Neutral Citation Number: [2019] EWHC 1288 (Admin)

Case Nos: CO/5683/2016, CO/5722/2016,
CO/5728/2016 & CO/5729/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 May 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

CO/5683/2016

THE QUEEN
on the application of

HUSSIEN NAGEEB OTHMAN HASSAN — **Claimant**
- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant**

CO/5722/2016

THE QUEEN
on the application of

MOHAMED HASSAN RASHEED HAGI — **Claimant**
- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant**

CO/5728/2016

THE QUEEN
on the application of

ZAHRA ABDULLA MOHAMED JAMA — **Claimant**
- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant**

CO/5729/2016

THE QUEEN
on the application of

AMEEN ABDULLAH MOHAMED **Claimant**
- and -
SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -
- -

Adrian Berry (instructed by **Aden & Co**) for the **Claimants**
Sarabjit Singh QC and Jo Moore (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 2 to 4 April 2019
- -

Approved Judgment

Mrs Justice Lang:

1. Each of the Claimants seeks judicial review of a decision of the Defendant to refuse his or her application for full British citizenship.

2. The Claimants are persons of Somali heritage who, by virtue of their birth in the Crown Colony of Aden, became Citizens of the United Kingdom and Colonies ("CUKCs"). When Aden ceased to be a British Colony in 1967 and became part of South Yemen, they did not acquire South Yemeni nationality, as they were not Arabs, and so they continued to hold British citizenship. Subsequently, the British Nationality Act 1981 reclassified them as British Overseas citizens ("BOCs"). BOC status does not confer any right of abode in the UK.

3. In order to acquire British citizenship with a right of abode, each Claimant applied under section 4B of the British Nationality Act 1981 ("BNA 1981") to be registered as a British citizen, on the basis that they did not have any citizenship or nationality other than their BOC status. The Defendant refused each of their applications, on the ground that, as they were holders of Somali passports, he was not satisfied that they did not have Somali nationality.

4. Each Claimant filed a claim for judicial review in November 2016. On 12 December 2017, I dismissed the Defendant's application to strike out these claims, together with other similar claims. As the claims raised similar issues to each other, I ordered that these four claims should be linked together and heard as lead cases, at a rolled-up hearing. Without intending any disrespect, counsel referred to the Claimants by their first names at the hearing, for ease, and I propose to adopt the same approach in my judgment.

The nationality law framework

Nationality status in the Colony/State of Aden

5. Under s.1(1)(a) of the British Nationality and Status of Aliens Act 1914, any person born within His Majesty's dominions and allegiance was deemed to be a natural-born British subject.

6. Section 4 of the British Nationality Act 1948 ("the 1948 Act") materially stated that:

> "…..every person born within the United Kingdom and Colonies after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by birth."

7. By virtue of s.12(1)(a) of the 1948 Act, a person who was a British subject immediately before the commencement of the 1948 Act became a CUKC on commencement if he was born within the territories comprised at commencement in the United Kingdom and Colonies and would have been a CUKC if section 4 of the 1948 Act had been in force at the time of his birth.

8. The Colony of Aden was a Crown colony as at 1 January 1949, which was the date of commencement of the 1948 Act. So from 1 January 1949, every person born in the Colony of Aden became a CUKC.

9. The Colony of Aden became the State of Aden within the British Protected Federation of South Arabia on 18 January 1963. It continued to be a British colony until independence.

The People's Republic of Southern Yemen

10. The State of Aden became part of the independent state of the People's Republic of Southern Yemen (also known as South Yemen) on 30 November 1967. In 1989, South Yemen unified with the former Yemen Arab Republic (North Yemen) to create the Republic of Yemen.

11. The Aden, Perim and Kuria Muria Islands Act 1967 ("the 1967 Act") provided for the relinquishment of UK sovereignty over *inter alia* Aden. Paragraph 1(1) of the schedule to the 1967 Act headed "Change of citizenship" stated that:

> "Except as provided by the following provisions of this Schedule, any person who, on such date as may be specified in an order made by the Secretary of State -
>
> (a) in consequence of his connection with a territory designated by the order, possesses any such nationality or citizenship as may be specified by the order, whether he acquired that nationality or citizenship before that date or acquires it on that date, and
>
> (b) immediately before that date is a citizen of the United Kingdom and Colonies,
>
> shall on that date cease to be a citizen of the United Kingdom and Colonies."

12. The relevant "order" referred to in the 1967 Act that was made by the Secretary of State was the British Nationality (People's Republic of Southern Yemen) Order 1968 ("the 1968 Order"), which provided that:

> "For the purposes of paragraph 1 of the schedule to the Aden, Perim and Kuria Muria Islands Act 1967 (which provides, subject to exceptions, for the loss, on such date as may be specified by order, of citizenship of the United Kingdom and Colonies by a person possessing on that date such nationality or citizenship as is so specified by reason of his connection with a territory designated by the order) -
>
> (a) the People's Republic of Southern Yemen shall be a designated territory;

> (b) in relation thereto the specified nationality shall be Southern Yemeni nationality, and;
>
> (c) in relation thereto the specified date shall be 14th August 1968."

13. The effect of the 1968 Order was that any person who possessed South Yemeni nationality in consequence of his connection with the People's Republic of Southern Yemen on 14 August 1968, and was a CUKC immediately before 14 August 1968, ceased to be a CUKC on 14 August 1968.

14. The question whether a person possessed Southern Yemeni nationality on 14 August 1968 has to be answered by reference to Southern Yemen nationality law. Article 1 of the People's Republic of Southern Yemen 'South Yemen' Law of Nationality 1968 (No 4), which came into force on 4 August 1968, materially provided that:

> "The following expressions in this law shall have the following meanings...
>
> (b) 'Republic': the People's Republic of Southern Yemen...
>
> (e) 'Arab': any person belonging to the Arab nation and holding the nationality of any Arab state."

15. Article 2 of Southern Yemen's nationality law provided that:

> "The following shall be considered Southern Yemeni by birth...
>
> (b) any Arab born in the Republic, provided that one or both of his parents has resided in the Republic for at least five years."

16. Following the settlement of the judicial review claim in *R (Botan) v Secretary of State for Foreign and Commonwealth Affairs* CO/1484/2009, the Defendant did not dispute that Somalis born in Southern Yemen were not considered Arab under Articles 1(e) and 2(b) and so did not automatically become Southern Yemenis from 4 August 1968, the date Southern Yemen's nationality law was applied by the 1968 Order. That meant that for the purposes of the 1968 Order, they did not, as a matter of birth, possess Southern Yemeni nationality on 14 August 1968. Therefore, unless they acquired Southern Yemeni nationality some other way, such as by registration on or before 14 August 1968, they did not cease to be CUKCs on 14 August 1968.

The British Nationality Act 1981 and British Overseas Citizens

17. A CUKC who lacked a right of abode in the UK or equivalent right in a remaining British Dependent Territory was re-classified as a BOC from 1 January 1983, by virtue of s.26 of the BNA 1981. Accordingly, all Somalis born in Aden on or before 14 August 1968 who had not acquired Southern Yemeni nationality on or before that date became BOCs from 1 January 1983.

18. BOCs are entitled to apply for a British passport and to request consular protection from the UK Government when travelling abroad. However, they have no right of abode in the UK. Acquisition of citizenship of another country does not result in the loss of British Overseas citizenship.

Section 4B of the British Nationality Act 1981

19. Section 4B BNA 1981 was added by amendment in 2002, to address the difficulties faced by those who had lost full British citizenship under the BNA 1981 and were not eligible for citizenship of any other nation. It provides:

> "4B. Acquisition by registration: certain persons without other citizenship
>
> (1) This section applies to a person who has the status of –
>
> (a) British Overseas Citizen
>
> (b)British subject under this Act,
>
> (c)British protected person, or
>
> (d)British National (Overseas).
>
> (2) A person to whom this section applies shall be entitled to be registered as a British Citizen if –
>
> (a) he applies for registration under this section,
>
> (b) the Secretary of State is satisfied that the person does not have, apart from the status mentioned in subsection (1), any citizenship or nationality, and
>
> (c) the Secretary of State is satisfied that the person has not after the relevant day renounced, voluntarily relinquished or lost through action or inaction any citizenship or nationality.
>
> (3) For the purposes of subsection 2(c), the "relevant day" means –
>
> …
>
> (b) in any other case, 4 July 2002."

20. Thus, when considering an application for full British citizenship by a BOC under section 4B BNA 1981, the Secretary of State must be satisfied that the applicant neither has, nor has renounced or relinquished, any other citizenship or nationality.

Somali nationality law

21. In *R (Vullnet Mucelli) v Secretary of State for the Home Department* [2012] EWHC 95 (Admin), the Divisional Court held that the court's assessment of foreign law should be based upon on an evaluation of expert evidence on the law in question (per Cranston J. at [50]).

22. The Claimants submitted an expert's report in support of their applications, dated 15 August 2012. The report was prepared by Mr Casey Kuhlman, who qualified as a lawyer in the USA, and is a senior partner of Watershed Legal Services Ltd. a law firm with its headquarters in Hargeisa, capital of the Republic of Somaliland, which operates throughout the Somali region.

23. The Defendant relied upon an expert's report from an advocate, Mr Mohamed Said Hersi. This report was only disclosed after the decisions had been made, in the course of this litigation. It is undated.

The Constitution of the Somali Republic 1960

24. Mr Hersi referred to 'The Constitution of the Somali Republic' which came into force on 1 July 1960. Article 2 made provision for citizenship in the following terms:

> "**Article 2**
>
> *The People*
>
> 1. The people consists of all the citizens.
>
> 2. The manner of acquiring and losing citizenship shall be established by law.
>
> ……"

25. The Constitution provided for the acquisition of citizenship to be determined by a subsequent law, so individual Somalis did not acquire citizenship under the Constitution, when read alone.

Law of Somali Citizenship 1962

26. The citizenship provisions in the constitution were implemented by the Law of Somali Citizenship (Law No. 28 of 22 December 1962) ("the 1962 Law"). It came into force until 21 January 1963. It provides, so far as is material:

> "**Article 1.** ***Acquisition of Citizenship***
>
> Somali citizenship may be acquired by operation of law or by grant
>
> **Article 2**. ***Acquisition of Citizenship by Operation of Law***

Any person:

a) whose father is a Somali citizen;

b) who is a Somali residing in the territory of the Somali Republic or abroad and declares to be willing to renounce any status as citizen or subject of a foreign country

shall be a Somali Citizen by operation of law.

Article 3. ***Definition of "Somali"***

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

Article 4. ***Acquisition of Citizenship by Grant***

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

a) he has established his residence in the territory of the Somali Republic for a period of at least seven years;

b) he is of good civil and moral conduct;

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

…

Article 6. ***Renunciation of Foreign Citizenship***

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

2. A certificate that the declaration has been made shall be issued in two copies, one of which shall be delivered to the person concerned.

3. In the case provided for in paragraph b) of article 2, if the person concerned is a minor, the declaration may be made by his legal representative.

…

Article 18. ***Citizenship Previously Acquired***

> Any person who, at the date of the entry into force of this law, had acquired Somali citizenship under the provisions of previous legislation, shall retain his citizenship for all purposes."

27. The Somali Citizenship Regulations 1963 (Decree of the President of the Republic No. 129 of 19 February 1963) further provide (so far as is material):

> "**Article 1.** ***Acquisition of Citizenship by Operation of Law by Birth***
>
> 1. The child of a Somali citizen shall automatically acquire Somali citizenship by birth.
>
> 2. The acquisition of citizenship by birth shall be entered in the records by the Officer in charge of the Registry of births upon notification of the birth of a child.
>
> **Article 2.** ***Acquisition of Citizenship by Operation of Law by nationality***
>
> 1. Apart from the cases provided for in the preceding article, a Somali who is not a citizen and intends to acquire citizenship under article 2 (b) of the Law, may apply in writing or orally to the competent District Commissioner or, in the case of a Somali residing abroad, to a Consulate of the Somali Republic.
>
> 2. In the first case referred to in the preceding paragraph, the District Commissioner, after satisfying himself as to the regularity of the application and the identity of the applicant, shall forward the documents to the President of the District court territorially competent. The President of the Court shall certify the declaration of the person concerned that he renounces any status as citizen or subject of a foreign country under article 6 of the Law. He shall transmit the certified declaration and the other documents to the District Commissioner and shall issue a copy of ·the certificate to the applicant. The District Commissioner shall, through the proper channel, forward the records together with his own report to the Ministry of Interior.
>
> 3. In the second case referred to in paragraph 1 above, the Consular Agent, after satisfying himself as to the regularity of the application and the identity of the applicant, shall certify the declaration of the person concerned that he renounces any status as citizen or subject of a foreign country and transmit the certified declaration and the other documents together with his own report, through the proper channel, to the Ministry of Interior, and issue a copy of the certificate to the applicant.

> 4. The Ministry of Interior, after verifying the regularity of the documents, shall enter in a register kept for the purpose the names of persons who have acquired citizenship under article 2 (b) of the Law."

28. Both experts agreed that, under the 1962 Law, Somali citizenship is acquired by operation of law under article 2 or by grant under article 4.

29. It was common ground that only one of the Claimants (Ameen) could meet the condition of residence to acquire citizenship by grant under article 4 of the 1962 Law. The other three Claimants had not established residence in the Somali Republic.

30. Under article 2(a) of the 1962 Law, Somali citizenship is acquired by operation of law, by descent through the male line only, to any person whose father is a Somali citizen. Neither the place of birth nor the place of residence is material. In order for citizenship to be passed by descent to the Claimants under this provision, there had to be an original grant of citizenship. Having regard to the relevant dates, this meant that a Claimant's father had to have acquired Somali citizenship, either by declaration under article 2(b) of the 1962 Law, or by retaining the Somali citizenship which he had acquired under earlier legislation.

31. Under article 2(b) of the 1962 Law, Somali citizenship is acquired by operation of law if a Somali (defined as a person who, by origin, language or tradition belongs to the Somali nation) declares that she or he is willing to renounce any status or subject of a foreign country. Article 6 of the 1962 Law and article 2 of the Citizenship Regulations set out the procedure for renouncing foreign citizenship, either by declaration to a District Commissioner and District Court in Somalia, or to a Consular Agent in a Consulate of the Somali Republic. In both cases, a copy of the certified declaration is to be provided to the applicant, and the original filed at the Ministry of Interior.

Citizenship legislation prior to the 1962 Law

32. In addition, by article 18 of the 1962 Law, those Somalis who had acquired citizenship under previous legislation retained their citizenship and became Somali citizens under the 1962 law. Despite the guidance in *Mucelli* that foreign law should be interpreted by the experts, not the advocates or the court, the Claimant's expert did not refer to these provisions and the Defendant's expert's description of them was unclear. So I am very grateful to Mr Berry for analysing them more fully for the Court.

33. The new state of Somalia was formed in 1960 by a union between the territory that had previously been British Somaliland and the territory that had previously been administered by the Republic of Italy, as a trust territory of the United Nations. This case only concerns individuals whose family originated from British Somaliland, and so there is no need to consider the legislation made in Somalia whilst administered by Italy.

34. British Somaliland was a British Protectorate, not a Colony, and so its inhabitants were not Citizens of the UK and Colonies. They only had the status of British

Protected Persons. When British Somaliland ceased to be a British Protectorate in 1960, the status of British Protected Person was lost.

The Somaliland Nationality and Citizenship Ordinance 1960

35. On 23 June 1960, the Governor of British Somaliland made on behalf of the Crown, the Somaliland Nationality and Citizenship Ordinance 1960 ("the 1960 Ordinance"), which came into force upon the date of independence, namely, 26 June 1960. It was repealed by article 17 of the Law of 1962. It provided:

> "**Nationality on coming into operation of this Ordinance**
>
> 3. Upon the coming into operation of this Ordinance every Somali who does not then possess any other nationality or citizenship, and
>
> (a) who was born in the Territory of Somaliland; or –
>
> (b) whose father (or in the case of an illegitimate child whose mother) was born in the said Territory,
>
> shall become a citizen of Somaliland."
>
> **Nationality after coming into operation of this Ordinance**
>
> 4. After the coming into operation of this Ordinance every Somali who shall be born –
>
> (a) in the Territory of Somaliland; or
>
> (b) of a father (or in the case of an illegitimate child, of a mother) who is a citizen of Somaliland at the time of the child's birth,
>
> shall be a citizen of Somaliland.
>
> **Application for registration a citizen of Somaliland**
>
> 5. (1) Any Somali born before the coming into operation of this Ordinance who has not acquired citizenship under section 3 hereof notwithstanding that he possesses the qualifications set out in paragraph (a) or (b) thereof may apply for registration as a citizen of Somaliland provided that:
>
> (i) at the time of his application he has normally resided in the Territory of Somaliland for a continuous period of twelve months immediately prior to such application; and
>
> (ii) he intends to continue normally to reside in the said Territory; and

> (iii) either
>
> (a) he has prior to making such application renounced or
>
> (b) he will within six months of the grant to him of such application, renounce … such other nationality or citizenship as he may possess …. ."

36. Somalis who had British citizenship by virtue of being born in the Crown Colony of Aden, would not have been eligible for Somali citizenship under article 3 of the 1960 Ordinance, as they possessed "another nationality or citizenship". Thus, dual citizenship prevented those Claimants who were alive between June 1960 and January 1963 (the period of operation of the 1960 Ordinance), and who had fathers born in Somaliland, from becoming Somali citizens under article 3. The Claimants' fathers would also have been prevented from acquiring Somali citizenship under article 3, if they also possessed British citizenship.

37. During the period of operation of the 1960 Ordinance, citizenship could only be acquired under article 4 of the 1960 Ordinance by Somalis who were born in Somaliland or whose father was a citizen of Somaliland at the time of his or her birth. The Claimants did not meet these conditions.

38. Article 5, which provided for citizenship by registration, included a condition of residence in Somaliland, which only one of the Claimants (Ameen) could meet.

The Transitional Federal Charter of Somalia 2004 and the Constitution of Somalia 2012

39. The Transitional Federal Charter of Somalia ("the Charter") was adopted in 2004 and recognised for the first time the right of Somali citizens to hold dual citizenship, in article 10. It also provided that a revised law of citizenship should be passed within 12 months. However, the necessary legislation was never made, and so the 1962 Act still remains in force.

40. The current Constitution of Somalia, made in 2012, confirms the right of Somali citizens to hold dual citizenship, in article 8. However, as with the Charter, the necessary legislation has not yet been enacted, and the 1962 Law is still in force. By article 139 of the Constitution, all laws in force as at the effective date continue to be in force and shall be construed and applied with such alterations, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution until such time as such laws are amended or repealed.

41. Mr Hersi's opinion was that, despite the acceptance in principle of dual nationality, the change in the law had not been implemented, and so he applied the 1962 Law without amendment to the facts of the individual cases.

Somali Passport Law (Law No. 21 of 1970)

42. Mr Hersi's report said that article 4 paragraph 1 of the Somali Passport Law (Law No. 21 of 1970) provides:

> "An ordinary passport may, except provision of article 5, be issued on request to any Somali citizen."

However, the authorities may withdraw the passport under article 7 if it is later discovered that a holder is not a Somali citizen. Article 7 provides:

> "An issuing authority may withdraw the passport even if still valid, when the holder no longer possesses all the conditions required [for] its issue."

The Claimants' applications

43. I have summarised below the material which the Claimants submitted to the Defendant in support of their applications, and which the Defendant already had available from earlier applications for BOC passports. I have not included the additional material which the Claimants produced for the purposes of these claims, as it was not available to the Defendant when he made his decision, and so he could not be expected to take it into account.

44. In his expert report, Mr Kuhlman gave an account of the difficulties which an applicant was likely to have in obtaining copies of citizenship records in Somalia, because of the civil war. Citizenship declarations were meant to be held in the District Courts, but many of the courts were not functioning. Even where they were functioning, records prior to 1990 had been lost or destroyed.

45. Mr Kuhlman's evidence was that under Somali law, possession of a passport had no relationship to a person's citizenship, which was separate and distinct under Somali law. This sentence was ambiguous. It was clear in the light of Mr Hersi's evidence that there was a separate Somali passport law (Somali Passport Law No. 21 1970) but only Somali citizens were eligible for passports, as one would expect. It is possible that in this sentence Mr Kuhlman was making a reference to his earlier evidence about the easy availability of Somali passports. His evidence was that it was not difficult to obtain a passport from the Ministry of the Interior in Mogadishu. It could be obtained by completing an application form and acquiring the appropriate certificates from the Ministry of the Interior. When asked how difficult it was for an ethnic Somali to obtain a passport at the Consulate Section of a Somali Embassy abroad, he answered that it was "a routine and simple matter for an ethnic Somali to obtain a passport. Simply by looking the part and speaking the language a person can obtain a passport after paying the necessary fees."

46. Mr Kuhlman also gave evidence that false passports were easily available for purchase in Somalia, though not in Somaliland after it became independent.

47. Mr Kuhlman's evidence about passports was confirmed by a report issued by the Immigration and Refugee Board of Canada on 29 July 2004. It quoted an Operational Guidance Note on Somalia issued by the Defendant in May 2004, to the effect that, following the civil war and the collapse of the government, official records were no longer being kept and previous records had been destroyed. It reported widespread forgery of passports, which could readily be purchased from the market in Mogadishu. Little weight could be attached to any Somali passports and they should

not be accepted as sole proof of identity or nationality. As of July 2003, the UK ceased to accept Somali passports as valid travel documents. Other countries also refused to accept them.

Zahra Abdulla Mohammed Jama ("Zahra")

48. Zahra's application to register as a British citizen was made on 21 February 2013.

49. Zahra was born in the British Colony of Aden on 24 January 1956. Her birth was registered on 30 January 1956 and she was issued with a Colony of Aden birth certificate.

50. Her Colony of Aden birth certificate records that her parents were of Somali ethnicity. Her father was born in British Somaliland in 1914 and her mother was born in British Somaliland in 1936. Both her parents migrated to Aden from British Somaliland. Her maternal and paternal grandparents were born in British Somaliland, as Mr Hersi's report noted.

51. When Aden became part of South Yemen, in 1967, Zahra continued to live there, but she did not acquire Southern Yemeni citizenship. This was confirmed in a letter from the Ministry of Foreign Affairs, Republic of Yemen, dated 25 June 2013.

52. Zahra left Aden permanently in 1985 and moved to the United Arab Emirates ("UAE"), where she continues to reside. She has not acquired citizenship of the UAE. This was confirmed in a letter from the Ministry of Foreign Affairs in the UAE, dated 13 November 2012.

53. Zahra first obtained a Somali passport from the Somali Consulate in Aden in order to travel to the UAE in 1985. She stated that she obtained her first passport by showing them her mother's passport, which included her name and date of birth. She also produced her birth certificate. Since then she has held a succession of Somali passports. She produced three Somali passports to the Defendant.

54. Zahra also produced a letter, dated 18 December 2012, signed and sealed, from the Consular Section of the Somali Embassy in Abu Dhabi which stated that she "was not a Somali national in accordance with the definition in the Somali citizenship law No. 28 of 22/1262 and that issuing her Somali Passport occurred in error". The letter went on to say:

> "This declaration was given according to the personal request of Mrs Zahra Abdulla Mohamed Jama, holder of British Overseas Passport No. 504862501 without any liability on this Embassy towards the rights of others."

55. Zahra's solicitors informed the Defendant that Zahra produced her BOC passport to the Somali Embassy. In her evidence to this Court, Zahra has added that she also produced her Colony of Aden birth certificate and a recently expired Somali passport.

56. In 2012, Zahra successfully applied for a BOC passport from the Defendant. The records of this application were available to the Defendant. She was required to provide proof of her identity and her place of birth and she produced her Colony of

Aden birth certificate, together with her Somali passport, her school certificate, and her parents' wedding certificate. She was also interviewed by British Embassy officials, in accordance with usual practice.

57. The submission made on Zahra's behalf, based on Mr Kuhlman's expert evidence, was that in order to become a Somali citizen, she would have had to declare, under article 2(b) of the 1962 Law, that she was willing to renounce any status as citizen or subject of a foreign country, as dual nationality was not permitted. She had never made any such declaration, and throughout her life she had been a British national. By virtue of her birth in the Colony of Aden, she was a CUKC, and after the BNA 1981, her status changed to that of a BOC. Her status as a BOC was confirmed by the grant of her BOC passport in 2012.

58. Alternatively, she could in theory have acquired Somali citizenship through her father, under article 2(a) of the 1962 Law, but only if her father had applied for Somali citizenship under article 2(b) of the 1962 Law, and made the required declaration. However, Zahra stated that her father had never done so.

59. Mr Hersi substantially agreed with Mr Kuhlman's evidence. He said that, in the absence of any proof that her father was a Somali citizen, or that she had applied for citizenship, she could not be considered a Somali citizen. The fact that her father was born in Somalia and that she had been issued with Somali passports was not sufficient.

Hussien Nageeb Othman Hassan ("Hussien")

60. Hussien applied to register as a British citizen on 29 January 2014.

61. He was born in the Colony of Aden on 4 February 1962. His birth was registered on 4 February 1962 and recorded in a Colony of Aden birth certificate. The certificate gave the names of his parents and recorded that they were of Somali ethnicity.

62. His father was born in British Somaliland in 1927, and his mother was born in British Somaliland in 1938. They both migrated to Aden. His maternal grandfather and paternal grandparents were all born in the Colony of Aden.

63. When Aden became part of South Yemen, in 1967, Hussien did not acquire Yemeni nationality. This was confirmed in a letter from the Ministry of Foreign Affairs, Republic of Yemen, dated 7 November 2013.

64. Hussien and his family left Aden and moved to the UAE in 1976, when he was aged 13. He has never acquired citizenship of the UAE. Although he was unable to obtain a letter to that effect, he has produced a series of residence permits and a departure permit, enabling him to leave the UAE without incurring penalties for overstaying. Such documents are evidence that he is not a UAE citizen.

65. In order to travel from Aden to the UAE, Hussien's mother obtained for him a Somali Lascia Passare, through the Somali Ambassador. In the UAE, he attended at the Consulate of the Somali Embassy with his family, and obtained a Somali passport, on

the basis of the Lascia Passare. Thereafter he has held a succession of Somali passports. He supplied three of these to the Defendant.

66. Hussien produced a letter, dated 6 January 2013, signed and sealed, from the Consular Section of the Somali Embassy in Abu Dhabi which stated that he was not a Somali national in accordance with the definition in the Somali citizenship law No. 28 of 22/1262, and that a Somali Passport had been issued to him in error. The letter went on to say:

> "This declaration was given according to the personal request of Mr Hussien Nageeb Othman Hassan, holder of British Overseas Passport No. 511191023 without any liability on this Embassy towards the rights of others."

67. Hussien's solicitors informed the Defendant that he produced his BOC passport to the Somali Embassy. In his evidence to this Court, Hussien has added that he also produced his Colony of Aden birth certificate and UAE driving licence.

68. In 2012, Hussien was issued with a BOC passport by the Defendant. He was required to provide proof of his identity and his place of birth and he produced his Colony of Aden birth certificate, together with four Somali passports, school certificates, medical cards etc. He was also interviewed by British Embassy officials, in accordance with usual practice.

69. In the course of the litigation, the Defendant has produced immigration records which showed that Hussien's father moved to the UK in the 1960s and died there in 1991, abandoning Hussien, his mother and siblings. Hussien had previously stated that he died in Aden in 1969. The Defendant also disclosed material relating to Hussien's visits to the UK in the 1980s and his unsuccessful applications for leave to remain with his father in the UK. However, none of this material was taken into account by the Defendant when making his decision on the application for citizenship.

70. The submission made on Hussien's behalf, based on Mr Kuhlman's expert evidence, was that as he had been born in the Colony of Aden, prior to independence, he was a CUKC. Although his father was born in British Somaliland, he was a CUKC by descent as his father (Hussien's paternal grandfather) was born in Aden. Following the BNA 1981, Hussien became a BOC, as confirmed by his BOC passport.

71. Because of the bar on dual citizenship, Hussien could only have acquired Somali citizenship under article 2(b) of the 1962 Law if he had declared that he was willing to renounce his British citizenship. He stated he had never made any such declaration. Alternatively, under article 2(a) of the 1962 Law, Hussien could only acquire Somali citizenship through his father if his father was a Somali citizen. However, Hussien stated that his father had never become a Somali citizen. This would have required him to make a declaration and to renounce his British citizenship, which he did not do.

Mohamed Hassan Rasheed Hagi ("Mohamed")

72. Mohamed applied to register as a British citizen on 1 November 2012.

73. Mohamed was born in the Colony of Aden on 3 March 1964. His birth was registered on 4 March 1964 and recorded in a Colony of Aden birth certificate.

74. The birth certificate recorded the names of his parents and that they were of Somali ethnicity. His father was born in Aden on 15 March 1924, and his mother was born in Somaliland on 20 March 1932. His paternal grandfather was born in Aden, and his other grandparents were born in British Somaliland.

75. Mohamed lived in Aden until 1993. When Aden became part of South Yemen, in 1967, Mohamed did not acquire Southern Yemeni citizenship. This was confirmed in a letter from the Ministry of Foreign Affairs, Republic of Yemen, dated 20 May 2009.

76. In 1993, Mohamed moved to the UAE where he has lived ever since. He has not acquired citizenship of the UAE. This was confirmed in a letter from the Ministry of Foreign Affairs in the UAE, dated 27 May 2012.

77. In 1978, Mohamed's father helped him to obtain his first Somali passport from the Consulate at the Somali Embassy in Aden. As he was a child, he did not know which documents were supplied by his father to obtain the passport. Thereafter he has had a succession of Somali passports, four of which he provided to the Defendant.

78. Mohamed produced a letter, dated 18 November 2012, signed and sealed, from the Consular Section of the Somali Embassy in Abu Dhabi which stated that he was not a Somali national in accordance with the definition in the Somali citizenship law No. 28 of 22/1262, and that a Somali passport had been issued to him in error. The letter went on to say:

> "This declaration was given according to the personal request of Mr Mohamed Rasheed Hassan Hagi, holder of British Overseas Passport No. 501312829 without any liability on this Embassy towards the rights of others."

79. Mohamed produced his BOC passport and birth certificate to the Somali Embassy.

80. The submission made on Mohamed's behalf, based on Mr Kuhlman's expert evidence, was that as he had been born in the Colony of Aden, prior to independence, he was a CUKC. Mohamed was also a CUKC by descent, as his father was a CUKC, by virtue of his birth in Aden. Following the BNA 1981, Mohamed became a BOC, as confirmed by his BOC passport.

81. Because of the bar on dual citizenship, Mohamed could only have acquired Somali citizenship under article 2(b) of the 1962 Law if he had declared that he was willing to renounce his British citizenship. He stated he had never made any such declaration. Alternatively, under article 2(a) of the 1962 Law, Mohamed could only acquire Somali citizenship through his father if his father was a Somali citizen. However, Mohamed stated that his father had never become a Somali citizen. This would have required him to make a declaration and to renounce his British citizenship, which he did not do.

82. Mr Hersi substantially agreed with Mr Kuhlman's evidence. He said that, as both Mohamed and his father were born outside of Somali territory, there was insufficient

proof that they had acquired Somali citizenship by operation of law or by grant, on the basis that a Somali passport had been issued.

Ameen Abdullah Mohamed ("Ameen")

83. Ameen applied to register as a British citizen on 23 February 2013.

84. Ameen was born on 25 December 1962 in the Colony of Aden. His birth was registered on 28 December 1962 in a Colony of Aden birth certificate. The birth certificate recorded the names of his parents and that they were of Somali ethnicity. His father was born in Aden in 1925 and his mother was born in British Somaliland in about 1942. His grandparents were born in British Somaliland.

85. Ameen left Aden with his parents in 1964 when the family relocated to Somaliland. Between 1990 and 2009, he was travelling as a crew member for Gallad Airlines, a cargo air company operating between Somalia and the UAE. He did not require a passport to enter the UAE as crew members were permitted to enter and exit from the UAE on a special manifest. In 2009 Ameen obtained a residence permit to live in the UAE and moved to live in Dubai.

86. Ameen was issued with a BOC passport in 2005. It was renewed in 2009 and again in 2017. In the application letter, his solicitor stated that he produced a Somali passport when he first applied for his BOC passport, but it was not genuine. He purchased a false passport in Hargeisa to use as an identity document.

87. Ameen produced a signed and sealed letter from the Consular Section of the Somali Embassy in Abu Dhabi, dated 18 February 2013 which stated that he was not a Somali national in accordance with the definition in the Somali citizenship law No. 28 of 22/1262. The letter went on to say: "as per our records, he has not been issued a Somali passport". It concluded:

> "This declaration was given according to the personal request of Mr Ameen Mohamed Abdulla, holder of British Overseas Passport No. 039910442 without any liability on this Embassy towards the rights of others."

88. Ameen's solicitors informed the Defendant that he had shown the Consulate his BOC passport.

89. The submission made on Ameen's behalf, based on Mr Kuhlman's expert evidence, was that as he had been born in the Colony of Aden, prior to independence, he was a CUKC. His father was also born in Aden, and so Ameen was a CUKC by descent as well. Following the BNA 1981, Ameen became a BOC, as confirmed by his BOC passports.

90. Because of the bar on dual citizenship, Ameen could only have acquired Somali citizenship under article 2(b) of the 1962 Law if he had declared that he was willing to renounce his British citizenship. Even if he applied for citizenship by grant under article 4 of the 1962 Law, on the basis of long residency, he would also have had to renounce his British citizenship. He stated that he had never taken out Somali

citizenship nor made any declaration that he was willing to renounce his British citizenship or status.

91. Alternatively, under article 2(a) of the 1962 Law, Ameen could only acquire Somali citizenship through his father if his father was a Somali citizen. However, Ameen stated that his father had never become a Somali citizen. This would have required him to make a declaration and to renounce his British citizenship, which he did not do.

92. Mr Hersi substantially agreed with Mr Kuhlman's evidence. He said that, as both Ameen and his father were born outside Somali territory (in Aden), there was insufficient evidence that Ameen had acquired Somali citizenship by operation of law or by grant.

The Defendant's decisions

93. The Defendant's decision letters for each Claimant were in very similar terms. The contents of the letters may be summarised as follows:

i) Based on the information presented, it did not appear possible to conclusively establish that the Claimant acquired Somali citizenship by operation of law, but conversely, nor was it possible to conclude that (s)he did not.

ii) It was suggested that, in the absence of a formal record or knowledge of a declaration having been made under the 1962 Law, the Claimant was not a Somali citizen. However, the Claimant's expert report stated that many records have been lost or destroyed, therefore it was possible that a declaration was made but the record was no longer available.

iii) As the Claimant had been issued with a formal document describing her/his nationality as Somali, the Defendant was of the opinion that the competent authority responsible for issuing that document did so on the basis that they were satisfied as to his claim to Somali nationality.

iv) The Defendant required written confirmation from the relevant authorities that the Claimants' Somali passport/s were issued in error [in the case of Ameen, was never formally issued].

v) The letter from the Somali Embassy stating that the Claimant was not a Somali citizen and her/his Somali passport had been issued in error did not explain the basis upon which this conclusion was reached or what checks, if any, were conducted. The Claimant only produced her/his BOC passport and, in some cases, his birth certificate. "Given that limited documentation was provided to the Somali Embassy on which to base their assessment, that no reference has been made as to what evidence was presented in order to obtain the Somali passports purported to be issued in error, and that your client was still in possession of a Somali passport which was not cancelled/voided when the opinion was given, the Secretary of State cannot be satisfied that [the Claimant] currently holds no other citizenship or nationality".

vi) As the Defendant could not be satisfied that [the Claimant] met the requirements to register, the application was refused.

94. It is important to record that the Defendant's decision letters did not allege that the Claimants had acted misleadingly or dishonestly, or that they were not credible. Although such allegations were made in an unsuccessful application to strike out the claims in 2017, and in the pleadings, Mr Singh QC did not pursue any such allegations at the hearing, and expressly disavowed any attack on the credibility of the Claimants, as part of his defence of the Defendant's decisions. Hence, the Claimants withdrew their application to give oral evidence.

Claimants' grounds of challenge

95. The Claimants submitted that the decisions of the Defendant refusing their applications were unreasonable and/or not open to him on the evidence, on the following grounds:

i) The expert evidence (including the Defendant's expert evidence) on Somali nationality law supported the conclusion that they were not Somali citizens.

ii) The letters from the Somali Embassy demonstrated that they were not considered Somali citizens.

iii) The Claimants have stated that no declarations renouncing any foreign nationality or status were made to Somali Authorities in order to claim Somali nationality.

iv) The Claimants have adduced cogent evidence (including expert evidence) to rebut the *prime facie* assumptions made on the basis of their possession of Somali passports that they are Somali nationals.

v) The Claimants have discharged the burden upon them to prove that they were not Somali nationals (even the Defendant's expert has concluded that there was no evidence that they were Somali nationals).

vi) Their possession of a BOC passport was indicative of their lack of Somali citizenship.

Conclusions

The test under section 4B BNA 1981 and the standard of review

96. Section 4B BNA 1981 entitles persons who hold a class of British nationality other than British citizenship, such as BOC, to apply for registration as British citizens. It is a condition that the Secretary of State must be satisfied that the person holds no other citizenship or nationality.

97. In *R (Vagh) v Secretary of State for the Home Department* [2012] EWHC 1841 (Admin), Singh J. considered the operation of section 4B (2)(b) BNA 1981, at [8] – [9]:

> "8. It will be seen immediately from the terms of section 4B that each of the criteria in subsection (2) must be satisfied but that if they are satisfied then there is an entitlement on the part of an applicant to be registered as a British citizen. Furthermore, the criterion which needs to be satisfied under paragraph b is one which depends upon the judgment of the Secretary of State as to a question of fact, namely whether the person concerned has, apart from the status mentioned in subsection (1), any other citizenship or nationality.
>
> 9. While it is well established that the formulation of paragraph (b) namely "the Secretary of State is satisfied that …" does not in any way immunise the Secretary of State's judgment from the judicial review, nevertheless, it is also well established and was common ground before me that the judgment as to that question of fact is primarily one for the Secretary of State and can only be corrected by way of judicial review on the ground of irrationality."

98. Before Singh J., it was accepted without argument that the conventional *Wednesbury* standard of review applied. On appeal, the Court of Appeal upheld Singh J.'s conclusion that the Secretary of State's decision was not irrational (*R (Vagh) v Secretary of State for the Home Department* [2013] EWCA Civ 1253, per Rimer LJ at [38]). There was no discussion of the intensity of review to be applied by the court.

99. In these claims, in considering the statutory requirement that the Secretary of State be "satisfied", Mr Berry referred to *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, in which the House of Lords considered whether the Secretary of State's judgment could be challenged when acting under section 68 of the Education Act 1944, which allowed the Secretary of State to take certain steps "if the Secretary of State is satisfied" of various matters.

100. Lord Wilberforce said, at 1047C-D:

> "(2)The section is framed in a "subjective" form – if the Secretary of State "is satisfied". This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge…

> (3)The section has to be considered within the structure of the Act. In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister: they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at….."

101. Lord Diplock gave guidance on the application of the *Wednesbury* test to the decision reached by the Secretary of State, at 1065A - B:

> "….. It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters upon which the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223 per Lord Greene M.R., at p.229. Or put more compendiously, the question for the Court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

102. Before me, the parties disagreed as to the intensity of review which should be applied to a decision made under section 4B BNA 1981. The Claimants submitted that the nature of the decision required an intensive standard of review, whereas the Defendant submitted that the conventional *Wednesbury* standard applied.

103. The Claimants relied upon the principles set out in *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, in which a British/Vietnamese claimant, who had lived in the UK since he was a child, challenged a decision to deprive him of his British citizenship and to deport him, on the grounds that this would be "conducive to the public good".

104. Lord Mance, in a judgment with which Lord Neuberger, Baroness Hale and Lord Wilson agreed, said:

> "94. In a judgment in *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808, paras 55-56, with which Lord Neuberger and Lord Clarke agreed, and with the reasoning in which I understand Lord Toulson also to have agreed (para 150), I concluded that there would be no real difference in the context of that case between the nature and outcome of the

scrutiny required under common law and under article 10 of the Convention on Human Rights, if applicable. The judgment noted (para 51) that:

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called Wednesbury principle. … The nature of judicial review in every case depends on the context."

95. The judgment also endorsed (in para 54) Professor Paul Craig's conclusion (in "The Nature of Reasonableness" (2013) 66 CLP 131) that "both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context" and continued:

> "The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law. Whatever the context, the court deploying them must be aware that they overlap potentially and that the intensity with which they are applied is heavily dependent on the context. In the context of fundamental rights, it is a truism that the scrutiny is likely to be more intense than where other interests are involved."

…

97. …The last two sentences of this passage were cited and approved by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] AC 453, paras 43-44. In the same case, para 70, Lord Bingham identified the relevant principles by the following quotations, in terms with which the Secretary of State did not quarrel:

> "Sir William Holdsworth, A History of English Law (1938), vol X, p 393, states:
>
> > 'The Crown has never had a prerogative power to prevent its subjects from entering the kingdom, or to expel them from it.'

> Laws LJ, in para 39 of his Bancoult (No 1) judgment which the Secretary of State accepted, cited further authority:
>
> > 'For my part I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen. Sir William Blackstone says in Commentaries on the Laws of England, 15th ed (1809), vol 1, p 137: 'But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal.' Compare Chitty, A Treatise on the law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject (1820), pp 18, 21. Plender, International Migration Law, 2nd ed (1988), ch 4, p 133 states: 'The principle that every state must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute …' and cites authority of the *European Court of Justice in Van Duyn v Home Office (Case 41/74)* [1975] Ch 358, 378–379 in which the court held that 'it is a principle of international law … that a state is precluded from refusing its own nationals the right of entry or residence'. Dr Plender further observes, International Migration Law, p 135: 'A significant number of modern national constitutions characterise the right to enter one's own country as a fundamental or human right', and a long list is given.'"
>
> ….."

105. Lord Carnwath also referred (at [60]) to the speech of Lord Mance in *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808, endorsing a flexible approach to principles of judicial review, particularly where important rights are at stake, and Professor Craig's conclusions. Lord Carnwath added:

> "Those considerations apply with even greater force in my view in a case such as the present where the issue concerns the removal of a status as fundamental, in domestic, European and international law, as that of citizenship."

106. Lord Reed, who agreed with the judgment of Lord Carnwath, also made the following observations:

> "113. It may be helpful to distinguish between proportionality as a general ground of review of administrative action, confining the exercise of power to means which are proportionate to the ends pursued, from proportionality as a basis for scrutinising justifications put forward for interferences with legal rights.
>
> 114. In the first context, there are a number of authorities in which a finding of unreasonableness was based upon a lack of proportionality between ends and means. Examples include *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 and *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052. There are also authorities which make it clear that reasonableness review, like proportionality, involves considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision-maker's view depending on the context. The variable intensity of reasonableness review has been made particularly clear in authorities, such as *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, and *R v Ministry of Defence, Ex p Smith* [1996] QB 517, concerned with the exercise of discretion in contexts where fundamental rights are at stake. The rigorous approach which is required in such contexts involves elements which have their counterparts in an assessment of proportionality, such as that an interference with a fundamental right should be justified as pursuing an important public interest, and that there should be a searching review of the primary decision-maker's evaluation of the evidence.
>
> 115. That is not to say that the Wednesbury test, even when applied with "heightened" or "anxious" scrutiny, is identical to the principle of proportionality as understood in EU law, or as it has been explained in cases decided under the Human Rights Act 1998. In *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, Lord Steyn observed at para 26, with the agreement of the other members of the House of Lords, that there was a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality in cases where Convention rights were at stake. In *Brind*, the House of Lords declined to accept that proportionality had become a distinct head of review in domestic law, in the absence of any question of EU law. This is not the occasion to review those authorities."

107. Mr Singh QC accepted that the principles set out in *Pham* were well-established but submitted that the factual context in *Pham* was very different to these claims. It related to a revocation, not a grant, of citizenship, and the potential impact on the claimant in *Pham*, who was faced with deportation from the UK where he had settled

as a child, was much more serious than the impact of a refusal on these Claimants, who already had BOC status. These differences indicated that a less intensive level of scrutiny was appropriate in these claims than in the case of *Pham*.

108. Mr Singh QC referred to *R (FR (Albania) and another) v Secretary of State for the Home Department* [2016] EWCA Civ 605, in which the appropriate intensity of review was considered in the context of decisions by the Secretary of State to certify claims for refugee status made by two asylum seekers as "clearly unfounded", under section 94(3) of the Nationality, Immigration and Asylum Act 2002. Section 94(3) requires the Secretary of State to be "satisfied" that a claimant is entitled to reside in a state listed in subsection (4).

109. Beatson LJ considered the courts' role at [48], stating:

> "… it is clear from the authorities that the nature of the decision to certify means that when the administrative decision under challenge is said to be one which may put the applicant's life at risk the supervisory jurisdiction by judicial review is exercised in an intensive way."

110. He concluded, at [62]:

> "62. To conclude, the intensity of review in a certification case is at the more and possibly most intensive end of the spectrum to which I have referred at [48] above, but the jurisdiction remains a supervisory and reviewing one. It is also important not to lose sight of the fact that provisions in the 2002 Act give the Secretary of State a certain "gate-keeping" or "screening" function as to the availability of an in-country appeal by the process of certification. As I stated in *R (Toufighy) v Secretary of State* [2012] EWHC 3004 (Admin) at [73], while recognising the intensity of review in this context, care must be taken not inappropriately to deprive the Secretary of State of that function."

111. I turn now to apply these principles of law to decisions under section 4B BNA 1981.

112. The judgments in *Pham* confirm that citizenship rights are recognised as fundamental rights in domestic law (both at common law and in statute), and internationally. Article 12(4) of the International Covenant on Civil and Political Rights provides that no one shall be arbitrarily deprived of the right to enter his own country. It has been ratified by the UK, though it has not been transposed into domestic law. Legislative policy is to be interpreted and applied consistently with it where possible, and absent contrary indication.

113. Registration under section 4B BNA 1981 is by entitlement, provided that the conditions are met. It is not a matter of discretion. That is confirmed by the fact that there is no good character test, or any other test of suitability.

114. The legislative purpose of the provision was to provide a route for British nationals who lack a right of abode in any country in the world, to secure a right of abode in the

UK as British citizens. *Fransman's British Nationality Law,* 3rd edition, 2011, 17.6.4, pp. 572-576 refers to the statement made by the Secretary of State for the Home Department in Parliament in 2002 in which he expressed the intention to make provision for:

> "British overseas citizens who have no other nationality but who, under the existing complex historical circumstances, cannot enter the country. It would be right for us to do that, as we have a moral obligation to them going back a long way, and it is unfinished business."

115. The courts have accepted that part of the reason for this legislative provision was that Parliament recognised the need to rectify historic wrongs in the provision made in British nationality law through the creation of classes of British nationality that lacked one of the essential attributes of nationality, namely, a right to enter a country as of right and to have a home there. In *R (Vagh) v Secretary of State for the Home Department* [2012] EWHC 1841 (Admin), which also concerned a BOC born in Aden, Singh J. explained the history as follows:

> "36. … the background to the amendment of the 1981 Act in 2002 was to correct what was perceived by Parliament to be "an historical wrong" — see *Entry Clearance Officer Mumbai v NH India* [2007] EWCA Civ 1330, in which the main judgment for the Court of Appeal was given by Sedley LJ, at paragraphs 6 and 35. At paragraph 35 Sedley LJ said so far as material:
>
> > "We accept the appellant's arguments that part of the reason behind the passing of section 12 of the Act was to 'right a historical wrong'."
>
> 37. The "historical wrong" that was referred to in that context was that the Commonwealth Immigration Act 1968 had deprived certain citizens of the United Kingdom and Colonies of the right to abode in the UK which they otherwise would have had. This was subsequently found in 1973 by the European Commission on Human Rights in the famous East Africa Asians case 3 EHRR 76 to be racially discriminatory. The Court of Human Rights never had to consider that case because a friendly settlement was reached under the Convention. As a result of that settlement the UK government embarked upon a special quota voucher scheme for many years. That scheme did not necessarily assist claimants such as the ones who were before the Court of Appeal in the case of *NH India*.
>
> 38. British overseas citizens, a category which was created by the 1981 Act, did not have the right of abode in the United Kingdom. Nevertheless, circumstances could arise in which they might be in effect Stateless because no other State in the

> world was prepared to regard itself as being their State of nationality and would not allow them to live there either.
>
> 39. It was that historical wrong which Parliament felt the need to correct in 2002. …

116. In my judgment, there are a number of features which, when taken together, do require heightened scrutiny of decisions made under section 4B, rather than a conventional *Wednesbury* review. These features are: the fundamental importance of citizenship; the applicant's lack of any citizenship which confers a right of abode; the entitlement to full citizenship where the conditions in section 4B BNA 1981 are met and the recognition that section 4B is intended to remedy an historic injustice. However, unlike *Pham*, where competing considerations had to be weighed in the balance, section 4B BNA 1981 only requires a reasonableness review of the Defendant's fact-finding exercise, not a proportionality review.

Review of the decisions

117. In reviewing the decisions, Mr Singh QC invited me to follow the approach set out by Singh J. in *Vagh*, where he said:

> "18. Reliance was also placed at the hearing before me on behalf of the claimant on a letter dated 7th March 2006 by the nationality directorate (as it then was) of the Home Office to a firm of solicitors. It should be observed immediately, as the defendant has pointed out to me, that this letter was addressed not in the context of this claimant's case but in the context of another anonymised case, to another firm of solicitors. The letter so far as material reads:
>
> > "Following advice from the Indian High Commission it is now accepted that Indian citizenship is lost at the age of 18, if any other nationality has not been renounced."
>
> 19. Quite apart from the care which needs to be taken in reading such documents, there is a more fundamental submission which the defendant has made and which I accept. The defendant submits that she is not bound simply to accept assertions by an applicant for British citizenship that he or she is not in truth a national of another state, when for example they have come to this country using an apparently lawful and properly issued passport of that country.
>
> 20. In that context the defendant places particular reliance upon the judgment of Sales J *in R (on the application of Nhamo) v Secretary of State for the Home Department* [2012] EWHC 422 (Admin), a judgment which was given on 14th February 2012. The context of that decision was admittedly different. It arose in the context of immigration law. In

particular, the question was whether the Secretary of State was entitled to certify the case under section 94 of the Nationality Immigration and Asylum Act 2002.

21. However, in the context of those proceedings the court did have to consider the approach to be taken to disputed issues of foreign nationality. At paragraph 36, Sales J said:

> "Where the question of nationality arises as a matter which has to be assessed by the authorities in the United Kingdom, it is for those authorities to assess the position on the evidence available to them. So, for example, the position in an English domestic court or tribunal, if asked to consider when whether a person is or is not a national of some other State, would be to assess that question by reference to the law of that State, but making its own findings of relevant fact. Thus, where there is an issue between the Secretary of State and a person claiming refugee status, whether that person is a national of some other State, the issue is to be resolved between the Secretary of State and that person (if necessary in legal proceedings) on the balance of probabilities by reference to the relevant national law of the State in question."

At paragraph 38 Sales J continued:

> "In the present context, it was accepted by Miss Kiai that the standard of proof for establishing questions of nationality and whether there is a prospect of return to the country of origin is on the balance of probabilities. She also accepted that, in the first place at least, the legal burden would lie with the claimant to establish that she had a nationality contrary to what appeared to be her nationality by reference to her passport or that she was stateless; although Miss Kiai submitted that the burden would shift to the Secretary of State with the submission by an individual of credible documentary evidence to support such a claim."

…

At paragraph 45 Sales J said:

> "If, notwithstanding the background of the claimant holding a South African passport and her dealings with the South African authorities in relation to obtaining travel documents, she wished to assert that, contrary to appearances, she was not a South

> African national, the onus clearly was upon her to adduce relevant evidence (including, so far as appropriate, expert evidence in relation to South African law). She attempted to adduce some evidence about foreign law (though not proper expert evidence) in relation to the legal position in South Africa and Zimbabwe with her letter of 26th November 2010, but such materials as she did then put forward were clearly insufficient to displace the clear picture which had emerged from everything else she had said and done to give the clear impression that she is indeed a South African national."
>
> …
>
> 23. In my judgment it is quite impossible to say that the defendant's assessment of the facts in the present case was irrational. She was entitled, in my view, to place reliance as she did upon the rebuttable presumption, not an absolute one, that an explanation needs to be given as to how and why the claimant was able, apparently lawfully, to travel on an Indian passport. The fact that she had that Indian passport is something the Secretary of State is prima facie entitled to regard as being evidence that the claimant has Indian nationality. As has been pointed out on behalf of the defendant, the current application form for an Indian passport, includes, as one would expect, a question to be answered to the effect: are you a citizen of India by birth, descent, registration or naturalisation? The answer, it would seem, has to include not only that the person is indeed a citizen of India but by what means they have acquired that citizenship."

118. Whilst *Vagh* provides a helpful framework for decision-making under section 4B BNA 1981, the assessment of individual applications is highly fact-specific.

119. In my view, the Claimants' applications had to be considered in their unique historical and political context. They were ethnic Somalis as their parents or grandparents originally came from British Somaliland, which was a British Protectorate and so they had the status of British Protected Persons. In the first half of the twentieth century, they were offered the opportunity to migrate to the British Colony of Aden, in Yemen, to provide a labour force for the busy Port and BP Oil Refinery. They settled in Aden, and married and raised their children there. For convenience, I shall call them 'Aden Somalis'. Those who were born in Aden, such as these Claimants, automatically acquired full British citizenship (CUKC) which they passed on to their children, through the male line. However, the evidence in these claims, and other cases concerning Aden Somalis which have been heard in this court[1], indicates that

[1] R (Nooh) v SSHD [2018] EWHC 1572 (Admin); R (Suleiman) v SSHD [2018] EWHC 2273 (Admin); R (Taher) v SSHD [2018] EWHC 2274 (Admin); R (Othman) v SSHD [2019] EWHC 340 (Admin)

British passports were not routinely applied for, or issued, during the era of colonial rule.

120. When British colonial rule ended in Aden, Somalis living in Aden faced an unusual predicament. Generally, inhabitants of Aden ceased to be CUKCs and became citizens of South Yemen. But Aden Somalis did not automatically become citizens of the state in which they had been born and resided all their lives, because they were not Arabs by ethnicity, which was a condition of citizenship under Southern Yemeni nationality law. During this period, if they needed a passport, they could usually only obtain one from the Somali Embassy.

121. Moreover, in the decades after independence, many Aden Somalis migrated to the UAE, to escape from the extreme economic and social problems which they experienced in the communist state of South Yemen. In order to migrate, they needed a passport or travel document. Frequently they could only obtain such documentation from the Somali Embassy.

122. Even those Aden Somalis who have become long-term residents in the UAE have no prospect of obtaining citizenship in the UAE. They are a migrant labour force in the UAE, and their continued residence in the UAE is dependent upon the willingness of the UAE authorities to grant them work visas, and their continued ability to work or to become financially self-sufficient.

123. Many of the second or third generation Aden Somalis have no links to Somalia, and never go there. Somalia has not been seen as a desirable relocation destination, with its struggling economy, chaotic administration, and dangerous conditions, particularly from the commencement of the civil war in 1991. Many of these problems continue to the present day, with some regional variations.

124. Following the settlement of the judicial review claim in *Botan* in 2009, the Defendant accepted that Aden Somalis who had not acquired Southern Yemeni nationality when Aden became independent, continued to be CUKCs, and so became BOCs following the BNA 1981. This information was not widely disseminated at the time. It appears to have been communicated mainly by word of mouth. There is evidence that some BOC passports were issued prior to 2009, but in the Aden litigation the majority have been issued since 2009.

125. Even after the Defendant's acceptance of entitlement to BOC status in principle, it has been difficult for individuals to obtain BOC passports, and so they have had to use Somali passports to travel and as proof of identity. The Defendant has applied stringent requirements of proof of birth in Aden prior to 14 August 1968, by production of Colony of Aden birth certificates, and proof of identity for themselves and their parents, in the form of a passport or similar official document. Whilst such requirements are standard, it has on occasion been difficult for applicants to produce such evidence many decades after their birth, when their parents are deceased, and records have been lost, as has occurred in a number of the Aden claims to this court. The civil war in Yemen, which began in 2015, has prevented Aden Somalis, who have left the country, from obtaining copies of official records. These Claimants have described in their evidence the difficulties and delay which they have experienced in obtaining BOC passports, either because they could not produce the required documents or their documents were thought to contain discrepancies. In previous

Aden cases, applications have been refused because of concerns about discrepancies in names, which arose from a lack of understanding of Somali language and culture.

126. I conclude that, in the light of the difficult circumstances in which Aden Somalis found themselves, it was understandable that the Claimants applied for and used Somali passports, in order to travel, to settle in other countries, and as proof of identity. For much of the time, they could not readily obtain British passports, or any other passports.

127. However, the key question which the Defendant had to consider was how or why the Somali authorities issued Somali passports to the Claimants Zahra, Hussien and Mohamed, when both experts agreed that, in order to obtain a passport, they would have had to apply for Somali citizenship and make a declaration renouncing their foreign nationality or status. Mr Kuhlman's evidence was that Somali passports were easily obtained, but his evidence was far too general and lacked any detail. Mr Hersi did not really address this issue at all. In particular, there was no evidence as to whether the initial passport application form included questions about dual nationality, and whether applications to renew passports did so too.

128. Unfortunately, the letters from the Consular Section of the Somali Embassy were extremely brief and formulaic, and gave no explanation as to the nature of the error which had been made in issuing the Somali passports. If, as Mr Berry submitted, the error was that they were not aware of the Claimants' BOC status, how did that arise? What questions would have been asked of the Claimants? What form would the Claimants have had to complete?

129. As the Defendant rightly pointed out, the Claimants' Somali passports should have been presented to the Consular officials for inspection and any current passport cancelled. There is no evidence that this was done. The letters do not disclose what checks, if any, were carried out in respect of the Somali passports which had been issued to the Claimants.

130. I accept Mr Berry's submission that the Defendant should be taken to have known what was in his own Operational Guidance issued in May 2004 to the effect that, following the civil war and the collapse of the government, official records were no longer being kept and previous records had been destroyed. However, it appears that the Defendant did agree that records of citizenship declarations were likely to have been lost, as Mr Kuhlman advised. Unfortunately this was unhelpful to the Claimants, as the Defendant has taken the view that there may have been declarations made, which have since been lost.

131. The fact that Zahra, Hussien and Mohamed were issued with Somali passports was prima facie evidence that the passports had been validly issued by the Somali authorities, on the basis that the Claimants were Somali citizens. The onus was on them to establish, on the balance of probabilities, that the passports were not validly issued. Because of the weaknesses in the evidence presented by them, I consider that the Defendant was entitled to conclude that he was not satisfied that Zahra, Hussien and Mohamed did not also hold Somali citizenship.

132. Ameen's application was made on a different basis to the other Claimants, as he claimed that he purchased a false passport. The Defendant's decision letter barely

engages with this difference, although it does refer to the passport being "issued in error or …. never formally issued". The Defendant was well aware from his own Operational Guidance, as well as from Mr Kuhlman's evidence, that there was widespread forgery of passports which could readily be purchased in markets in Somalia.

133. However, Ameen's application was so inadequate that I consider the Defendant was entitled to reject it. The application letter to the Defendant was perfunctory, and unconvincing. It failed to give an adequate explanation of the circumstances in which he came to use a false passport. The explanation was set out in his subsequent witness statement to this court, and provides some mitigation for his deception, but none of this information was given to the Defendant at the time. Furthermore, the application letter did not explain to the Defendant the reasons why the dates in the passport did not tally with the dates when he purchased the passport. Again, the explanation was set out in his subsequent witness statement to this court.

134. The letter from the Consular Section of the Somali Embassy was extremely brief, stating "as per our records, he has not been issued a Somali Passport". There was no explanation as to what records were checked. The Consular officials were not shown the false passport, in order to comment on whether it appeared genuine, and to check the passport number against its records.

135. Ameen did not provide any expert evidence to support his assertion that the passport was a forgery, and not genuine.

136. Ameen submitted in evidence to this Court two relevant documents which strongly supported his application. First, a letter from the Somali Ministry of Foreign Affairs dated 23 September 1986 refusing an application for Somali passports by Ameen's father, on behalf of himself and his four children (Ameen and three others). The basis of the refusal was that the father and his children had dual nationality as they were born outside Somalia. Second, a letter from the Somali Ministry for Foreign Affairs, dated 25 August 2008, which confirmed that passport number 091986 issued on 23 April 2001 and valid until 22 April 2004 did not exist according to the Ministry's records and the records held by its Embassies. Unfortunately neither Ameen nor his representative submitted these documents to the Defendant with his application, and therefore they could not be taken into account.

137. The fact that Ameen was the holder of a Somali passport was prima facie evidence that the passport had been validly issued by the Somali authorities, on the basis that he was a Somali citizen. The onus was on him to establish, on the balance of probabilities, that the passport was not genuine. I consider that the Defendant was entitled to conclude that he was not satisfied that Ameen did not also hold Somali citizenship.

138. In conclusion, on the basis of the material presented to him, I consider that the Defendant acted lawfully in concluding that he was not satisfied that the conditions in section 4B BNA 1981 were met, and so refusing the applications. In the light of my comments on the inadequacy of the material submitted in support of the applications, the Claimants may wish to consider making fresh applications which have more substance.

139. I grant permission to apply for judicial review in all four claims, as the grounds were clearly arguable. However, for the reasons set out above, the four claims for judicial review are dismissed.