Neutral Citation Number: [2019] EWCA Civ 2020

Case No: T2/2018/3082

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
SC/138/2017 AND SC/146/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2019

Before:

LORD JUSTICE FLAUX
LORD JUSTICE SINGH
and
LORD JUSTICE HADDON-CAVE

- -

Between:
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

- and -
E3 AND N3 **Respondents**

- -
- -

Neil Sheldon QC and James Stansfeld (instructed by **the Government Legal Department**) for the **Appellant**
Hugh Southey QC and Alasdair Mackenzie (instructed by **Duncan Lewis**) for the **Respondents**

Hearing dates: 29 and 30 October 2019

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Approved Judgment

Lord Justice Flaux:

Introduction

1. The Secretary of State appeals with the permission of the Special Immigration Appeals Commission ("SIAC") (Mr Justice Jay, Upper Tribunal Judge Gleeson and Mrs J Battley) its decision dated 15 November 2018 overturning the orders of the Secretary of State dated 4 June 2017 and 3 November 2017, depriving E3 and N3 of their British citizenship under section 40(2) of the British Nationality Act 1981 ("the 1981 Act").

2. The issue raised by the appeal is a narrow but nonetheless important one as to whether the Secretary of State was precluded by section 40(4) of the 1981 Act from making the orders, because they rendered E3 and N3 stateless.

Factual and procedural background

3. E3 was born in the UK on 27 May 1981 so that he was a British citizen at birth pursuant to the British Nationality Act 1948. His parents were both citizens of Bangladesh at the time of his birth and accordingly, he was a Bangladeshi citizen by descent under the Bangladesh Citizenship Act 1951, at least at the time of his birth.

4. On 2 June 2017, the Secretary of State gave E3 notice that she intended to make an order under section 40(2) of the 1981 Act, depriving E3 of his British citizenship, on the grounds that he was an Islamic extremist who had sought to travel abroad to participate in terrorist related activity and that he posed a threat to national security. The notice stated that, in accordance with section 40(4), the Secretary of State was satisfied that the order would not make E3 stateless.

5. N3 was born in Bangladesh on 12 December 1983 and acquired Bangladeshi citizenship at birth. His parents were both naturalised British citizens, so that he was also a British citizen at birth pursuant to section 2(1)(a) of the 1981 Act.

6. On 31 October 2017, the Secretary of State gave N3 notice that she intended to make an order under section 40(2) of the 1981 Act, depriving N3 of his British citizenship, on the grounds that he had travelled to Syria and aligned with an al-Qaeda aligned group and that he posed a threat to national security. The notice stated that, in accordance with section 40(4), the Secretary of State was satisfied that the order would not make N3 stateless.

7. Both E3 and N3 appealed those deprivation decisions to SIAC on a number of grounds, including that, at the date of the decisions they did not hold Bangladeshi nationality, so that the decisions rendered them stateless. SIAC decided to deal with the issue of statelessness as a preliminary issue. The proceedings in relation to that preliminary issue were conducted primarily in OPEN. Although there was a short CLOSED judgment, it is of no relevance to this appeal, which has been conducted entirely in OPEN.

The statutory framework: the 1981 Act

8. Section 40 of the 1981 Act provides, so far as relevant, as follows:

> "(1) In this section a reference to a person's "citizenship status" is a reference to his status as—
>
> (a) a British citizen…
>
> (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."

The key provisions of Bangladeshi law

9. Under section 4 of the Citizenship Act 1951 (formerly the Pakistani Citizenship Act 1951 amended in 1972 by Presidential Order after Bangladesh became independent) anyone born in Bangladesh after the commencement date is a citizen of Bangladesh by birth. By section 5, anyone born after the commencement date is a citizen of Bangladesh by descent if his father or mother was a citizen of that country at the time of his birth. Thus, section 4 applies to N3 and section 5 to E3.

10. Section 14 of the Citizenship Act 1951, as amended in 1972, provides as follows:

> "Dual citizenship or nationality not permitted
>
> 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 country renouncing his status as a citizen or national thereof, cease to be citizen of Bangladesh.
>
> (IA) Nothing in sub-section (1) applies to a person who has not attained twenty-one years of age."

11. On 15 December 1972, the Bangladeshi Citizenship (Temporary Provisions) Order (No 149 of 1972) ("the 1972 Order") was enacted with effect from independence on 26 March 1971. By Article 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 Bangladesh on 25th March 1971 and continues to be so]."

12. On 23 May 1973 the 1972 Order was amended by Article 2 of the Bangladeshi Citizenship (Temporary Provisions) (Amendment) Act 1973 to add these Articles:

> "2A. A person to whom Article 2 would have been ordinarily applied but for his residence in the United Kingdom shall be deemed to be permanent resident in Bangladesh.
>
> Provided that the Government may notify, in the Official Gazette, any person or categories of persons to whom this article shall not apply.
>
> 2B. Notwithstanding anything contained in any other law for the time being in force or in this Order, a person –
>
> (i) owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state or
>
> (ii) is notified under the proviso to Article 2A
>
> shall not qualify himself to be a citizen of Bangladesh."

13. That version of Article 2B was replaced in 1978 by the following wording, enacted in primary legislation in the form of a military ordinance:

> "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."

14. All these provisions were enacted in English. On 18 March 2008 a statutory notification (SRO No. 69) was issued in the Bangla language by order of the President of Bangladesh ("the 2008 Instruction"). SIAC found that the following was the most authoritative and coherent translation of the 2008 Instruction into English:

> "The Government, in the exercise of the power conferred in sub-article (2) of article 2B [of the 1972 Order as amended] by cancelling all the circulars or directives or orders or

> notifications issued hereinbefore in this behalf, has issued the following directives only in the case of the United Kingdom as regards granting or continuation of Bangladeshi citizenship of those Bangladeshis who have acquired citizenship of the United Kingdom:
>
> a) The Bangladeshi citizenship of any citizen of Bangladesh according to the law as in force in Bangladesh shall remain as it is notwithstanding their acquiring citizenship of the United Kingdom, unless the oath to be taken for acquiring citizenship of that country does contain any oath to renounce allegiance to their own country (Bangladesh);
>
> b) In the aforesaid circumstances, the citizen of Bangladesh, who has acquired citizenship of the United Kingdom, shall not be required to obtain dual citizenship from the Government of Bangladesh;
>
> c) All Bangladeshis who have acquired citizenship of the United Kingdom may retain and use their Bangladeshi passports;
>
> d) On the expiry of their validity, their passports shall have to be renewed as usual;
>
> e) Bangladeshi passports can be issued again to those who had previously acquired citizenship of the United Kingdom.
>
> 2. This order shall be applicable only in the case of citizens of Bangladesh acquiring citizenship of the United Kingdom.
>
> 3. This order is issued in the public interest and shall come into force forthwith".

15. These provisions, up to and including the 2008 Instruction, were considered by SIAC (Lane J presiding) in an earlier judgment in *G3 v SSHD* (SC/140/2017). Having heard and considered expert evidence on Bangladeshi law, SIAC concluded that the 2008 Instruction did not apply to G3 because it did not apply to those who had acquired British citizenship at birth. The Secretary of State had produced limited evidence in that case from the Bangladeshi authorities as to how the 2008 Instruction applied in practice, in the form of an email from the High Commission in Bangladesh reporting on what had been said by their Honorary Legal Adviser, also a senior lawyer of the Supreme Court of Bangladesh. Unsurprisingly, SIAC did not regard this exiguous evidence as sufficient. It refused an application on behalf of the Secretary of State for an adjournment to enable further evidence to be adduced, because of the appalling conditions in which G3 and her young children found themselves in Turkey. However, at [98] of its judgment, SIAC left open the possibility of different evidence being adduced in a future case which would lead to a different conclusion, saying: "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".

The *Note Verbale*

16. On 7 January 2018, the British High Commission in Dhaka submitted a *Note Verbale* No POL/02/18 to the Bangladesh authorities asking a series of questions about the application and effect of SRO No. 69. On 3 June 2018, the Ministry of Foreign Affairs wrote in response, setting out the answers provided by the responsible department, the Security Service Division, Ministry of Home Affairs. The *Note Verbale* from the Ministry of Foreign Affairs provided in its formal parts:

> "No. 19.00.0000.456.52.401.17.269
>
> The Ministry of Foreign Affairs of the Government of the People's Republic of Bangladesh presents its compliments to the British High Commission in Dhaka, and with reference to the High Commission's Note Verbale No. POL/02/18 dated 07 January 2018, has the honour to forward herewith the answer of the given questions regarding S. R. O. no. 69-Act/2008 dated 08 March 2008 on dual-Bangladesh / British citizenship received from the Security Service Division, Ministry of Home Affairs.
>
> The Ministry of Foreign Affairs, Government of the People's Republic of Bangladesh avails itself of this opportunity to renew to the British High Commission in Dhaka, the assurances of its highest consideration."

The *Note Verbale* was duly stamped and dated. It thus complied with all the formalities for this form of official communication, as set out at [6.7] and [6.9] of *Satow's Diplomatic Practice*, 7th edition.

17. The questions and answers were as follows:

Question	Answer
1.Q- Does S.R.O. No 69 apply to a.Individuals who are Bangladeshi Citizens at birth, and latter naturalize as British citizens? b.Individuals who are dual Bangladeshi/British citizens at birth, by descent? or, c.Both of the above?	According to the Bangladesh Citizenship (Temporary Provisions) Order 1972 P.O.No.149 of 1972 every person shall be deemed to be a citizen of Bangladesh who or whose father or mother or grandfather was born in territories of Bangladesh. S.R.O.No 69 is applied for Bangladeshi Citizen.
2.Q- Does S.R.O.No 69 have retrospective effects, i.e. does it apply to those who prior to 18 March 2008 were naturalized as British Citizens and/or those who acquired their Bangladeshi/British citizenship at birth?	Yes S.R.O.No 69 has retrospective effect. It is applied to those who prior to 18 March 2008 were naturalized as British Citizens and also for those who acquired their Bangladeshi/British Citizenship at birth.
3.Q- If S.R.O.No 69 does apply to individuals who are dual	Yes S.R.O No69 is applied for those individuals who had reached the age of 21

Bangladeshi/British citizens at birth, by descent and S.R.O does have retrospective effects, would it apply to someone who had reached the age of 21 (and therefore may have lost their Bangladeshi citizenship in accordance with section 14 of the Citizenship Act 1951) prior to 18 March 2008?	prior to 18 March 2008 also.
4.Q- How did S.R.O No 69 change the existing Bangladeshi law in relation to dual Bangladeshi/British nationals?	According to the Bangladesh Citizenship (Temporary Provisions) Order 1972 P.O.No.149 of 1972 section 2B(2) the Government of Bangladesh has issued the S.R.O. No 69-Law/2008. Bangladesh Citizenship (Temporary Provisions) Order 1972 P.O.No149 of 1972 Comes after The Citizenship Act,1951. If anything is contradictory with other previous existing law, then Bangladesh Citizenship (Temporary Provisions) Order 1972 P.O.No.149 of 1972 will prevail Over them. So, there is no contradiction between the existing Bangladeshi Laws and S.R.O 69-Law/2008 in relation to dual Bangladeshi/British Nationals

18. The *Note Verbale* was adduced in evidence by the Secretary of State in the present appeals before SIAC. It was accepted by Mr Hugh Southey QC for E3 and N3 that these answers came from the correct department of the Bangladesh government. In its judgment at [25] SIAC found that the questions posed were appropriately non-leading and non-case specific.

The judgment of SIAC

19. SIAC dealt initially with the submission of Mr Southey QC that it would be an abuse of process to allow the Secretary of State to adduce the *Note Verbale* in evidence and make submissions about it or to revisit *G3*, in circumstances where that case should have been appealed. SIAC rejected that submission. In doing so, it said this at [34] in relation to the burden of proof:

> "However, these [points made by Mr Southey QC] are all reasons supporting the proposition that, in a situation where the burden of proof is firmly on the Respondent [i.e. the Secretary of State], caution should be exercised before concluding that it has been discharged. They are not reasons for abstaining from embarking on the exercise in the first place."

20. SIAC then considered the expert evidence of Bangladeshi law which had been adduced on both sides, Professor Hoque for E3 and N3 and Ms Rafique for the Secretary of State. So far as is relevant to the present appeal, SIAC recorded the expert evidence about the *Note Verbale* as follows. At [43]-[44] it dealt with the evidence of Professor Hoque:

> "43. At paragraphs 83-86 of his first report, Professor Hoque makes a number of important points. The legal status of the *Note Verbale* must be called into question. Specifically:
>
> > "The responses are at best extra-official interpretation, they are mere opinions communicated to the British representatives through a diplomatic letter … It would have binding effect, had it been issued officially as an official order as another SRO by the Ministry of Home Affairs. … The relevant part of [article 152 of the Bangladeshi constitution] [defines] "law" [as] "any Act, ordinance, rule, regulation, bye law, notification or other legal instrument, and any custom and usage, having the force of law in Bangladesh".
>
> 44. At paragraph 84 of his first report, Professor Hoque emphasises that the *Note Verbale* cannot be regarded as an *official* instrument which falls within this definition of "law"".

21. Then at [51] it dealt with the opinion of Ms Rafique:

> "51. Ms Rafique has also opined on the *Note Verbale.* In her opinion, the legal basis for the statement that it is applied retrospectively "is not clear". Ms Rafique does not accept the entirety of the Government's legal reasoning regarding the interplay between the Citizenship Act 1951 and section 2B of the 1972 Order, including the 2008 Instrument purportedly made under that latter provision. More importantly:
>
> > "In this particular instance, it is clear from their responses that the Ministry of Home Affairs will apply this SRO retrospectively and to someone who had reached 21 years of age before 18/3/08 [the date of implementation of the 2008 Instruction]. What is important to note is that there was a policy reason for the SRO to be issued as it was issued in the public interest (clause 3) which means it was intended to be for the benefit [of] as many people as possible, which could be the guiding reason for their decision. So, unless the Government is successfully challenged in a court of law in Bangladesh on allowing the SRO to have … retrospective effect, the position remains that the SRO has retrospective effect as Security division of the Ministry of Home Affairs has chosen it to be so, given that they are both the formulating and implementing organ for the SRO"".

22. At the outset of Section G: Discussion of the judgment, SIAC said that its assessment of the expert evidence was that it was "sub-optimal" although it went on to say at [53] that both experts were more helpful on the meaning and application of the 2008 Instruction and the *Note Verbale*. To the extent that there was a material difference between their views on matters of Bangladeshi law and practice, SIAC preferred the evidence of Professor Hoque.

23. SIAC then addressed at [56] to [70] the parties' respective cases on the proviso to Article 2B(1) of the 1972 Order as amended, upon which the Secretary of State particularly relied, and rejected the case for the Secretary of State. Since there is no appeal against that conclusion of SIAC, it is not necessary for us to consider that part of the judgment further, save to note that, at [67], SIAC says in relation to the proviso that; "the burden is of course on the [Secretary of State]". As with the previous reference to the burden of proof being on the Secretary of State at [34], this is evidently a reference to the legal burden of proof being on the Secretary of State on the issue of statelessness.

24. Consideration was then given to the meaning of the 2008 Instruction, without reference to the *Note Verbale*. Having recorded the parties' respective submissions SIAC concluded at [78] to [80] that it would come to the same conclusion as the *G3* Commission for broadly similar reasons, that as a matter of Bangladeshi law, the 2008 Instruction did not apply to E3 and N3.

25. SIAC then went on to consider the *Note Verbale*, in particular whether the answers related to application of the law or to evidence of practice:

> "81. The Respondent's questions to the Bangladeshi authorities sought the latter's opinion as to the correct application of the 2008 Instruction. The focus of the questioning was the true position under Bangladeshi law, although in our view it is possible to adopt a slightly subtler approach. The questioner might only be asking: how do you interpret the 2008 Instruction as a matter of law? Further or alternatively, he or she might be asking: whatever it means as a matter of strict or black letter law, how do you apply it in practice?
>
> 82. This distinction, which on any view is a fine one when it comes to the position of a responsible public authority applying the relevant law as it understands it to be, was not made explicit in the four questions posed. It is probable that those who drafted these questions wanted to find out how the Bangladeshis applied a law which a separate organ of the State had enacted in 2008. This may explain why Mr Sheldon's primary submission in opening the case to us was formulated as it was. By the time he came to his closing arguments, Mr Sheldon placed greater emphasis on the *Note Verbale* constituting evidence of policy and practice.
>
> 83. This new emphasis was, in the Commission's view, correctly made, because if the *Note Verbale* is said to be no more and no less that the author's opinion of what the law is, it carries very little weight. Both experts have criticised this document, we have concluded for good reason. A memorandum which is expressed to be parasitic on another instrument, and is held out to be no more than exegetical, cannot carry the day. On the other, a memorandum which is evidence of practice, without prejudice to its strict legal meaning, might be regarded as more weighty. Thus in G3 the

> Commission separately considered the issue of practice, and was clearly troubled by where its analysis led.
>
> 84. A question arises as to whether the *Note Verbale* does indeed contain evidence of the Bangladeshi authorities' practice in this domain. The use of the verb "applied" could be regarded as synonymous with "interpreted"; on the other hand, it could mean "this is how we apply it in practice"".

26. In relation to this issue of practice, SIAC then considered whether it was open to the Secretary of State to rely on evidence of practice in a statelessness case, by reference to the decision of the Supreme Court in *Pham v SSHD* [2015] UKSC 19; [2015] 1 WLR 1591. It was common ground in that case, as in the present case, that the term "stateless" in section 40(4) of the 1981 Act has the same meaning as in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, which provides: "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."

27. SIAC referred in particular to [38] of the judgment of Lord Carnwath JSC (with whom three other Justices in a Court of seven agreed) where he said:

> "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."

28. SIAC noted that Lord Carnwath went on in effect to say that it was unnecessary to decide the point, because there was no evidence of any relevant practice adopted by the Vietnamese government, although at [87] SIAC said that if the passage just quoted was correct, it would mean that state practice could be relevant even if the government in question acted arbitrarily and in defiance of the law and SIAC would hesitate before coming to the same conclusion. SIAC also noted at [85] that Lord Mance JSC in *Pham* strongly doubted whether a practice that was inconsistent with or said to supersede law could be relevant at all and Lord Sumption JSC was not convinced that practice could stand for law in the 1954 Convention.

29. However, SIAC went on to say at [88] that, because Bangladesh was a constitutional Republic which adheres to the rule of law and has a system of judicial review, this case was not in the realm of potential arbitrariness or capriciousness. It also noted that, assuming that the *Note Verbale* accurately set out the Bangladeshi authorities' application of the 2008 Instruction, this was entirely benevolent in that it involves an addition to rather than a subtraction from existing rights. In the particular circumstances of the case, there could be no principled objection to taking *Pham* into account.

30. On the issue of the status of the *Note Verbale*, SIAC concluded at [90]:

> "90. In our view, the critical question is whether the *Note Verbale* does represent sufficiently compelling evidence of

> established practice in Bangladesh such as to discharge the burden of proof which rests on the Respondent. For these purposes it matters little whether the question is posed in terms of how the authorities in Bangladesh chose to interpret the law they have caused to come into effect, or how they choose to apply it in practice. The dividing line between law and practice is somewhat difficult to identify, and we would be content to treat the instant case as a form of hybrid."

31. The judgment then went on to consider the issue of the burden of proof. As noted at [92], after the hearing before SIAC, Mr Southey QC had drawn the attention of the Commission to the decisions of the Court of Appeal in *Hashi v SSHD* [2016] EWCA Civ 1136 and *AS (Guinea) v SSHD* [2018] EWCA Civ 2234. The judgment records that the latter was a case about qualification for leave to enter or remain under the Immigration Rules through statelessness, where the burden of proof is on the applicant. It was not directly in point, as it was not a case of deprivation under section 40(4) of the 1981 Act.

32. SIAC considered [23] and [24] of the judgment of Longmore LJ in *Hashi* to be more directly in point:

> "23. No doubt the SS has the burden of showing that she was satisfied that her order would not make Mr Hashi stateless. That is a comparatively easy burden to discharge and Mr Hashi does not challenge that she was so satisfied.
>
> 24. But Mr Hashi is entitled to and does assert that she was wrong to be so satisfied and on that question he must have the relevant burden of proof. If at the end of the day the court is left in genuine doubt whether a person who is to be deprived by his UK citizenship would be stateless, his claim to challenge the SS's decision will fail. Such cases will inevitably be rare since, if the challenge is a serious matter, there will have to be evidence of the relevant law as there was in this case. The court will then make up its mind on that evidence as SIAC did. In *Al-Jedda v SSHD* [2012] EWCA Civ 358 Richards LJ recorded (paras 122-3) that there was no dispute in that case that the burden of proof was on the appellant on the balance of probabilities. He expressed no surprise at that absence of dispute. Neither do I."

33. SIAC's judgment recorded the rival written submissions of the parties, which were essentially repeated in this Court. SIAC concluded at [98] that on the wording of section 4 of the Special Immigration Appeals Act 1997 and section 40(4) of the 1981 Act the burden was on E3 and N3 as appellants to prove that deprivation would render them stateless. However, SIAC went on to find at [99] that if the case were being decided without reference to the *Note Verbale*, that burden would have been discharged, on the basis of its earlier determination as to the meaning of the 1972 Order and the 2008 Instruction. SIAC continued:

> "…The question, though, is how we should approach the *Note Verbale*. It is said to be evidence of settled practice which makes all the difference. Is it incumbent on the Appellants to prove that the *Note Verbale* is not (sufficient) evidence of settled practice, and/or if the Commission is left harbouring a doubt (per *Hashi*) are we required to determine this appeal in the Respondent's favour?
>
> 100. The Commission does not consider that the law continues to treat the Appellants as having to shoulder the relevant burden. *Generally*, the burden is on the Appellants in this appeal, as we have already pointed out. However, within the ambit of this appeal a *specific* question has arisen in relation to the *Note Verbale*. Is there a settled or established practice in Bangladesh such that individuals in the position of these Appellants are deemed to be entitled to nationality of that country? The *Note Verbale* is put forward by the Respondent as being sufficient evidence of such practice. In this context we part company with paragraph 6 of Mr Sheldon's latest Note, which appears to us to elide what we have called the general and the specific questions, and would hold that the burden of proof must be on the Respondent in connection with that issue.
>
> 101. The decision of the Court of Appeal in the *Estonian State Steamship Line* case is directly in point. Specifically:
>
> > "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".
>
> 102. …The real point here is that "the material proposition of foreign law" is that there is a settled or established practice in Bangladesh which means that these Appellants are not stateless. Envisaged in these specific terms, the burden of proof must reside on the Respondent because he is contending that such a practice exists. If the position were otherwise, exiguous evidence of state practice would be sufficient in a case such as this to engender a level of doubt which, in line with *Hashi*, would require the Commission to dismiss the appeals."

34. SIAC then turned at [103] and following to consider whether the Secretary of State had satisfied it, on the balance of probabilities, that there existed in Bangladesh a settled or established practice which meant that E3 and N3 were not stateless. It said that: "the resolution of this question has proved to be uncommonly difficult" but continued that, on careful reflection, it could not conclude that the *Note Verbale* went so far as to articulate such a practice. It noted at [104] that an application of the 2008 Instruction in a benevolent and purposive way would lead to Bangladeshi citizens who were dual nationals at the time of their birth not requiring the discretionary grant

of dual nationality certificates. This would be consistent with the absence of evidence of any problems faced by the hundreds of thousands of dual nationality Bangladeshis.

35. However, SIAC concluded that the Secretary of State had not made out his case at [105] to [108]:

> "105. On the other hand, the Commission is confronted by the nature and terms of the *Note Verbale*, the sparseness of the reasoning it provides, the assumption underlying it that this is what the law provides, and what Professor Hoque calls an "extra-official interpretation", falling short of custom and usage which has force of law in Bangladesh. There is no evidence, beyond what is said in the *Note*, that this is how the 2008 Instruction has been applied in Bangladesh on a systematic basis. Ms Rafique could have provided it had it existed, but instead has informed the Commission that the NVR system is her standard mode of evidence of any difficulty, which absence could well be explained by the NVR scheme. It is surprising that, on a matter of this potentially far-reaching importance, the *Note Verbale* is all that there is.
>
> 106. Ms Rafique has failed to address, still less refute, Professor Hoque's arguments as summarised under paragraph 43 above. Moreover, if there were ever to be a dispute on this topic, it is unclear what status the judicial review court in Bangladesh would accord to the *Note Verbale*. If her Majesty's Government gave similar assurances in a document of this sort, these would not be regarded (*pace* Professor Hoque) as "extra-official", and a good reason would need to be adduced in the Administrative Court for departing from them. Yet, the Commission has no idea what status or weight would be given to the *Note Verbale* as a matter of the public law of Bangladesh. In this regard we continue to note Professor Hoque's observations relating to Article 152 of the Bangladesh constitution.
>
> 107. On the basis of Professor Hoque's evidence, it is difficult to conclude that the *Note Verbale* represents evidence of a settled practice in Bangladesh, still less one which satisfies the standards imposed by, or inherent in, the rule of law.
>
> 108. The Commission continues to recognise the difficulty of this point, and assesses the merits as being finely balanced. Ultimately, however, the Commission remains unpersuaded that the *Note Verbale* clinches the case for the respondent."

The grounds of appeal

36. The Secretary of State contended that SIAC had made two material errors of law in determining the preliminary issue of statelessness:

(1) It had erred in law in concluding that the Secretary of State bore the burden of proof on the "specific" question of the effect of the *Note Verbale*.

(2) Even if the burden of proof in respect of the *Note Verbale* was on the Secretary of State, SIAC was wrong to conclude that the evidence was insufficient to discharge that burden.

The Respondent's Notice

37. E3 and N3 seek to uphold the decision of SIAC for different or additional reasons:

(1) That SIAC had erred in law in holding that the burden of proof was on them to prove statelessness. The burden was on the Secretary of State to show that deprivation of British citizenship was lawful and that the decision did not render E3 and N3 stateless.

(2) That reliance on the *Note Verbale* was undermined by inconsistent statements of the Bangladeshi government regarding its nationality law. Permission is sought to rely upon fresh evidence consisting of newspaper reports of the Shamima Begum case in which the minister of foreign affairs is reported as saying that she was not a Bangladeshi citizen but was a British citizen by birth who had never applied for dual nationality.

(3) That SIAC had erred by taking account of the relevance of practice when considering statelessness.

Summary of the parties' submissions

38. On behalf of the Secretary of State Mr Neil Sheldon QC submitted that in three places in the judgment ([34], [67] and [90]), SIAC had stated erroneously that the burden of proof was on the Secretary of State throughout. In the written submissions post-hearing, that had been Mr Southey QC's position on behalf of E3 and N3. Mr Sheldon QC's position had been that the burden of proof on the issue of statelessness was on E3 and N3 throughout. In [100] of the judgment, SIAC had adopted what was in effect an intermediate position, saying that, whilst the general rule was that the burden of proof was on E3 and N3 as appellants, the burden of proof in relation to the specific question of whether the *Note Verbale* proved that there was a settled or established practice in Bangladesh was on the Secretary of State. Mr Sheldon QC submitted that SIAC was clearly right that the general rule was that E3 and N3 as appellants had the burden of proof on the issue of statelessness. There was a clear and consistent line of authority to that effect culminating in the decision of the Court of Appeal in *Hashi* and the recent decision of SIAC (Garnham J presiding) in *R3 v SSHD* (SC/150/2018). I will consider the cases cited on both sides in more detail in the Analysis and Conclusions section of this judgment.

39. However, Mr Sheldon QC submitted that there was no justification anywhere in that line of authority for treating different parts of the evidential picture on the issue of statelessness differently and applying a different burden of proof, dependent upon who adduces and relies upon the particular piece of evidence. He submitted that the decision of the Court of Appeal in the *Estonian State Steamship Line* case was dealing with a rule of private international law about the adducing of expert evidence of foreign law, which was not applicable in the present context and would lead to bizarre and unworkable results.

40. None of the other reasons identified by SIAC, such as the "exiguous evidence" point at [102], justified the displacement in relation to the *Note Verbale* of the general rule that the burden of proof was on E3 and N3. Likewise, the points made by Mr Southey QC in his skeleton argument about the "legal" burden of proof and the "evidential" burden of proof did not justify a reversal of the burden of proof on the *Note Verbale.* As Mr Sheldon QC put it, all the cases contained a mixed bag of evidence, including evidence of practice, but there was no suggestion that the burden shifted, depending upon who adduced the particular piece of evidence.

41. He submitted that, although, at [90], SIAC had treated the *Note Verbale* in this case as a hybrid between interpretation of the law and application of a practice, at [100] and following SIAC had only dealt with the *Note Verbale* as evidence of practice. This was a mischaracterisation of what it was, a statement by the Bangladeshi government of the law. That had been his primary case before SIAC, but he informed the Court that during the course of argument, SIAC had been disparaging about the meaning and status of the *Note Verbale* (as reflected in, for example [83] and [84] of its judgment, characterising it as no more than a statement of opinion). The indications from SIAC had been that the *Note Verbale* could only be regarded as a statement of practice and it was for that reason that Mr Sheldon QC had made submissions focusing on whether it was evidence of settled practice, although he had never relinquished his primary case.

42. Mr Sheldon QC submitted that, if SIAC had adopted the correct approach to the burden of proof and had characterised the *Note Verbale* in the correct way, as a definitive statement of the law by the ministry which made that law, it would have concluded that Professor Hoque's opinion as to the meaning of the 2008 Instruction would not have "clinched" the case for E3 and N3 and that they had not established that they were stateless. He recognised that, strictly speaking he was inviting this Court to substitute its own finding of fact for that of SIAC, but submitted that we could do so because it was clear that, if SIAC had applied the burden of proof correctly, it would have reached the conclusion he invited us to reach.

43. In relation to the second ground of appeal, Mr Sheldon QC submitted that, even if the burden of proof was on the Secretary of State in relation to the *Note Verbale*, SIAC should have concluded that he had discharged that burden. He repeated his submissions as to why SIAC had mischaracterised the *Note Verbale* and failed to address its meaning and effect on the basis that it was a statement of the relevant law, not merely evidence of practice. Neither expert had been wholly objective or independent, nor had either cited any Bangladeshi case law or academic commentary as to how the provisions of the 2008 Instruction applied. The *Note Verbale* was the best evidence by far as to the application of the 2008 Instruction, both as to its interpretation and its application in practice. There was no basis for Professor

Hoque's view that this was an "extra-official" interpretation. The British High Commission had asked a friendly foreign government for information about the application of one of its administrative orders and the government had provided an official response, answering the questions without any suggestion of contamination by political considerations. It would be possible for SIAC to find that the interpretation in the *Note Verbale* was wrong, but it would require strong evidence to do so which was absent here.

44. Mr Hugh Southey QC submitted on behalf of E3 and N3 that there were two key points which provided the context to the approach of SIAC. First, given that the Secretary of State was not appealing SIAC's interpretation of the proviso to Article 2B of the 1972 Order as amended, there is no doubt both E3 and N3 lost their Bangladeshi nationality on attaining the age of 21 in 2002 and 2004 respectively. The issue was whether the 2008 Instruction had retrospective effect to restore their Bangladeshi nationality in 2008. Secondly, this explained the structure of the judgment. SIAC had begun by looking at whether the 1972 Order applied and rejected the Secretary of State's argument. Then it had considered whether Bangladeshi citizenship had been regained under the 2008 Instruction or as a matter of practice. He submitted that SIAC had rightly given significant weight to the language of the 2008 Instruction. The opening words of paragraph a): "The Bangladeshi citizenship of any citizen of Bangladesh according to the law as in force in Bangladesh shall remain as it is…" were inconsistent with the 2008 Instruction having retrospective effect.

45. So far as the *Note Verbale* is concerned, he submitted that SIAC had dealt with it consistently with its conclusion at [90] that it was a hybrid between law and practice. It had dealt with the issue as to whether it was a statement of law at [32] where it said that; "if regarded as an insight into the correct legal interpretation of the Instruction, the *Note Verbale* is notably bereft of reasoning and analysis." At [83] SIAC had then said that the *Note Verbale* was no more than an opinion and so of little weight. He submitted that there was no statement as to the basis for saying that the 2008 Instruction had retrospective effect, no analysis of its provisions and no guidance from the Bangladesh High Commission in London.

46. When Singh LJ put to him in the course of argument that, because the *Note Verbale* emanated not from a professor of law, but the government of Bangladesh, it should give rise to an inference that the government would treat the 2008 Instruction as having retrospective effect, Mr Southey QC submitted that there was an issue not only as to whether any statement in the *Note Verbale* had the force of law, but also the extent to which it was enforceable in Bangladesh, which was the point at SIAC had addressed at [106] of the judgment.

47. In support of his point that the *Note Verbale* was sparse and bereft of analysis, Mr Southey QC submitted that, although SIAC had said that it preferred the evidence of Professor Hoque to that of Ms Rafique, even she had said, as recorded at [51] of the judgment, that the legal basis for the statement that the 2008 Instruction had retrospective effect was not clear.

48. Mr Southey QC submitted that, in relation to the issue whether the *Note Verbale* was evidence of practice, SIAC had adopted an approach which if anything was over-generous to the Secretary of State. The phrase "under the operation of its law" in Article 1(1) of the 1954 Convention was the subject of guidance from the UNHCR in

its 2014 Handbook, quoted by Lord Carnwath JSC in *Pham* at [24]. Under the rubric "meaning of law" the handbook states: "The reference to 'law' in article 1(1) should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice." Mr Southey QC submitted that, accordingly, unless the relevant practice could be said to be a customary practice which was a form of law, practice was irrelevant or only relevant to a limited extent.

49. He relied upon Lord Mance's doubts in *Pham* (referred to at [28] above) as to whether practice which was inconsistent with or said to supersede the law could ever be relevant and also upon what Lord Sumption said at [101]: "I am not convinced that practice can stand for law in article 1(1) of the 1954 Convention, nor that any relevant practice was proved in this case." Mr Southey QC said that he did not need to go that far but did submit that there was no evidence as to the status of the *Note Verbale* and that practice could only be relevant if it were enforceable.

50. In relation to the burden of proof, Mr Southey QC submitted that citizenship was a fundamental right and that it was for the Secretary of State to justify deprivation. He had to justify that deprivation was lawful as in the case of false imprisonment. One of the conditions precedent to an entitlement to deprive someone of his or her citizenship was that he or she would not be rendered stateless. Mr Southey QC relied upon [28] and [31] of the judgment of Baroness Hale of Richmond DPSC in *Sadovska v SSHD* [2017] UKSC 54; [2017] 1 WLR 2926, a case where a removal order was made against an EU citizen on the grounds that she had abused her right of residence by attempting to enter a marriage of convenience:

> "28 …The respondent is seeking to take away established rights. One of the most basic rules of litigation is that he who asserts must prove. It was not for Ms Sadovska to establish that the relationship was a genuine and lasting one. It was for the respondent to establish that it was indeed a marriage of convenience.
>
> 31 The First-tier Tribunal did not analyse her rights in this way. It was quite simply incorrect to deploy the statement that "in immigration appeals the burden of proof is on the appellant", correct though it is in the generality of non-EU cases, in her case. She had established rights and it was for the respondent to prove that the quite narrow grounds existed for taking them away."

51. Mr Southey QC also relied on the statement of principle by Lord Scarman in *R v SSHD ex parte Khawaja* [1984] 1 AC 74 at 112:

> "Secondly, there is the problem of proof. The initial burden is upon the applicant. At what stage, if at all, is it transferred to the respondent? And, if it is transferred, what is the standard of proof he has to meet? It is clear from the passages cited from Lord Atkin's opinions in *Liversidge v Anderson* [1942] AC 206 and *Eshugbayi's* case that in cases where the exercise of executive discretion interferes with liberty or property rights he

> saw the burden of justifying the legality of the decision as being upon the executive. Once the applicant has shown a *prima facie* case, this is the law."

52. Mr Southey QC submitted that none of the cases relied upon by Mr Sheldon QC was strictly binding on this Court and that there were, in effect, two lines of authority. One was the line of cases starting with *Abu Hamza* on which Mr Sheldon QC relied. The other consisted of the decision in *G3 v SSHD* (SC/140/2017) (Lane J presiding) where SIAC held that the burden of proof in relation to the issue of statelessness was on the Secretary of State and the decision of this Court in *KV (Sri Lanka) v SSHD* [2018] EWCA Civ 2483; [2018] 4 WLR 166 (which I consider further below). Mr Southey QC submitted that the better approach was to say that establishing that E3 and N3 were not rendered stateless was a condition precedent and that the burden of proof was on the Secretary of State, in part because the concept of statelessness derives from international human rights law which recognises the importance of citizenship.

53. In relation to the issue of whether the *Note Verbale* was evidence of a settled practice, Mr Southey QC submitted that, in any event, the burden of proof was on the Secretary of State and the approach of SIAC in [100] to the specific burden was correct. It was possible to have a different burden applying in relation to different issues. He relied in this context on the citation from the judgment of Scott LJ in the *Estonian State Steamship Line* at [101] of the judgment of SIAC. He submitted that it was appropriate that the burden of proving state practice should be upon the Secretary of State, since the UK government was in a better position than individual appellants to adduce such evidence given that the government had the relevant contacts.

54. Mr Southey QC submitted that, if this Court considered that SIAC had erred in law, the correct course was to remit the matter to a differently constituted Commission and not, as submitted by Mr Sheldon QC, to substitute its own findings of fact for those of SIAC on this issue. This Court should be particularly cautious about criticism of Professor Hoque, since SIAC had found his evidence of value on this issue and it was broadly consistent with the evidence of other experts in this and other SIAC cases.

Analysis and conclusions

55. I agree with Mr Sheldon QC that there is a consistent line of authority which, although not strictly binding on this Court, establishes that once the Secretary of State has demonstrated that he is satisfied that the deprivation order will not render the individual stateless, the burden of proving that the individual will be rendered stateless by the deprivation order is on the individual.

56. The starting point is the decision of SIAC (Mitting J presiding) in *Abu Hamza v SSHD* (SC/23/2003). At [5] of its judgment, the Commission noted that counsel for the appellant had accepted in his closing submissions that it was necessary for the appellant to establish on a balance of probabilities that he would be made *de jure* stateless by the deprivation order. The judgment continued:

> "As to the burden and standard of proof, we are satisfied that the burden is on the Appellant and that he must prove that he would be made stateless on the balance of probabilities. The prohibition on making a deprivation order if it would make a

> person stateless is an exception to the general power of the Secretary of State to make the order, if the conditions set out in s40 are satisfied. Conventional statutory construction requires that a person who seeks to establish the existence of an exception to a general power must prove it.
>
> …
>
> Finally, as our analysis of the material in this case demonstrates, it is possible even in a difficult and unusual case, to apply the conventional civil standard of proof without injustice."

57. This analysis as to why the appellant's counsel's concession was correct was approved by Richards LJ in this Court in *Al-Jedda v SSHD* [2012] EWCA Civ 358 at [122] noting that the issue of where the burden of proof lay was not in issue in that case.

58. However, in *Hashi v SSHD* [2016] EWCA Civ 1136, the question of where the burden of proof lay on the issue of statelessness was in issue and the issue was fully argued. Accordingly, although what Longmore LJ said at [23] and [24] (quoted at [32] above) is strictly *obiter*, it is a statement of principle made after full argument. In my judgment, it is a correct statement of principle. The statutory regime under section 40(4) of the 1981 Act has two stages. As Longmore LJ said at [23], the first stage is that the Secretary of State demonstrates that he is satisfied that the deprivation order will not render the appellant stateless and on that issue the burden is on the Secretary of State. Once that burden is satisfied, at the second stage, if the appellant wishes to establish that nonetheless the deprivation order will render him stateless, the burden of so proving is on the appellant, given that, as SIAC said at [5] of its judgment in *Abu Hamza*, the appellant is alleging that there should be an exception to a general power.

59. This analysis does not detract from the appellant's fundamental rights of citizenship. The fact that, before making a deprivation order the Secretary of State has to be satisfied that the order will not render the appellant stateless requires a degree of investigation by the Home Office and thus provides a safeguard in respect of those rights. I would respectfully disagree with the suggestion of Lord Wilson JSC in *Al-Jedda v SSHD* [2013] UKSC 62; [2014] AC 253 at [30] that "satisfied" in section 40(4) may not sensibly be afforded any significance at all. Although, as Longmore LJ said in *Hashi*, it will be a comparatively easy burden for the Secretary of State to discharge to demonstrate that he was so satisfied, this first stage provides a protection for the individual against the arbitrary exercise of the power or, as Mr Southey QC put it, being satisfied at the first stage is a condition precedent to the exercise of the power.

60. In *G3 v SSHD* (SC/140/2017) at [15], SIAC (Lane J presiding) stated that:

> "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."

However, it does not appear that either *Abu Hamza* or *Hashi* was cited. Neither case is referred to in the judgment. To the extent that the judgment suggests that the burden of proof in relation to the issue of statelessness at the second stage is on the Secretary of State, I consider that it was wrongly decided.

61. *KV (Sri Lanka) v SSHD* [2018] EWCA Civ 2483 was not a case under section 40(2) of the 1981 Act but section 40(3) where the Secretary of State made a deprivation order on the ground that naturalisation had been obtained by fraud. As Leggatt LJ pointed out at [24] of his judgment, there is no similar requirement to establish that the person concerned would not be rendered stateless before a deprivation order is made under section 40(3). Accordingly, he held that the reasoning in *G3* did not apply to a decision under that sub-section. We were told by Mr Southey QC, who appeared for the appellant in that case, that *Hashi* was cited to the Court of Appeal. There is no suggestion in the judgment of Leggatt LJ that *Hashi* was wrongly decided.

62. Mr Southey QC argued in that case that statelessness was nonetheless still relevant to the issue whether the order was proportionate and that the burden was on the state to establish that interference with a right was proportionate. That argument was rejected by this Court, which decided that the burden of proving statelessness in this context was on the appellant. As Leggatt LJ said at [26]:

> "I see no reason why, before depriving a person of citizenship on the ground that his naturalisation as a citizen was obtained by fraud, the Secretary of State should be required to investigate whether that person has, or previously had, another nationality. If a person who has been shown to have obtained citizenship by fraud wishes to argue that he should nevertheless not be deprived of his citizenship because this would have further particular adverse consequences in his case over and above the loss of citizenship itself, then it seems to me that the burden must lie on him to identify and prove the further consequences on which he seeks to rely. That includes any assertion that the person will be made stateless."

In my judgment, there is nothing in the decision of this Court in *KV* which is of any assistance to the argument of Mr Southey QC in the present case.

63. Finally in the line of authority is the decision of SIAC (Garnham J presiding) in *R3 v SSHD* (SC/150/2018), where judgment was handed down a few weeks after the judgment of SIAC in the present case. In that case, SIAC referred to both *Hashi* and *KV*. It noted that *Hashi* had been cited in *KV* which had said nothing to indicate that *Hashi* had been decided *per incuriam* (as Mr Southey QC was contending in *R3*, a contention which was repeated, albeit somewhat faintly, in his skeleton argument on the present appeal, but not repeated orally). SIAC considered, at [27] of its judgment, that the decision in *KV* did not mandate a different conclusion to that in *Hashi*.

64. At [28] SIAC concluded:

> "In our judgment, the law remains as stated by Longmore LJ in *Hashi*; should it matter, we would hold that the burden of proof, once the Secretary of State has shown, as she has in this case, that she was satisfied that the Appellant would not be made stateless by the decision, falls on the Appellant who must show that in fact he has been rendered stateless."

In my judgment, that is a correct statement of the law.

65. In the present case, as I have already noted, there were three places in the judgment, (at [34], [67] and [90]), where SIAC erroneously stated that the burden of proof on the issue of statelessness was on the Secretary of State. That error was not sufficiently cured by the subsequent conclusion at [100] that the burden was generally on E3 and N3, given that SIAC went on to conclude that, in relation to the *Note Verbale*, the burden of proof was on the Secretary of State. These paragraphs of the judgment demonstrate a confused and inconsistent approach to the burden of proof.

66. In any event, having stated that generally the burden of proof was on the appellants in relation to the issue of statelessness, SIAC erred in concluding that nonetheless, in relation to the *Note Verbale*, the burden of proof switched to the Secretary of State. As Mr Sheldon QC said, many of the cases involve a "mixed bag" of evidence from a variety of sources adduced by both the appellants and the Secretary of State, including evidence of practice. For example, in both *Al-Jedda* and *Hashi* there was evidence of practice, but there is no suggestion in the judgments in either case that the burden of proof on the issue of statelessness shifted depending upon who adduced the particular evidence of practice.

67. Contrary to the view of SIAC in the present case, the decision of the Court of Appeal in the *Estonian State Steamship Line* does not support the approach to the burden of proof which SIAC adopted. In that case, the defendants (a company formed under Soviet legislation) claimed absolute title to insurance monies as assignee of the state of Estonia, under what were in effect Soviet expropriation laws. There was an issue on an interpleader as to whether those laws had the effect for which the defendants contended. However, the defendants called no evidence of the relevant foreign law. The judgment of Scott LJ reiterates the well-established principle that, in English courts, foreign law is a matter of fact which must be pleaded and proved by the party who asserts the relevant principle of foreign law. That is no more than the application of another well-established principle, that he who asserts must prove. It does not support the conclusion reached by SIAC that, in the context of the issue of statelessness, on which the burden of proof is on the appellant throughout, and in relation to which there will almost inevitably be evidence of the law of the relevant foreign state, as Longmore LJ recognised in *Hashi* at [24], the burden of proof will shift depending upon who adduces a particular piece of evidence of the relevant foreign law.

68. In my judgment, the approach of SIAC in [100] and following of its judgment confuses the legal burden of proof with the evidential burden. Of course, the evidential burden was on the Secretary of State in the sense that if he wished to call evidence on the interpretation of the 2008 Instruction (whether in the form of the *Note*

Verbale or otherwise) it was incumbent on him to do so. However once such evidence was adduced it did not follow that the legal burden of proof which on the issue of statelessness was, as I have concluded, on E3 and N3 throughout, suddenly switched to the Secretary of State in relation to the *Note Verbale*, as SIAC had concluded at [100].

69. In practice, decisions of courts or tribunals rarely turn on where the burden of proof lies. At trial, the court or tribunal simply considers the evidence in the round and decides a particular issue on the balance of probabilities. In relation to the issue of statelessness it would only be if the court or SIAC was in genuine doubt whether deprivation of citizenship would lead to statelessness that the conclusion would be that the appellant's case failed, applying the burden of proof, which is on the appellant. As Longmore LJ said at [24] of *Hashi* such cases are inevitably rare because usually (as in the present case) there will be evidence of the relevant law and the court or SIAC simply decides the case on the evidence.

70. Accordingly, in my judgment, SIAC erred in law in reaching the conclusion it did that the burden of proof in relation to the *Note Verbale* was on the Secretary of State. The burden of proof on the issue of statelessness was on E3 and N3 throughout. This error of law infected the reasoning of SIAC in relation to the *Note Verbale* generally: see for example [32] to [34] of the judgment where the analysis proceeds on the false basis that the burden of proof rests on the Secretary of State and [102] to [108] which proceed on the same false basis.

71. Furthermore, I consider that SIAC also erred in law in mischaracterising the *Note Verbale*. It is clear from both the questions and answers that what is being addressed is application or interpretation of the *law* of Bangladesh. The *Note Verbale* is an official document which complied with all the relevant formalities. For whatever reason, SIAC failed to take account of the level of formality it entailed and disregarded that this was an official response as to the law from the correct ministry of a friendly foreign government. SIAC mischaracterised the *Note Verbale* as being somehow "extra-official" and only evidence of or an opinion about *practice*. I have already referred earlier in the judgment to the fact that Mr Sheldon QC's primary case was that the *Note Verbale* was dealing with application of the law, not practice, which is unsurprising given that nowhere in any of the questions or answers is there any mention of practice. It was essentially at the behest of SIAC, during the course of argument, that there was more focus on practice which had not previously been at the forefront of the case for the Secretary of State.

72. Whether it was because of that mischaracterisation of the *Note Verbale* or its erroneous approach to the burden of proof, SIAC did not consider in any proper sense the primary case for the Secretary of State that the *Note Verbale* was addressing the application or interpretation of Bangladesh law in the 2008 Instruction, notwithstanding that, at [90], SIAC had said that the *Note Verbale* was a hybrid between law and practice. In the paragraphs which follow, SIAC only really analysed the issue of practice.

73. In relation to the question whether the *Note Verbale* was evidence of a settled practice in Bangladesh, I consider that there is force in the argument of Mr Southey QC that SIAC adopted an approach to this question which was over-generous to the Secretary of State and which misinterpreted *Pham*. It is arguable that practice can only be

relevant to the issue of whether the person in question has been rendered *de jure* stateless by operation of law if the practice in question is one which is a form of law and is benevolent towards that person. However, since as set out below, I would propose remitting this case to SIAC, it seems to me preferable not to express a concluded view on that question but to leave it to be determined by SIAC after full argument.

74. It follows that I consider that the appeal should be allowed on the first ground of appeal. In the circumstances it is not necessary to consider the second ground of appeal, which would only arise if the appeal did not succeed on the first ground. So far as the consequences of allowing the appeal are concerned, I do not consider that, despite Mr Sheldon QC's submission to the contrary, it would be appropriate for this Court to substitute its own findings of fact for those of SIAC. In my judgment, the appropriate course is to remit the case to a differently constituted Commission to decide the issue of statelessness, applying the correct approach to the burden of proof, as set out in the present judgment and giving proper consideration to the status and effect of the *Note Verbale*. It will also be open to E3 and N3 before the reconstituted Commission to adduce any evidence upon which they wish to rely suggesting an inconsistency of approach on the part of the Bangladeshi government.

Lord Justice Singh

75. I agree.

Lord Justice Haddon-Cave

76. I also agree.