7 prohibits an Afghan citizen from holding dual citizenship. This contrasts with the position under the 1936 law which did not do so. Article 7 is, however, silent as to the effect of the acquisition of the citizenship of another state by an Afghan citizen. The only article which deals with the consequence of doing so is Article 30, which appears in section III of both laws under the heading "*Granting, Relinquishment, Lapse and Restitution of Citizenship of the Republic of Afghanistan*" (1991) or "*Granting, Abandoning, Forfeiting and Restoring the Nationality of the Islamic Emirate of Afghanistan*" (2000). Articles 23 – 35 set out the manner in which citizenship may be granted or lost. Apart from the replacement of references to the President, National Assembly and Republic of Afghanistan in the 1991 law by references to the Council of Ministers, Amirul mo'minin (the supreme religious & political leader, or caliph) and the IEA in the 2000 law, the wording in the official languages is identical. Article 23 permits the President/Amirul to grant citizenship/nationality. Article 24 entrusts acceptance of applications to relinquish/abandon citizenship to the National Assembly/Council of Ministers and President/Amirul and provides that citizenship may lapse/be forfeited by a final judgment/verdict of a Court. Article 25 sets out the circumstances in which relinquishment of Afghan citizenship will not be accepted: unfulfilled obligations to the State/IEA, certain undischarged financial obligations, conviction of/"indicted in" a crime and when relinquishment/abandonment will harm the country. Articles 26 and 27 deal with the effect of relinquishment by one member of a family on another. Article 28 (upon which Dr. Lau placed reliance, so we set it out in full) provides:
1991
"Article 28

Where citizens of the Republic of Afghanistan marry foreign citizens, they shall retain their citizenship of the Republic of Afghanistan.

The citizenship of such persons may only be forfeit in accordance with the provisions of this law"

2000

"Article 28

If an Afghan weds a foreigner, he/she maintains his/her Afghan citizenship. He/she can lose his/her citizenship only according the orders of this law."

Article 29 provides for the compulsory sale of the immovable property in Afghanistan of a citizen who relinquishes/abandons nationality.
Article 30 is the only article which deals with the consequence of acquiring foreign citizenship.
1991
"Article 30

The citizenship of a person who holds citizenship of the Republic of Afghanistan who unlawfully acquires citizenship of a foreign country shall not lapse but he shall not benefit from the privilege set out in Article 6(1) of this law."

2000

"Article 30

Afghan national who illegally gets a foreign nationality does not lose his/her Afghan nationality but cannot benefit from the privilege mentioned in the first part of the Article 6 of this statute".

Article 6(1) provides for the protection by the Afghan State of an Afghan citizen abroad.
Article 31 provides for two circumstances in which the citizenship/nationality of a person may lapse/be forfeited: conviction/indictment of a crime and betrayal of the nation and the people/treachery to the country and the nation and service in the armed forces of a country that is at war/busy in war with Afghanistan. Article 32 provides that any foreigner who has acquired Afghan nationality who commits an act of treachery/treason may be deprived/will lose his citizenship/nationality by a judgment of a Court. Articles 33 - 35 contain provisions that are of no direct relevance.

11. Our first task is to construe Articles 7 and 30. We are satisfied that they must be read together and in the context of the 1991 and 2000 laws as a whole. We do not understand this approach to be controversial. Both Dr. Lau and Mr. Shajjan are of the opinion that it is difficult to reconcile Article 7 and 30. Initially, Dr. Lau was of the opinion that, on balance, the effect of Article 7 was automatically to deprive the appellant of his Afghan citizenship when he acquired British citizenship on 25th August 2004. His interpretation of Article 30 was that it might mean that a person who illegally acquired foreign nationality – for instance through fraud – did not automatically lose his Afghan nationality; but there was no case law or source of information on the

practice of Afghan Courts during the time that the 1991 and 2000 laws were undoubtedly in force – before the end of 2001. In his oral evidence, Mr. Shajjan was initially of the same opinion. His view that Article 7 was not effective to deprive the appellant of citizenship was initially based upon Article 4 of the 2004 Constitution, (an issue which we address below). Both expressed a different opinion in response to questions posed by the Commission. Mr. Shajjan perceived a common thread in the 1936, 1991 and 2000 laws. Article 16 of the 1936 law provided that no Afghan national could renounce his citizenship until he became an adult and "*the Council of Ministers has approved his renunciation*". Article 17 provided:

"An Afghan national who has accepted the citizenship of another state without observing the provisions of Article 16, above, shall not be considered a non-Afghan, but he shall be barred from all service in the Afghan Government".

Article 18 provided five sets of circumstance in which the Afghan Government could deprive persons of their Afghan citizenship. His final position was that under the 1991 and 2000 laws as under Articles 16 and 17 of the 1936 law, an Afghan citizen did not automatically lose his Afghan citizenship on acquiring the citizenship of another state, but merely lost either the right to serve in the Afghan Government or consular protection when abroad. Again in response to questions posed by the Commission, Dr. Lau accepted that Article 7 did not spell out the consequences of becoming a citizen of a foreign state. It could be that he automatically lost Afghan citizenship or that the Afghan state would not recognise his foreign citizenship. In the latter event, Article 30 would determine the consequence.

12. We are satisfied that the 2000 law, if it applied at the time at which the appellant acquired British citizenship, did not have the consequence that, upon becoming a British citizen, he automatically lost his Afghan citizenship. We reach that conclusion for the following reasons:

    (i) Article 7 does not set out what the consequences of defying the prohibition on acquiring the citizenship of a foreign state are. Only Article 30 does so.
    (ii) Article 30 expressly provides that the only consequence of "unlawfully/illegally" acquiring the citizenship of a foreign state is the loss of protection by Afghanistan when abroad.
    (iii) The reference to "unlawfully/illegally" in Article 30 does not refer to fraud or kindred means. That would suggest a concern with legality under foreign law which is inconsistent with the Afghan-centred drafting of the 1991 and 2000 laws.
    (iv) Nor does it refer, as Dr. Lau suggested in oral evidence, to a person acquiring foreign nationality when duties to the Afghan state remained unfulfilled. That was dealt with in Article 25, in precisely the opposite sense: relinquishment/abandonment of Afghan citizenship would not be accepted if the person applying had unfulfilled duties to the state. No rational (or even irrational) purpose would have been served by permitting someone with unfulfilled duties automatically to relinquish Afghan citizenship by acquiring a foreign nationality, whose application would be refused

if he applied formally to relinquish/abandon his Afghan citizenship.

(v) The natural construction of Article 30, to which we are driven in the absence of any plausible alternative explanation, is that where a person acquires foreign nationality unlawfully/illegally - because of the prohibition in Article 7 - he does not cease to be an Afghan citizen.

(vi) We do not accept Dr. Lau's point that Article 28 would be unnecessary if a person who married a foreign citizen and so, perhaps, acquired dual nationality, would not thereby lose their Afghan citizenship. We are satisfied that the explanation given by Mr. Swift QC in his closing submission is correct: that it effected a change in Afghan nationality law, which, by Article 11 of the 1936 law, provided that a female citizen who married a foreign national should lose her Afghan citizenship.

(vii) There is no evidence that the Courts or authorities in Afghanistan interpreted Article 7 as having the effect of depriving a dual national of Afghan citizenship automatically between 1991 and 2001, when the 1991 and 2000 laws were undoubtedly in force.

(viii) There is clear and undisputed evidence of current practice. Many ministers, officials and members of the National Assembly hold dual citizenship. There is no evidence that any legal challenge to them holding office on that account has been made, still less succeeded. Further, a large number of persons of Afghan origin who are dual nationals have returned to Afghanistan. Unlike those who do not hold Afghan citizenship they are not required to obtain a visa to do so.

(ix) There is a continuing thread in all three laws that the means by which an Afghan citizen could lose his citizenship are, with limited and express exceptions, by renunciation approved by a high authority, or by deprivation by an appropriate authority for specified reasons. The limited and expressed exceptions were marriage to a foreign national by a woman under the 1936 law and lapsing/forfeiture for treachery or serving in the armed forces of a country at war with Afghanistan in the 1991 and 2000 laws.

The 2004 Constitution

13. The Bonn Agreement of 5th December 2001 established an interim framework for the government of Afghanistan under an interim administration headed by Hamid Karzai. The interim legal framework was based on the Constitution of 1964 (without the Monarch) and on existing laws, to the extent that they were not inconsistent with that Constitution, with the Bonn Agreement or with international legal obligations. The interim authority was to have power to repeal or amend those laws. By legislative decree number 66 of 5th February 2002, Hamid Karzai as President of the interim administration revoked all laws etc. which conflicted with the 1964 Constitution and Bonn Agreement and charged the Ministry of Justice with reviewing all legislative instruments prior to 22nd December 2001 in the light of those instruments cancelling conflicting provisions and presenting proposals for reform to the Council of Ministers for ratification. A new Constitution was adopted by the Loya Jirga,

the supreme representative body of the people of Afghanistan, which came into force on 4th January 2004. Its provisions have given rise to the only remaining un-reconciled difference of opinion between Mr. Shajjan and Dr. Lau.

14. Articles 4 and 28 deal with citizenship:

"Article 4

National sovereignty in Afghanistan belongs to the nation that exercises it directly or through its representatives.

The nation of Afghanistan consists of all individuals who are citizens of Afghanistan.

The nation of Afghanistan is comprised of the following ethnic groups (they are then identified).

The word Afghan applies to every citizen of Afghanistan.

No member of the nation can be deprived of his citizenship of Afghanistan.

Affairs related to citizenship and asylum are regulated by law.

Article 28

No citizen of Afghanistan accused of a crime can be extradited to a foreign state unless according to mutual agreement and international conventions that Afghanistan has joined.

No Afghan would be sentenced to deprivation of citizenship or to exile inside the country or abroad".

Articles 62, 72 and 85 set out the qualifications for holding office as President, a minister or as a member of the National Assembly. Article 62 requires that Presidential candidates "*should be citizen of Afghanistan, Muslim and born of Afghan parents, and should not have citizenship of another country*". Article 72 requires that a minister "*must have only the citizenship of Afghanistan. Should a nominee for a ministerial post also hold the citizenship of another country the Wulesi Jirga (the House of People in the bicameral National Assembly) shall have the right to confirm or reject his or her nomination*". Article 85 requires that a member of the National Assembly "*should be a citizen of Afghanistan, or has obtained the citizenship of the State of Afghanistan at least ten years before becoming a candidate*".

15. It is common ground that many ministers and members of the National Assembly have dual citizenship, including the Minister of Defence, the Minister of Foreign Affairs and the head of the Intelligence and Security Service. Mr Shajjan's evidence, which we accept, is that the re-establishment of state institutions and business life in Afghanistan would have been impossible without the significant contribution made by returning Afghans with dual nationality. His opinion is that, if Article 7 of the 2000 Citizenship

Law had the effect of prohibiting dual nationality (which at one time he thought it did) it had been abrogated by the Bonn Agreement, the Legislative Decree 66 and by Article 4 of the 2004 Constitution. Dr. Lau is of the opinion that the 2000 Citizenship Law remains in force until and unless repealed by a new citizenship law or declared to be inconsistent with the Constitution by the Supreme Court. The Supreme Court, and inferior courts, were established by Article 116 of the 2004 Constitution. A law on the organisation and jurisdiction of the Courts was published in the official gazette number 851 on 21st May 2005. Article 24 of that law provides that the Supreme Court,
"shall have the following jurisdictions and duties within the scope of interpretation of laws and judicial issues:

1. *Assessment on conformity of laws, decrees, legal documents, international contracts and conventions with the Constitution and their interpretation based on the Government or Court's demand in accordance with law".*

That provision refers to and is consistent with Article 121 of the 2004 Constitution, which provides,

"The Supreme Court upon request of the Government or the Courts can review compliance with the Constitution of Laws, legislative decrees, international treaties, and international conventions, and interpret them, in accordance with the law".

16. Dr. Lau is of the opinion that only the Supreme Court has the power to determine whether a law is compliant with the Constitution. His opinion is supported by developing jurisprudence of the Supreme Court. Orderly publication of its decisions is only beginning, but we have no reason to doubt the accuracy of a report of a decision of the Court by Mohammad Qasim Hashimzai, an Afghan legal scholar (and dual citizen) in a book edited by Grote & Roder on "Constitutionalism in Islamic Countries". On 14th April 2007, the National Assembly passed a law for the appointment by the President, with the confirmation of the Wulesi Jirga of a Commission with power to interpret the Constitution at the request of the President, the National Assembly, the Supreme Court and the Executive. The President vetoed the Bill as unconstitutional. His veto was overridden by the National Assembly on 18th August 2008. On 6th March 2009, the President referred the law to the Supreme Court for a review of its constitutionality. The Court declared that several provisions of the law were unconstitutional – in particular, Article 8.1 which authorised the Commission to interpret the Constitution: that contradicted Article 121 of the Constitution, which gave the Supreme Court alone authority to do so. In the light of this decision, we accept the opinion of Dr. Lau that the Supreme Court is the only Afghan institution with that power.

17. That conclusion is the foundation stone for a sophisticated argument advanced by Mr Gottlieb, for the appellant. Many – perhaps a majority – of distinguished academic lawyers specializing in private international law have been of the opinion that the Courts of one state should not determine the constitutionality of a law of another state when the Constitution of that state entrusts that task exclusively to a Supreme or Constitutional Court. There is an elegant analysis of the issue in an article by Professor Lipstein entitled

"*Proof of Foreign Law: Scrutiny of its Constitutionality and Validity*" [1967] 42 BYIL 265. Professor Lipstein's solution is equally elegant, but impractical: that the courts of the *forum* might be empowered to refer such questions to a court of the *lex causea* for determination. There being no such opportunity in this case, Mr. Gottlieb submits that we should accept Dr. Lau's opinion that until and unless Article 7 of the 2000 Citizenship Law is declared by the Supreme Court of Afghanistan to be unconstitutional, we must treat it as if it remains the law of Afghanistan.

18. We accept that, for reasons of comity, we would not determine the constitutionality of a foreign law in litigation which had the sole purpose of determining that question: see *Buck v. Attorney General* [1965] Ch 745 per Diplock LJ at p.77. But English law does not prohibit an English Court from interpreting foreign law, including the provisions of a foreign constitution when it is necessary to do so to resolve an issue in domestic litigation. This issue arose and was decided, as part of the *ratio decidendi* by the Court of Appeal in a decision which binds us, *Al Jedda v. Secretary of State for Defence* [2010] EWCA Civ 758. In rejecting a submission, as it happens by Mr. Swift on behalf of the Secretary of State, that an English Court could not construe the Iraqi Constitution, Lady Justice Arden stated at paragraph 74:
"…The provisions of the Constitution with which this appeal is concerned clearly provide judicial and manageable standards. English courts are familiar with constitutional interpretation. The issues in this action do not involve a challenge to the validity of the constitution of Iraq. This court will only be reaching conclusions as to the meaning of the Iraqi constitution for the purposes of this private law claim in damages. The fact that Iraq is another sovereign state does not preclude this court from adjudicating on Mr. Al Jedda's claim."

19. Lord Dyson stated at paragraph 189,
"In my judgment, the reasons given in that case (Buck) for refusing to exercise jurisdiction simply do not apply here. The purpose of this litigation is not to determine the validity of the foreign constitution; that is not what the claim is about. It is to determine whether the appellant has been lawfully detained or not. In resolving that issue it is necessary to interpret certain provisions in the law of Iraq, and that includes its constitution. To use Lord Diplock's words, that issue comes in incidentally in proceedings in which the court plainly does have jurisdiction. The domestic law is simply interpreting the constitution as a necessary step in determining the legal claim before it. The ruling, of course, has no effect at all on the Courts of Iraq. They are not in any sense bound by the judgment. But the legal issues arising under Iraq law need to be resolved in order to decide a dispute which is properly before the courts."

20. The issue before the Commission is whether or not the decision and order of the Secretary of State made the appellant *de jure* stateless. To determine that question, we must determine whether the appellant is or is not considered as a national by Afghanistan under the operation of its law – the test in Article 1.1 of the 1961 Convention. To do that, we must determine the answer which the courts of Afghanistan would give. Unless we do, we cannot determine the statutory question posed by section 40(4) of the 1981 Act. In doing so, we must be entitled to have regard to the answer which any Afghan court, up to and including the Supreme Court, would give to the question in issue: did the

appellant lose his Afghan citizenship automatically when he acquired British citizenship? If that requires us to interpret the 2004 Constitution, we must do so.

21. Article 162 of the 2004 Constitution – one of its transitional provisions – provides,

"This constitution enters into force upon its approval by the Loya Jirga and will be signed and proclaimed by the President of the transitional Islamic state of Afghanistan.

Upon its enforcement, laws and decrees contrary to the provisions of this constitution are invalid."

22. Dr. Lau is of the opinion, and Mr Gottlieb submits, that this provision did not have immediate and direct effect. Mr Shajjan is of the opinion that it did, so that Article 7 of the 2000 Citizenship Law, if it had the effect of depriving an Afghan citizen of his citizenship upon acquiring the citizenship of a foreign state, would be contrary to Article 4 of the 2004 Constitution and so invalid. This debate takes place in uncharted legal territory. Most constitutions are high level legal instruments which set the framework within which detailed laws may be passed, interpreted and enforced. Most come into existence in a context in which there are subsisting detailed laws which are intended to continue until amended or repealed. There is nothing in principle to prevent a constitution from repealing existing detailed laws; but, we accept, it is a technique that is not often used. Nevertheless we are satisfied that, for a number of reasons, Article 162 of the 2004 Constitution had immediate and direct effect in relation to laws and decrees which were contrary to its provisions. The first is that it was intended to restore legal order to a country in which it had been absent for 30 years. Certain basic laws needed to be settled at the start, including the annulment of laws inconsistent with the new legal order. The second reason is that it says so, in terms. The third is that Article 4 creates a right, vesting in each Afghan, not to be deprived of his citizenship of Afghanistan. If the Afghan Executive were to claim that an Afghan citizen who acquired citizenship of a foreign state after 4th January 2004 had thereby automatically been deprived of his Afghan citizenship, we would expect an Afghan court of first instance to rule that he had not. If it thought it necessary to refer the issue to the Supreme Court under Article 121 of the 2004 Constitution, we believe that the Supreme Court would hold likewise. The fourth is that the Constitution recognises that Afghans may hold dual citizenship: hence the need to provide, in Articles 62 and 72, that the President and Ministers must be a citizens of Afghanistan only. The fifth is that important provisions of the Constitution are unworkable if Article 7 of the 2000 Citizenship law had the effect of depriving an Afghan citizen of his citizenship upon acquiring the citizenship of a foreign state. Article 72 requires that a Minister must have only the citizenship of Afghanistan, unless the Wulesi Jirga confirms his nomination. Article 85 requires every member of the National Assembly to be a citizen of Afghanistan. If either had already lost their Afghan citizenship on acquiring the citizenship of a foreign state, neither would be eligible to be appointed a Minister or to become a member of the National Assembly, because they would not be Afghan citizens. The sixth is that state practice, which accepts the existence of dual nationality (as explained above) demonstrates that dual citizenship is no longer regarded as prohibited by Afghan law.

23. For those reasons, we accept the opinion of Mr Shajjan that, at least since 4th January 2004, an Afghan citizen is permitted to hold dual nationality.

Conclusion

24. For the reasons given, we are satisfied that when the appellant acquired British nationality on 25th August 2004, he did not lose his Afghan nationality. Accordingly, the decision and order of the Secretary of State did not make him stateless.