

SPECIAL IMMIGRATION APPEALS COMMISSION

Appeal No. SC/132/2016
Date of hearing: 22nd February 2017

BEFORE:

THE HONOURABLE MRS JUSTICE ELISABETH LAING

BETWEEN:

X2 -

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MR. E. GRIEVES (instructed by Birnberg Peirce & Partners, Solicitors) appeared on behalf of the Appellants.

MS. K GRANGE QC (instructed by The Government Legal Department) appeared on behalf of the Respondent.

MR. M. GOUDIE QC (instructed by the Special Advocates Support Office) appeared as Special Advocates.

RULING

MRS. JUSTICE ELISABETH LAING:

1. This is my decision on two preliminary issues that have been raised in email correspondence between the parties. The appellant is represented by Mr Grieves. Mr Goudie QC is the Special Advocate and the Secretary of State is represented by Ms Grange QC. The hearing principally took place in open although there was a short closed session as well.
2. The main issue I have to decide is whether a preliminary issue should be ordered on the question whether the appellant is stateless. That is a question posed by section 40(4) of the British Nationality Act 1981, which provides that the Secretary of State may not make an order under sub-section (2) – that is an order depriving someone of citizenship status – if he is satisfied that the order would make a person stateless.
3. Mr Grieves has argued that the question of statelessness should not be listed as a preliminary issue for several reasons. Firstly he says it is a departure from the ordinary procedure which applies to an appeal or review in SIAC which provides an appellant with a number of protections, principally because the national security case is served on the Special Advocates and an exculpatory review also takes place.
4. In response to that Ms Grange has submitted that preliminary issues on the question of statelessness have regularly been ordered by SIAC. She referred me, for example, to the case of **Pham** that went up to the Supreme Court and to the cases of **S1, T1 and others**, and to **Al Jeddah**.
5. Mr Grieves does not dispute that SIAC would have a power to order a preliminary issue but he says, as I have indicated, that it should not be done because it is a departure from the

ordinary procedure and deprives the appellant of the protections of, for example, a thorough search and exculpatory review

6. The second point he makes is that the issues in this case are closely intertwined. He referred me to the Scott Schedule of issues and, for example, to issue 6, which is that the deprivation of the appellant's citizenship is unlawful if there is a real risk that the appellant would be subject to persecution and/or Article 3 ill treatment in Morocco. He essentially wishes to argue that a person is in effect stateless if the behaviour of the state of which they are or might be a national is such as in practice to deprive him of that state's protection by taking steps that would render them a refugee. He referred me to a redacted submission to the Minister which preceded the decision, and in which, in paragraph 5, it is said that "Whilst there is always a risk if it emerges at a later point that X2 has been somehow stripped of his Moroccan citizenship it is our opinion that we currently have sufficient information in our possession to be satisfied that he will not be rendered stateless by the loss of his British citizenship". He says that that factual risk means that it would be undesirable for the preliminary issue of statelessness to be decided at a point when the Secretary of State's knowledge about what might have happened already is unclear.

7. It seems to me that the question whether or not section 40(4) of the 1981 Act prevents an order of deprivation being made is principally a question of law. The issue posed by that is whether the order depriving the appellant of his citizenship would make him stateless, and that is an issue to be decided at the date when the order is made. It is clear from the decision of the Supreme Court in **Pham –v- Secretary of State for the Home Department** [2015] UKSC 19, paragraph 38, what test SIAC must apply in considering whether or not the appellant is stateless. Paragraph 38 reads as follows:

8. “In conclusion on issue (i), I would accept that the question arising under Article 1(1) of the 1954 Convention in this case is not necessarily to be decided solely by reference to the text of the nationality legislation of the state in question, and that reference may also be made to the practice of the government, even if not subject to effective challenge in the courts. However, there is in my view no evidence of a decision made or practice adopted by the Vietnamese government, which treated the appellant as a non-national ‘by operation of its law’, even adopting the broadest view of those words as interpreted by the UNHCR; nor in any event of one which was effective at the date of the Secretary of State’s decision. The appeal under this ground must accordingly be dismissed.”

9. It seems to me that the way in which the test is phrased in paragraph 38 of **Pham** excludes any possible argument that what was being examined was anything other than the de iure position as expanded by the practice described in paragraph 38 of **Pham**. It therefore seems to me that that is a question of law and is one which is readily susceptible to decision as a preliminary issue.

10. Mr Grieves pressed on me the potential waste of effort and the cost that might be incurred if a preliminary issue were to be ordered, decided and then appealed up to the Supreme Court. I accept that that is a risk but it also seems to me that in the wake of **Pham** the test to be applied is relatively well settled. Ultimately the question whether or not the appellant would be made stateless by the order is a question of fact to be decided by SIAC on the basis of expert evidence about foreign law. I therefore consider that the risk of appeal is small and that I should proceed on the assumption that if a preliminary issue is ordered it is capable of disposing of the case in the appellant’s favour at a relatively low expenditure of time and public money. It therefore seems to me that as well as being legally sensible the ordering of a preliminary issue is likely, although I accept not certain, to end up saving the parties

money and cost. For those reasons it is my decision that there should be a preliminary issue on the question of status.

11. That preliminary issue should also include the scope of what the question of statelessness involves so as to enable Mr Grieves to argue the points which he wishes to argue which are relevant to the question of whether or not the appellant is stateless. The order should also build in a proviso that if after the issue has been decided by SIAC the Secretary of State later discovers information which shows that the appellant was stateless at the date of the order, SIAC should be able to revisit the question in the appellant's favour.
