Appeal No: SC/140/2017
Hearing Dates: 15th & 16th November 2017
Date of Judgment: 15 December 2017

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

The Hon Mr Justice Lane
Upper Tribunal Judge Perkins
Mr Boyd McCleary

G3

APPLICANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

Representation:

For the Appellant: Mr T Hickman and Miss J Kerr-Morrison, instructed by Irvine Thanvi Natas Solicitors

For the Respondent: Mr N Sheldon, instructed by the Government Legal Department

Introduction

1. G3 was born in 1990 in Enfield, London. At the time of her birth, her father, a Bangladeshi national, was present and settled in the United Kingdom. Accordingly, G3 acquired British citizenship by birth, pursuant to section 1 of the British Nationality Act 1981.

2. In November 2016, G3 was placed in detention by the Turkish authorities in Gaziantep. So too were two children, aged 1 and 2, who are said to be G3's biological children.

3. The respondent assessed G3 to have been involved in terrorism-related activity with ISIL overseas and that G3 presents a risk to the national security of the United Kingdom, due to her extremist views. In June 2017, the respondent served on G3's former representatives a notice of the respondent's intention to deprive G3 of her British citizenship, pursuant to section 40 of the 1981 Act. A deprivation order was later signed by the respondent but subsequently withdrawn, on the grounds that the representatives of G3 had not been properly served.

4. On 3 August 2017, the respondent served a new notice of intention to deprive, on the present representatives of G3, followed by a fresh deprivation order dated 6 August 2017.

5. Insofar as relevant for present purposes, section 40 of the 1981 Act provides as follows:-

> **"40. Deprivation of citizenship**
>
> …
>
> (2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> …
>
> (4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless."

6. G3 has appealed to the Commission against the respondent's decision to make the deprivation order. G3's appeal is brought under section 2B of the Special Immigration Appeals Commission Act 1997.

7. On 3 November 2017, Laing J ordered that the issue of G3's statelessness was to be determined as a preliminary issue. G3 contends that, if deprived of her British citizenship, she would be stateless because she does not have citizenship of Bangladesh.

8. The hearing of the preliminary issue took place on 15 and 16 November 2017 at Field House. The Commission heard expert evidence by video-link from Bangladesh from Professor Ridwanul Hoque (called by G3)

and Mr Moin Ghani (called by the respondent). The Commission also heard evidence from Phil Larkin, an official of the respondent.

Bangladesh Nationality Legislation

9. Following independence in 1971, the State of Bangladesh adopted as its primary law of citizenship the Pakistan Citizenship Act 1951 (re-named the Citizenship Act 1951). Section 5 of the 1951 Act provides as follows:-

> "**Citizenship by descent**
>
> 5. Subject to the provisions of section 3 a person born after the commencement of this Act, shall be a citizen of Bangladesh by descent if his father or mother is a citizen of Bangladesh at the time of his birth:
>
> Provided that if the father or mother of such person is a citizen of Bangladesh by descent only, that person shall not be a citizen of Bangladesh by virtue of this section unless –
>
> (a) that person's birth having occurred in a country outside Bangladesh the birth is registered at a Bangladesh Consulate or Mission in that country, or where there is no Bangladesh Consulate or Mission in that country, at the prescribed Consulate or Mission or at a Bangladesh Consulate or Mission in the country nearest to that country; or
>
> (b) that person's father or mother is, at the time of the birth, in the service of any Government in Bangladesh."
>
> ….
>
> **Dual citizenship or nationality not permitted**
>
> 14.(1) Subject to the provisions of this section if any person is a citizen of Bangladesh under the provisions of this Act, and is at the same time a citizen or national of any other country, he shall, unless he makes a declaration according to the laws of that other country renouncing his status as citizen or national thereof, cease to be a citizen of Bangladesh.
>
> (1A) Nothing in sub-section (1) applies to a person who has not attained twenty-one years of age.
>
> (2) Nothing in sub-section (1) shall apply to any person who is a subject of an Acceding State so far as concerns his being a subject of that State."

10. On 15 December 1972, the President of Bangladesh issued the President's Order No. 149 of 1972. So far as relevant, this provides as follows:-

> "1 (1) This Order may be called the Bangladesh Citizenship (Temporary Provisions) Order, 1972.
>
> (2) It shall come into force at once and shall be deemed to have taken effect on the 26th day of March 1971.
>
> …
>
> 2. Notwithstanding anything contained in any other law, on the commencement of this Order, every person shall be deemed to be a citizen of Bangladesh –
>
> (i) who or whose father or grandfather was born in the territories now comprised in Bangladesh and who was a permanent resident of such territories on the 25th day of March, 1971, and continues to be so resident; or
>
> (ii) who was a permanent resident of the territories now comprised in Bangladesh on the 25th day of March, 1971, and continues to be so resident and is not otherwise disqualified for being a citizen by or under any law for the time being in force:
>
> Provided that is any person is a permanent resident of the territories now comprised in Bangladesh or his dependent is, in the course of his employment or for the pursuit of his studies, residing in a country which was at war with, or engaged in military operations against Bangladesh and is being prevented from returning to Bangladesh, such person or his descendents, shall be deemed to continue to be resident in Bangladesh.
>
> 2A. A person to whom Article 2 would have ordinarily applied but for his residence in the United Kingdom shall be deemed to continue to be permanent resident in Bangladesh within the meaning of that Article:
>
> Provided that the Government may notify, in the official Gazette, any person or categories of persons to whom this Article shall not apply.
>
> 2B.(1) Notwithstanding anything contained in Article 2 or in any other law for the time being in force, a person shall not, except as provided in clause (2), qualify himself to be a citizen of Bangladesh if he –
>
> (i) owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state, or

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

Provided that a citizen of Bangladesh shall not, merely by reason of being a citizen or acquiring citizenship of a state specified in or under clause (2), cease to be a citizen of Bangladesh.

(2) The Government may grant citizenship of Bangladesh to any person who is a citizen of any state of Europe or North America or of any other state which the Government may, by notification in the official Gazette, specify in this behalf.

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

11. On 18 March 2008, a named official, acting by order of the President of Bangladesh, issued an instrument known as S.R.O. No. 69-Act/2008 or the 2008 Instruction. This Instruction was issued in Bangla. Both experts gave evidence on the 2008 Instruction on the basis of having read and considered it in that language. An unofficial English translation has, however, been provided. This reads as follows:-

"**S.R.O. No. 69 – Act/2008 –**

The Government, by dint of the power given as per subsection (2) of section 2B of Bangladesh Citizenship (Temporary Provision) Order 1972 (P.O. No. 149 of 1972) issued the following instructions only applicable for the United Kingdom in regard to assigning or keeping intact the Bangladeshi citizenship for those who have obtained the citizenship of the United Kingdom, by annihilating all circulations or instructions or orders or notifications issued prior to this for this purpose, such as:-

(a) According to the existing law of Bangladesh if any citizen of Bangladesh accepts citizenship of the United Kingdom and does not withdraw his obedience to his own country (Bangladesh) during taking oath, his citizenship shall remain in effect.

(b) In such circumstances, a Bangladeshi citizen who has taken citizenship of United Kingdom need not take dual citizenship of Bangladesh.

(c) All Bangladeshi citizens who have accepted citizenship of the United Kingdom can keep and use their Bangladeshi passport.

(d) If validity of their passport expires they have to renew those as per existing norm.

(e) A passport can be re-issued against the names of those persons who have taken citizenship of the United Kingdom earlier.

2. This will only be applicable for those who are Bangladeshi citizens and have taken citizenship of the United Kingdom.

3. This order is issued in favour of public interest and it will come into effect in no time."

12. The experts also made reference to certain sets of rules concerning citizenship of Bangladesh.

13. Rule 9 of the Citizenship Rules of 1952 concern citizenship by descent:-

"**9. Citizenship by descent**

(1) Any person claiming citizenship by descent under section 5 of the Act shall apply in Form B to the Provincial Government of the area in which he has his domicile of origin as defined in Part II of the Succession Act, 1925.

(2) Such application shall be in triplicate and each form shall be accompanied by –

(a) a certificate of citizenship of Pakistan granted to his father, and

(b) evidence establishing his relationship with his father:

Provided that where the certificate of citizenship indicates that the father is a citizen of Pakistan by descent only, then one of the following additional documents shall also be produced –

(i) Either a certificate of registration of birth at a Pakistan Mission or Consulate in the country where the applicant was born, or there is no Pakistan Mission or Consulate in the country, at a Pakistan Mission or Consulate in the country nearest to the country.

(ii) Or a certificate documentary proof that the applicant's father was in the service of a Government in Pakistan at the time of the applicant's birth in that other country.

(3) The Provincial Government after making such enquiries as it deems fit may pass orders in regard to such applications, except where additional documents are required under the provision to sub-rule (2) in which case it shall forward the papers to the Central Government.

(4) The Central Government shall pass such orders on the application as it deems fit."

14. Rule 3 of the Bangladesh Citizenship (Temporary Provisions) Rules 1978 provides as follows:-

"**3. Application for citizenship under Article 2B**

(1) Any person seeking citizenship of Bangladesh under clause (2) of Article 28 shall apply to the Government in Form A, in duplicate, and in the manner hereinafter provided, namely:

(a) if the applicant is a person temporarily residing in Bangladesh, the application shall be submitted direct to the Government, and if the applicant is a person residing outside Bangladesh, the application shall be submitted to the Government through the Bangladesh Mission or Consulate in that country or where there is no Bangladesh Mission or Consulate in that country to a Bangladesh Mission or Consulate in the country nearest to the country.

(b) every application shall be accompanied by an affidavit affirming the truth of the statements made before a Magistrate of the First Class or a Notary Public and four copies of passport size photograph of the applicant duly attested by a Class 1 Gazetted Officer or a Magistrate of the First Class or a Notary Public.

(2) The Government or a Mission or Consulate to which an application has been submitted under sub-rule (1) may call for such further information as may be deemed necessary including the following:

(a) the place and date of birth of the applicant in the territory, now comprised in Bangladesh;

(b) when he left the territory and with what travel documents;

(c) when he acquired his present citizenship.

(d) his knowledge of Bengali language;

(e) his special qualifications, if any;

(f) his income and its source; and whether he is regularly sending remittance to Bangladesh or not;

(g) particulars of his properties in Bangladesh, if any;

(h) particulars of the members of his family residing in Bangladesh, if any; and

(i) any disabilities to which citizens of Bangladesh are subject in the country of the applicant."

The Commission's approach to the evidence

15. Although it is the case that section 40(4) of the 1981 Act speaks of the respondent being "satisfied that the order would make a person stateless", the Supreme Court held in Secretary of State for the Home

Department v Al-Jedda [2013] UKSC 62 that the task for the Commission is to determine whether, on the evidence before the Commission (whether or not this was before the respondent), the person concerned will be stateless, if deprived of British citizenship. This emerges from [30] and [32] of the judgment. Given that it is the respondent who is seeking to deprive a person of British citizenship, the burden lies on the respondent to show, on the balance of probabilities, that, on the facts of the particular case, that person will not be stateless, if deprived of British citizenship.

16. As was held by the Supreme Court in Pham v the Home Secretary [2015] UKSC 19, this factual question is not necessarily limited to interpreting the words that the legislators in a foreign state have set down in that state's law of nationality. Depending on the circumstances, regard will need to be had to how the state in question operates the law in practice, whether or not a lawyer, reading the relevant words, would interpret them differently.

17. It is, of course, the position that construction of foreign law is a question of fact, for United Kingdom courts and tribunals. The general rule is described in A/S Tallinna Laevauhisus v Estonian State Steamship Line (1947) 80 Ll. L. Rep. 99 at [107]:

> "The general rule of English private international law, that foreign law is in our Courts a question of fact, is fundamental, although it does not inhibit the Court from using its own intelligence as on any other question of evidence. The material proposition of foreign law must be proved by a duly qualified expert in the law of the foreign country and the burden of proof rests on the party seeking to establish that law. The Court is free to scrutinise both the witness and what he says, as on any other issue of fact. The translation from the foreign language must be proved by a duly qualified interpreter, but even when approved or agreed translation takes the place of the foreign document, it is still primarily the function of the expert witness to interpret its legal effect in order to convey to the English Court the meaning and effect which a Court of the foreign country would attribute to it if it applied correctly the law of that country to the questions under investigation by the English Court. His function necessarily extends to interpretation as well as application in the light of the general law of that country. The degree of freedom which the English Court has in putting its own construction on the written translation of foreign statutes before it, arises out of, and is measured by, its right and duty to criticise the oral evidence of the witness."

18. Although its decision on statelessness was overturned by the Court of Appeal (whose judgment was then upheld on appeal to the Supreme Court), the Commission in Al-Jedda (SC/66/2008) made a number of observations regarding the correct approach to expert evidence, in cases of this kind. These observations were not subject to criticism in either of the courts above and we agree with Mr Hickman, who appears for G3, that they represent the correct approach.

19. The observations can be distilled as follows:-

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

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

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

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

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

    (e) To the extent that the experts failed to say what rules of construction the courts of the foreign state will apply to the legislative sources under consideration, the Commission must construe those sources in accordance with the English rules of statutory construction, since English law presumes that, in the absence of evidence to the contrary, the foreign rules of statutory construction are the same as the English rules ([14], citing Dicey, Morris & Collins para. 9-018).

The expert evidence

(1) Mr Rahman

20. Besides the witness statements of Professor Hoque and Mr Ghani, the Commission had before it a written expert report from Mr Al Amin Rahman of FM Associates. Mr Rahman is an advocate of the Supreme Court of Bangladesh. His report, dated 8 September 2017, was provided to the respondent and disclosed by her to G3's representatives and the Commission as exculpatory material.

21. Mr Rahman's conclusion was that, upon being deprived of British citizenship, G3 would not be a citizen of Bangladesh. In order to become

such a citizen, G3 would have to apply to the Bangladesh authorities and obtain dual citizenship certification. Any application would be made pursuant to section 2B(2) of the 1972 Order, as amended in 1978.

22. In his report, Mr Rahman made reference to the 2008 Instruction. His view was that, since G3 had not been required to take an oath of allegiance in order to obtain British citizenship, the 2008 Instruction was not applicable to her. In other words, the 2008 Instruction did not cover those who, like G3, had become British citizens at birth.

(2) Professor Hoque

23. Professor Hoque is Professor of Law at the University of Dhaka, Bangladesh. In addition to degrees from the University of Chittagong, he holds an LLM from the University of Cambridge and a PhD from The School of Oriental and African Studies, University of London. He has also taught law in Australia, at university level.

24. The essence of Professor Hoque's written report is as follows. G3 was, at birth, a British citizen and also a citizen of Bangladesh, by descent. The latter followed from section 5 of the 1951 Act. Although section 14(1) of that Act prohibits dual nationality, subsection (1A) provides that the prohibition in subsection (1) does not apply to a person who has not attained the age of 21.

25. According to Professor Hoque, G3 lost her citizenship of Bangladesh upon reaching the age of 21. She would, however, be able to apply for such citizenship, compatibly with retaining her British citizenship, pursuant to Article 2B(2) of the 1972 Order.

26. Professor Hoque's report makes reference to the distinction drawn by Mr Ghani, in his report, between *de jure* and *de facto* Bangladeshi citizenship. As we shall see, Mr Ghani's report opines that G3 is a *de jure* citizen of Bangladesh but not a *de facto* citizen.

27. Professor Hoque denies that under Bangladesh law, there is a distinction between *de jure* and *de facto* citizenship. According to Professor Hoque, G3 lost her Bangladeshi citizenship at the age of 21, on 25 February 2011.

28. Professor Hoque disagrees with Mr Ghani, to the extent that Mr Ghani does not consider G3 to have been a *de facto* citizen of Bangladesh at birth. In other words, Professor Hoque considers that G3 was in all relevant senses a citizen of Bangladesh from birth until age 21.

29. On this point, Professor Hoque agrees with the view of Mr Rahman, that G3 would need to apply for dual citizenship of Bangladesh.

30. At paragraph 72 of his report, Professor Hoque addresses the issue of the 2008 Instruction:

> "**72**. I have seen this statutory notification (in Bangla), which says that if a Bangladeshi citizen who later naturalizes as a British citizen and under whose oath of British citizenship does not require him to abandon allegiance to Bangladesh shall not lose Bangladeshi citizenship. I, therefore, say that this notification does not apply to the case of G3 because G3 is not a Bangladeshi citizen who acquires British citizenship subsequently – which is the test for the application of the notification SRO No. 60-Law/2008. G3 is a British citizen by birth and hence is outside of the ambit of SRO No. 69-Law/2008. I will therefore endorse the answer given to the relevant question at hand in the [Rahman/FMA Associates] report."

31. Cross-examined by Mr Sheldon, Professor Hoque disagreed with Mr Rahman, to the extent that, in the latter's report, Mr Rahman might be suggesting that, in order to lose citizenship at age 21, G3 would have to have been subject to notification by the Bangladesh Government of an intention to make an order, depriving G3 of her citizenship. According to Professor Hoque, no such process would have been required. On reaching the age of 21, G3 would have lost her Bangladesh citizenship automatically, by operation of the 1951 Act.

32. Professor Hoque was unaware of the Bangladesh High Commission in London publishing any kind of application form, together with associated advice, in connection with those wishing to apply to the Bangladesh authorities for a dual nationality certificate. Professor Hoque had, however, found such materials on the website of the Consulate-General of Bangladesh in Los Angeles, California.

33. Asked about the apparent discrepancy, Professor Hoque said that there appeared to be "a lot of confusion" amongst the Bangladesh diplomatic missions overseas.

34. Professor Hoque did not know how frequently applications of the kind said to be required by persons in the position of G3 were made to the High Commission in London. He was unaware of any such application being made by an individual living in the United Kingdom. Professor Hoque accepted that there were likely to be around 500,000 persons of Bangladeshi origin living in the United Kingdom.

35. Professor Hoque was questioned in detail about the 2008 Instruction. It was put to him that confining the effect of the Instruction to persons who acquired British citizenship by naturalisation produced anomalies. Asked to explain the justification, Professor Hoque said that "we are talking about statutory interpretation" and that the 2008 Instruction was of doubtful legal validity. He believed it was the intention of the drafter

of the instrument to draw a distinction between those who acquired Bangladesh citizenship by birth and those who acquired it by descent.

36. In the opening passage of the Instruction, in the phrase "for those who have obtained the citizenship of the United Kingdom", Professor Hoque said that the relevant Bangla verb could be read as "accepted" or "acquired" and that "acquired" was the better translation.

37. Asked, why, therefore, a person could not "acquire" British citizenship at birth, Professor Hoque said that the Instruction was about those who had acquired British citizenship otherwise than by reason of birth. This was evident from the provision in paragraph (a) of the Instruction describing the taking of an oath.

38. Professor Hoque said that the 2008 Instruction had been produced during "a caretaker" Government of Bangladesh, in response to political pressure from those of Bangladeshi origin in the United Kingdom. Asked again about the distinction between those who obtained British citizenship by birth and those who obtained it later, Professor Hoque said that the distinction was "curious" but that the law of nationality distinguished between citizens by birth and those by descent.

39. Professor Hoque was asked about the e-mail exchange between an official of the respondent and a member of the Bangladesh High Commission in London. On 31 October, the latter was e-mailed by the former with a question, which was whether the 2008 Instruction covered those who obtained British citizenship by birth. The High Commission official replied on 3 November 2017 to say that:-

> "Your statement seems correct. In last three years, I have not seen any British-Bangladeshi citizen applying for dual-citizenship to this mission. A British-Bangladeshi citizen can retain both British and Bangladeshi passport meaning he/she is holding dual citizenship."

40. Professor Hoque said that he disagreed with the view expressed by the High Commission official.

41. Professor Hoque agreed that, at paragraph 55 of his report, when talking about G3's mother, he had failed to realise that the 2008 Instruction, on his view, applied to G3's mother, since the mother had become a naturalised British citizen.

(3) Mr Ghani

42. Mr Ghani is an advocate of the Supreme Court of Bangladesh. He holds an LLB and an LLM from the London School of Economics. Prior to becoming a partner in the law firm of Dr Kamal Hossain & Associates in

2017, Mr Ghani had worked with law firms in the United Kingdom and the USA.

43. Mr Ghani's report states that, from the factual background provided in respect of G3, she would be a *de jure* citizen of Bangladesh by descent. Importantly, however, "acquiring *de facto* Bangladeshi citizenship by descent requires an active measure to be taken by the person concerned in the form of an application seeking Bangladeshi citizenship to be made to the Bangladesh authorities".

44. G3 would, according to Mr Ghani, have been a *de jure* Bangladesh citizen on 6 August 2017 but not a *de facto* citizen "unless she had claimed and sought Bangladeshi citizenship through an application to the Bangladeshi authorities and that application was successful resulting in G3 being granted Bangladeshi citizenship".

45. Cross-examined by Mr Hickman, Mr Ghani accepted that the concepts of *de jure* and *de facto* citizenship were not to be found in Bangladesh nationality law. Mr Ghani accepted that the concepts were ones that had been suggested to him by the solicitors acting for the respondent.

46. Mr Ghani was adamant that, in his view, nothing of material significance had occurred upon G3 reaching the age of 21. G3 had not, in his view, been a *de facto* citizen of Bangladesh at any time previously. G3's status as a citizen of Bangladesh had not, according to Mr Ghani, been affected at all by her having British citizenship at birth. She could apply pursuant to Article 2B(2) of the 1972 Order for a dual citizenship certificate. Such citizenship would take effect only from the date of certification. It would not have any effect upon G3, so far as it concerned her status as a citizen of Bangladesh at any time previously.

47. Mr Ghani was asked in detail about the 2008 Instruction. He said that the Bangla word that had been translated as "obtained" in the phrase "keeping intact the Bangladeshi citizenship for those who have obtained citizenship of the United Kingdom" was "prodan". According to Mr Ghani, this verb had a more passive sense, in Bangla, than the verb "grohan", which was used in paragraphs (a) to (e) and in Article 2 of the Instruction. This was the verb which was translated as "taken" in paragraph (e) and Article 2 and as "accepts" or "accepted" in paragraphs (a) and (c).

48. Mr Ghani said that, in his view, the 2008 Instruction covered persons who obtained British citizenship at birth, rather than only as a result of naturalisation. He pointed to the phrase "such as" immediately before paragraph (a), the Bangla words for which were used in a non-exclusive sense. He considered that references in paragraphs (c) and (e) to those persons keeping and using Bangladeshi passports or having passports re-issued were capable of covering those who had obtained British citizenship at birth.

49. Mr Ghani was asked about the Supreme Court of Bangladesh's judgment in Bangladesh v Golam Azam and Others 46 DLR (AD) 1994 192. Mr Ghani said that he had decided not to include this case in his report. He was asked whether he was aware that the judgment in the case made it plain that Article 3 of the 1972 Order, which states that cases of doubt under the Order would be decided by the Bangladesh Government, was confined to Article 2 of that Order and could not, as Mr Ghani had suggested in his written report and in oral evidence, cover Article 2B. Mr Ghani said that he had been "partly incorrect" in that regard. He later clarified that he had been "incorrect".

50. Questioned by Mr Sheldon, Mr Ghani accepted that Mr Rahman and Professor Hoque both disagreed with his view that G3 had not become a citizen of Bangladesh by descent, on her birth in the United Kingdom. Mr Ghani said that the position was governed by the various sets of Rules, which set out what he said were the requirements for obtaining citizenship by descent.

Non-expert oral evidence

51. Philip Larkin gave oral evidence. He confirmed as accurate his two statements. In the first of these he said that in order to "clarify" the respondent's understanding of the 2008 Instruction, he had caused enquiries to be made with the Bangladesh High Commission, who had replied as indicated in the e-mail exchange described above.

52. In Mr Larkin's second statement, he had addressed the assertion on behalf of G3 that the respondent had not obtained expert advice before making the decision to deprive her of British citizenship.

53. Mr Larkin confirmed that the respondent had obtained such expert advice, in the form of two reports from Dr Kamal Hossain & Associates. The first report was dated 2 March 2013. This report had been about whether a person known as "C", born in the UK in 1982 to Bangladeshi parents, had also held Bangladesh citizenship from the time of birth in the United Kingdom. This advice, the Commission observes, was to the effect that "C" would be permitted to hold both Bangladesh and British citizenship under Article 2B(2) of the 1972 Order, read with the 2008 Instruction. Asked how likely it was that "C" could "practically assert his right to Bangladeshi citizenship", if he held such citizenship by descent, Dr Hossain had said that C's parents could make an application "for Bangladeshi citizenship by descent under section 5 of the Citizenship Act 1951".

54. A further report on "C" from Dr Hossain & Associates, this time written by Mr Ghani, was also considered by the respondent in connection with G3's deprivation decision. This stated that "C does not formally become

a citizen of Bangladesh by descent unless he makes an application for obtaining citizenship by descent and the Government of Bangladesh passes an order recognising C's citizenship"; but also that "C automatically holds Bangladesh citizenship by descent by virtue of section 5 of the 1951 Act. The application process is required to formally recognise the Bangladesh citizenship of C".

55. Mr Larkin said that both of these reports had been taken into account by the respondent before the decision was taken to deprive G3 of British citizenship.

56. Mr Larkin's second statement also exhibits an e-mail dated 6 November 2017 from a member of the British High Commission in Bangladesh. This states that their Honorary Legal Adviser, who is also a senior lawyer of the Supreme Court of Bangladesh, has confirmed that:-

> "If you're a dual British-Bangladeshi national you will be considered by the Bangladesh Government to be a Bangladeshi citizen, even if you don't hold or have never held, a Bangladeshi passport and were born outside Bangladesh."

57. The High Commission official said that this had been stated "without citing any particular source" and that the Honorary Legal Adviser was "agreeing to the contention from his extended experience of working with the Bangladeshi citizenship law and its interpretation".

58. Cross-examined by Mr Hickman, Mr Larkin said the respondent had been aware of the 2008 Instruction at the time of the submission to the respondent that led to the deprivation order.

59. Mr Larkin was asked about a press report from the Daily Star (Bangladesh), exhibited to his second statement. This report, dated 24 March 2008, described the 2008 Instruction. It stated that the Instruction "will put an end to a long standing problem of the Bangladeshi-Briton in retaining dual citizenship", according to an official.

60. Asked about the e-mail exchange between an official of the respondent and an official of the Bangladesh High Commission in London, Mr Larkin said that the officials had met the previous week but had not, as far as he was aware, discussed the case of G3 and the impact of the 2008 Instruction.

61. Mr Larkin was asked about the so-called Visa Waiver Scheme, set out on the website of the Bangladesh High Commission in London. This stated that Bangladesh origin foreign nationals, subject to certain exceptions, were eligible to obtain NVR [No Visa Required] in their foreign passports, in order to visit Bangladesh. So too were spouses and children. The NVR allowed the holder multiple entries into Bangladesh with unlimited duration of stay for the validity of the passport.

62. Mr Larkin said that he had been aware of this scheme, when he had made his statement. He agreed that it was it an explanation as to why there might be no evidence of British citizens in the position of G3 making applications to Bangladesh for dual citizenship certificates, after the age of 21. Mr Larkin said that the NVR scheme was fundamentally different from the issue of citizenship. He could not, however, say whether there was likely to be interest from such persons in obtaining Bangladesh citizenship, if they were allowed to travel to and from Bangladesh in accordance with the provisions of the NVR.

Discussion

63. It is common ground between the parties that this appeal turns on the question of whether the 2008 Instruction applies to G3. Article 2B(1) and its proviso (which might on their face have significance for G3) do not apply to G3. The opening words of Article 2B(1), referring to Article 2, make it apparent that Article 2B(1) is confined to persons who were alive on the commencement of the 1972 Order.

64. By contrast, the parties and their experts are agreed that Article 2B(2) has continuing application, in that it enables the Government of Bangladesh to grant what are described as dual citizenship certificates; that is to say, the grant of citizenship of Bangladesh to a person who is also the citizen of a particular foreign state.

65. It is, accordingly, to the 2008 Instruction that we must turn. Dr Rahman and Professor Hoque are both of the view that the 2008 Instruction does not apply to those, such as G3, who obtained British citizenship at birth. Mr Ghani's evidence in this regard was not pellucid. Nevertheless, he considers that the 2008 Instruction does extend to those who acquire British citizenship at birth. Importantly, however, Mr Ghani regards this as immaterial, so far as G3 is concerned, because his view is that G3 has never been a citizen of Bangladesh; at least not in the *de facto* sense employed by him.

66. As will have become apparent, Mr Ghani's evidence presents formidable difficulties for the respondent, a fact which Mr Sheldon realistically acknowledged in his submissions. In order to reach the position where the respondent can place reliance on the 2008 Instruction, in order to defeat G3's appeal, the respondent must disown much of the expert evidence of Mr Ghani.

67. The respondent's case, accordingly, rests on the following propositions:-

    (i) Despite the problems with his evidence, Mr Ghani is correct to say that the 2008 Instruction applies to G3;

(ii) It would be anomalous to construe the 2008 Instruction as applying only to those who obtained British citizenship by naturalisation, rather than at birth by descent;

(iii) If the 2008 Instruction has only the limited effect for which G3 contends, it is surprising that no evidence has been adduced of those of Bangladeshi descent in the United Kingdom making applications for certificates of dual nationality;

(iv) The absence of such evidence gives credence to the views expressed by the official of the Bangladesh High Commission and the Honorary Legal Adviser to the British High Commission, that the 2008 Instruction covers British citizens by descent.

68. We address these matters in turn.

69. The weight to be accorded to Mr Ghani's evidence is, we find, seriously diminished by his view of the nature of citizenship by descent. That view finds no support in the evidence of either Dr Rahman or Professor Hoque. It is, furthermore, directly challenged by the respondent herself; and for good reason.

70. It is manifest from a reading of the 1951 Act that citizenship by descent arises at birth. That is in no way surprising. The position is exactly the same under the British Nationality Act 1981 and its predecessor, the British Nationality Act 1948. Mr Ghani has introduced into Bangladesh nationality law the concepts of *de jure* and *de facto* citizenship, which find no expression in the legislation or in any commentary upon it. As both counsel in effect submitted, Mr Ghani has fundamentally misunderstood the significance of the various sets of Rules governing what is needed in order to demonstrate citizenship of Bangladesh. The Rules upon which he relies are not substantive Bangladesh nationality law. They are, rather, the means by which a person who claims to be entitled to citizenship at birth, by descent, persuades the Bangladesh Government that she is such a citizen.

71. Accordingly, applying the law as set out in the Estonian State's Steamship Line case, the Commission is entitled to depart from the expert evidence of Mr Ghani, by reference to the fact that his view of this important matter is plainly wrong.

72. To this extent, the way is therefore open to the Commission to interpret the 2008 Instruction according to ordinary English principles of legislative interpretation. In doing so, however, we have had regard to the evidence given to us by Mr Ghani regarding the translation of particular Bangla verbs, used in that Instruction. Despite the deficiencies in Mr Ghani's evidence, Mr Hickman did not urge the Commission to ignore this aspect of Mr Ghani's testimony. On the

contrary, he submitted (and we agree) that the evidence supports G3's construction of the provision.

73. Mr Ghani told us that the Bangla verb "prodan" is used in the introductory lines of the Instruction; that is to say, the provisions that immediately precede paragraph (a). This verb, we are satisfied on balance, appropriately translates as the English words "obtained" or "acquired". Although Mr Hickman submitted that one cannot properly be said to be said to "acquire" citizenship by birth, a reading of the British Nationality Act 1981 proves otherwise. Section 1 of that Act is entitled "Acquisition by birth or adoption".

74. Mr Ghani told us that, by contrast, the verb "grohan" is used in paragraphs (a), (b), (c) and (d) and also in Article 2. "Grohan" is a much more active verb, carrying the meaning in English of "take" or "taken" or "accept" or "accepted".

75. We find as a fact that, on balance, the use of this verb in the provisions in question shows that it is more likely than not that the drafter of the 2008 Instruction was referring only to persons who acquire British citizenship by a deliberate act on their part. In particular, as Mr Hickman pointed out, the use of "grohan" in Article 2 is determinative in this regard, since that Article purports to cover the totality of those Bangladesh citizens who are within the scope of the Instruction.

76. For this reason, whether the Bangla words for the phrase "such as", which immediately precedes paragraph (a), are or are not exhaustive in their meaning, the 2008 Instruction cannot assist the respondent.

77. In any event, as a matter of pure statutory interpretation, it is difficult to see how G3 could come within the scope of the Instruction. The opening words, which end with "such as", are not an operative part of the instrument. They serve, rather, as a preamble or introduction. The only part of the instrument that can properly be regarded as operative is paragraph (a). Paragraphs (b) to (e) are consequential upon paragraph (a).

78. As we have seen, paragraph (a) not only refers to a person accepting British citizenship; it also assumes that such a person would be taking an oath of allegiance to the United Kingdom. Such a scenario is, of course, impossible in the case of a person who acquired British citizenship at birth. That is precisely the point made by Professor Hoque in paragraph 72 of his report (see paragraph 30 above).

79. These findings are not, however, determinative. We remind ourselves that a question of foreign law may involve what the foreign state does in practice, notwithstanding the words on the page. We accordingly turn to points (2) to (4) of the respondent's arguments.

80. Although we were overall persuaded of his expertise, we do not consider that Professor Hoque had a strong response to the respondent's suggestion that the 2008 Instruction created anomalies, if it were confined to those obtaining British citizenship by naturalisation. At one point, Professor Hoque said that the position was "curious".

81. The 2008 Instruction makes no distinction between the categories of those who have Bangladesh citizenship (as opposed to British citizenship). In other words, it covers not only those who have Bangladesh citizenship by birth but also those who have it by descent.

82. There is, in our view, nothing to show that, unless persons obtaining British citizenship at birth are included within the terms of the 2008 Instruction, the effect of that Instruction is rendered absurd. On its own terms, the Instruction meets the needs of a significant class; that is, those who have come to the United Kingdom as Bangladesh citizens and who subsequently wish to take British citizenship. It is perfectly possible (indeed likely) that, in issuing the 2008 Instruction, the Government of Bangladesh was responding to calls from that particular group of its citizens. In short, although the 2008 Instruction *could* have been framed to cover persons in the position of G3, the result of its not doing so is not absurd or otherwise so problematic as to compel the construction for which the respondent contends.

83. Mr Sheldon submitted that, if the 2008 Instruction were not interpreted in the way suggested by the respondent, one would expect to see evidence of applications being made to the Bangladesh authorities by those in the position of G3. There was simply no such evidence.

84. On a related matter, Mr Sheldon also submitted that there was no evidence of any advice to those in the position of G3 being provided by the Bangladesh authorities, whether by writing to those concerned shortly before their 21st birthday, or on any website of the Bangladesh High Commission.

85. Attractive as they are, these submissions in our view lack force. Our reasons are as follows.

86. As Mr Hickman said, the difficulty with the absence of evidence regarding applications is that there was, on any view, a significant change in 2008, with the coming into force of the Instruction. We have not seen any evidence of the position before that date, so as to compare it with the position afterwards. In any event, the respondent's reliance on the absence of evidence is predicated on the basis that the class of people to which G3 belongs (those obtaining British citizenship at birth) or their parents (a) know about the 2008 Instruction and (b) are confident that it covers them. This is inherently unlikely.

87. We agree with Mr Hickman that the absence of evidence regarding warning letters and the like being sent to those approaching their 21st birthdays can be explained by the fact that the Bangladesh authorities have no knowledge of the identities and addresses of the persons to whom such letters would need to be sent.

88. The absence of information on the London High Commission website is, we agree, less easily explained. Nevertheless, if – as we find it to be the case – the 2008 Instruction effected no change in the position since 1972, concerning Bangladesh citizens who were also British citizens by birth, then the High Commission in London would have seen no reason to say anything, in the light of the Instruction. The existence of the information and form on the website of the Los Angeles Consulate General takes matters no further, in our view.

89. We accept the submission on behalf of G3 that the absence of evidence of applications may be explained, at least to some extent, by the NRV (No Visa Required) scheme, to which we have referred.

90. The article in the *Daily Star* also offers the respondent no material assistance. It certainly does not indicate that those in the position of G3 were regarded as being within the scope of the 2008 Instruction.

91. Finally, we have regard to the recent e-mail correspondence, involving an official of the High Commission in London and the British High Commission in Dhaka. Taken in the round with the other evidence, we do not find that these e-mails are such as to discharge the burden of proof on the respondent. They are both extremely terse. They give no indication of the amount of thought that has gone into their making. They also have to be read in the light of the brief record of a telephone conversation on 12 June 2017 between the British and Bangladeshi embassies in Turkey, in which the latter said it was intending to write to the Turkish authorities to advise that G3 was not a Bangladeshi national. With the benefit of hindsight, that message can now be ascribed a significance which the respondent declined to give it in the summer of 2017 since it did not appear to have been followed up by the Bangladesh or Turkish authorities.

92. Standing back and reviewing the evidence as a totality, we find that it is more likely than not that G3 does not fall within the scope of the 2008 Instruction, as operated by the Bangladesh authorities. Accordingly, if deprived of her British citizenship, G3 would be stateless.

93. Mr Sheldon submitted that, if we were to reach this conclusion, the Commission should consider whether to afford the respondent an opportunity to adduce further evidence.

94. This submission touches upon the respondent's request, made on 9 November 2017, for the hearing on 15 November 2017 to be adjourned.

That application was made by reference to the contention that the respondent should be given more time to follow-up the opinions expressed in the e-mails, to which we have referred, concerning the view of the 2008 Instruction taken by the Bangladesh authorities.

95. The Commission refused the adjournment application, prior to the hearing, and no renewed application was made to us at that hearing.

96. We do not consider that, in the circumstances of this case, it would be appropriate to afford the respondent the opportunity she seeks. As Mr Hickman submitted when opposing the adjournment application, the significance of the 2008 Instruction must have been evident to the respondent for some weeks.

97. In so finding, we do not in any sense wish to be seen as belittling the importance of the issues in the appeal. The asserted reasons underlying the respondent's decision to deprive G3 of her British citizenship are, on their face, very serious. Nevertheless, we do not consider that, in the circumstances of these proceedings, resolution of the issue of G3's status should be postponed. In addition to the respondent's having had an adequate opportunity to deal with the 2008 Instruction, the following matters are relevant.

98. First, our findings regarding the effect of the 2008 Instruction are necessarily predicated upon the evidence that we have seen and heard. If, in any future case, different evidence was to be adduced regarding the effect of the 2008 Instruction, the Commission will have to deal with it. In other words, the findings in this appeal are not necessarily determinative of any future appeal brought by a person in a similar position to that of G3.

99. Secondly, at the time of her detention in 2016, G3 had with her two young children. Although the respondent has called for DNA evidence to establish G3's maternity of those children, there is currently no contention on the part of the respondent that they are not hers. The fact that very young children are involved in this case is a further factor, which points towards further delay as being undesirable.

100. There is one final matter, with which the Commission must deal. Mr Hickman's case for G3 included the claim that the respondent's deprivation order was unlawful, on the ground that the respondent had no adequate basis for reaching the conclusion that, if deprived of British citizenship, G3 would not be stateless. Although, in his closing submissions, Mr Hickman told the Commission, on instructions, that G3 did not wish to have the deprivation decision re-made by the respondent, he asked the Commission nevertheless to address this aspect of G3's case.

101. The Commission has done so. We accept the evidence of Mr Larkin on this issue, as set out in his second statement and in his oral evidence. When she made the order in August 2017, the respondent had before her material which, as a matter of public law, entitled her to be satisfied that the order would not make G3 stateless.

102. It is important to bear in mind that, in certain circumstances, a decision under section 40, to deprive a person of citizenship, may need to be taken urgently. In any event, what is required for the Secretary of State to be satisfied in terms of section 40(4) will in every case depend upon the particular evidence.

103. In the present case, the Commission is fully satisfied that the respondent and her caseworkers were entitled to have regard to the report of 2 March 2013 from Dr Kamal Hossain & Associates, concerning the position of a Bangladesh citizen known as "C". The thrust of that advice was that C would be a Bangladesh citizen, if deprived of British citizenship. Although the subsequent advice from Mr Ghani, in April 2014, can be seen with the benefit of hindsight as drawing a distinction between what he would now describe as *de jure* and *de facto* citizenship, we are fully satisfied that the overall thrust of the 2013 advice was that C would not be stateless.

104. There is also the following point. As a general matter, we doubt whether, in appeal proceedings under section 2B of the 1997 Act, it would be appropriate for the Commission to determine whether a public law challenge could be made to the respondent's decision under section 40(4) of the 1981 Act. In enacting section 2B, Parliament has seen fit to give a general right of appeal to the Commission. As explained in Al-Jedda, the Commission's task is to decide *de novo*, on all the evidence before it (whether or not before the respondent), if a person would be rendered stateless by the deprivation order.

105. In those circumstances, it is difficult to see how the Commission could properly allow an appeal if satisfied (a) that the person would not be stateless in those circumstances but (b) that the respondent could not in public law terms have been so satisfied on the evidence before her, at the time she took the deprivation decision.

106. The Commission has no judicial review function in appeals of this kind: contrast sections 2C, 2D and 2E of the 1997 Act. Even if it did, on normal public law principles, it is equally difficult to see how the Commission could legitimately "remit" the matter to the respondent in such circumstances. Not only does the appellant have a suitable alternative remedy; namely, the section 2B appeal; the Commission's conclusion on that appeal would be a significant (in fact, probably decisive) factor in deciding whether the discretionary remedy of judicial review should lie.

Decision

107. G3's appeal is allowed.

The Hon Mr Justice Lane

Date: 15 December 2017