Neutral Citation Number: [2023] EWHC 805 (Admin)

Case No: CO/2952/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 April 2023

Before :

MRS JUSTICE FOSTER DBE

- -

Between :

THE KING
on the application of
(1) SAFA JAMA ABDI AL HASHEMI
and (2) SADA ALI OBALEH NOOR **Claimants**

- and –

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT **Defendant**

- -
- -

Mr Adrian Berry (instructed by **Bindmans LLP**) for the **Claimants**
Mr William Irwin (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 11 May 2022

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Approved Judgment

This judgment was handed down remotely at 12.00pm on 5 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see e.g. https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MRS JUSTICE FOSTER DBE

MRS JUSTICE FOSTER DBE:

INTRODUCTION and ISSUE

1. By this application two ethnic Somalis born in Aden in Yemen in early 1968 seek a Quashing Order in respect of decisions of HM Passport Office for which the Defendant has ministerial responsibility. The challenge is to HM Passport Office's refusal of UK British Overseas Citizen's ("BOC's") passports to the Claimants because the Defendant declines to recognise them as entitled to British Overseas Citizenship. They claim also a declaration that they are entitled to the passports on the facts of their case in light of the legislation properly construed.

2. The First Claimant was born in Aden City on 19 February 1968. She is of Somali origin; her father was also of Somali origin. The First Claimant holds a Somali passport as does her mother, who is of Turkish ethnicity. The First Claimant had been refused a BOC passport previously in 2013 and was again refused (after reconsideration) on 1 June 2021.

3. The Second Claimant was born in Aden on 17 January 1968 she too holds a Somali passport. Both her parents are of Somali origin. She was first refused a BOC passport in 2012. Following her further application, she was refused again (after reconsideration) on 1 June 2021.

4. The status of BOC under the British Nationality Act 1981 is accorded inter alios, to those who held the status of Citizen of the UK and Colonies ("CUKC") on the coming into force of that Act on 1 January 1983.

5. The Claimants assert British nationality by operation of law, arguing that they were CUKCs under the British Nationality Act 1948 ("the 1948 Act"), and are BOCs within the meaning of the British Nationality Act 1981 ("the 1981 Act"). They rely upon a construction of the relevant statutory materials and upon observations of Lang J in the case of *R (Nooh) v Secretary of State for the Home Departmen*t [2018] EWHC 1572 (Admin) a case concerning a claim to be BOCs by persons born in Aden before 30 November 1967 when Aden became independent. They assert the effect of the materials is that Aden retained the necessary status until the new independent state passed its own nationality laws.

6. The Defendant does not accept that Lang J's observations, which were obiter, have any application to the present case where the Claimants were born after independence and after the Colony of Aden ceased to exist.

7. The nub of the Defendant's refusal to grant passports to the Claimants is that, having been born after the 30 November 1967 when Aden was granted independence, and after 30 November 1967 when Aden became part of the People's Republic of South Yemen ("PRSY"), which comprised the territories of a number of places including what used to be the Aden Colony and the South Aden Protectorate, they have no claim to British nationality through their birth in Aden since Aden was at that point no longer a British colony. By Section 1(1) of The Aden, Perim and Kuria Muria Islands Act 1967 on 30

November 1967 the territory was no longer a part of Her Majesty's dominions, accordingly, no longer a colony.

8. The Claimants emphasise the undisputed fact that the first nationality law of the PRSY came into force on 14 August 1968 but they did not qualify for PRSY nationality because they were not within the class of those who acquired citizenship of the new state.

9. The Claimants say first that the natural reading of relevant statutes is to the effect that between the proclaimed end of British rule and its "old law", and the adoption of the new Yemeni nationality law, the old nationality law of the UK continued in force. Thus those who were born "in the gap" after November 1967 but before 14 August 1968 had the benefit of CUKC status because *for nationality purposes* Aden was still a colony. Alternatively, a purposive construction must be given, otherwise the consequence for the Claimants is that they were stateless, and the Court should accept that Parliament would not so have intended.

RELEVANT BACKGROUND

10. The Claimants emphasise the historical position in Aden. Initially seized by the East India Company in the 19th century, the "Aden Colony" was administered from British India as "the Aden Settlement". On 1 April 1937 it became part of the "Colony of Aden". Also, and separately, the Aden Protectorate was formed from various British Protectorates in the vicinity, reflected in an Order in Council known as the Aden Protectorate Order 1937/245. On 1 January 1949, when the 1948 Act came into force, the Aden Protectorate was a protectorate under that Act. (See Order in Council 1949/140).

11. The essential framework for considering a claim by a person with connections to Aden was set out by Lang J in her judgement in *Nooh*. That case concerned claims by people born before the November 1967 independence of Aden.

12. The parties agree the relevant background is as was set out in that case. It provides as follows:

> "*10 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.*
>
> *11. 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." The term "citizen of the United Kingdom and Colonies" is commonly abbreviated to "CUKC".*
>
> *12. 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.*
>
> *13. 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.*
>
> *14. 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.*
>
> *15. 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.*"

13. It is not disputed that by operation of sections 4, 5(1)(a), 8(1) and 12(3) of the British Nationality Act 1948 people in the Aden Colony were able to become CUKCs, or if born to a CUKC father who had been born there could inherit CUKC status.

14. The question here is whether these Claimants acquired that status when they were born in early 1968, after independence and the loss of Colony status, in what had become, a different sovereign state.

15. As indicated above, Mr Berry for the Claimants emphasised the history in his submissions, so I set out further detail here which is not in dispute but which he argues should inform an understanding of relevant legislation.

16. In February 1959, by Treaty, the UK had recognised the Federation of South Arabia which was a group of local rulers whose territories formed part of the Aden Protectorate; the Treaty recognised the intention of this group to gain independence. Under the Treaty, recognition of the Federation did not alter the status of the territories as a British Protectorate. On 18 January 1963 the Aden Colony joined the Federation by Order 1963/82, the Federation of South Arabia (Accession of Aden) Order. The Aden Colony still remained within the UK and Colonies. By virtue of the Protectorate of South Arabia Order 1964/920, on the same day, that is 18 January 1963, the Aden Protectorate became the Protectorate of South Arabia. Although now within the Federation, the Aden Colony remained a Colony and access to CUKC status was preserved for those with a relevant connection.

17. Order in Council 1949/140 (above) was replaced on 29 October 1965 by a similarly titled Order in Council 1965/1864, under schedule 2 to which those connected to the Protectorate of South Arabia could remain or become CUKCs under the 1948 Act.

18. The Secretary of State in his Detailed Grounds of Defence explains what happened next in the following terms:

> "*By 1965, the UK had announced that the Federation should attain independence by early 1968. … However anti-British movements arose from 1965 and an insurgency developed. An organisation called the National Liberation Front ("NLF") emerged as a dominant movement and by 1967 it controlled nearly all of the territories of the Federation. … As a result of these political developments, independence for the Protectorate was accelerated. On 29 November 1967 British troops left Aden. On 30 November 1967 the NLF declared the People's Republic of South Yemen.*"

19. By 1965 the Federation had made certain of its own laws pursuant to a constitution set out in the schedule to the Federation of South Arabia (Accession of Aden) Order 1963/82. Thereafter as stated on 14 August 1968 in South Yemen provision was made in certain cases for citizenship of the PRSY. It did not cater for those in the category of the Claimants.

20. It is the Defendant's case that the earlier history is not relevant to the question as to status as a CUKC in this case, although it is accepted, the consequence is that the Claimants, born in January 1968 and February 1968, were born stateless and did not acquire PRSY nationality in August 1968.

THE 1948 ACT

21. The 1948 Act provided materially as follows:

> "**4 *Citizenship by birth***
>
> *Subject to the provisions of this section, 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:*
>
> *Provided that a person shall not be such a citizen by virtue of this section if at the time of his birth—*
>
> *(a) his father possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to His Majesty, and is not a citizen of the United Kingdom and Colonies; or*
>
> *(b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy.*
>
> …
>
> **32 Interpretation**
>
> (1) *In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively ascribed to*

> *them, that is to say :—*
>
> *"Colony" does not include any country mentioned in subsection (3) of section one of this Act.*"

Aden was not mentioned in subsection (3).

22. In other words, the nationality rules in the 1948 Act show that it was place of birth that conferred nationality. This is a *jus soli*, status is taken from the status of the territory. The Defendant's do not dispute the Claimants historical analysis of the relevant Acts and instruments, but they point to the fact that the term "colony" is not defined in the 1948 Act. Rather it is to be found in the Colonial Laws Validity Act of 1865 which is described as "*An Act to remove Doubts as to the Validity of Colonial Laws*". It provided by its preamble and first section thus:

> "*WHEREAS Doubts have been entertained respecting the Validity of divers Laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the Powers of such Legislatures, and it is·expedient that such Doubts should be removed: Be it hereby enacted by the Queen's most Excellent Majesty, by·and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:*
>
> 1. *The Term "Colony" shall in this Act include all of Her Majesty's Possessions abroad in which there shall exist a Legislature, as herein-after defined, except the Channel Islands, the Isle of Man, and such Territories as may for the Time being vested in Her Majesty under or by virtue of any Act of Parliament for the Government of India …*"

There follow various definitions of legislatures that are not relevant for our purposes.

23. The Claimants however emphasise how the status of the Aden Colony vis-à-vis the 1948 Act and the ability to become a CUKC was preserved as the move towards independence progressed. Thus, on 18 January 1963, Aden joined the Federation of South Arabia (by the Federation of South Arabia (Accession of Aden) Order 1963/82), but this did not affect the status of the Aden Colony as within "the UK and Colonies". Also on that day, the Aden Protectorate became "the Protectorate of South Arabia" under the Protectorate of South Arabia Order 1964/920. On 29 October 1965, that British Protectorates, Protected States and Protected Persons Order in Council 1965/1864 replaced the 1949 Order in Council. Under Sched 2 to the 1965 Order, the Protectorate of South Arabia continued the same status as under the 1949 Order. The effect of this was that persons connected to the Aden Colony could remain or become CUKCs under the BNA 1948. Independence then progressed very quickly, until British sovereignty was relinquished.

24. Mr Berry sought to draw from this chain of legislation the proposition that two separate streams of rule-making were in play. One was concerned with nationality, the other

was concerned with independence. Separate instruments were utilised to deal with these separate issues.

25. Thus, for the Protectorate of South Arabia the process of independence was reflected in a UK instrument by a Proclamation (SI 1967 (vol III page 5457)):

> "*And Whereas it is intended that the territories known as the Protectorate of South Arabia shall become independent on the thirtieth day of November 1967 (hereinafter referred to as "the appointed day"):*
>
> *Now, therefore, We do hereby … proclaim and declare that, as from the beginning of the appointed day, our protection over the territories known as the Protectorate of South Arabia and all functions, powers, rights, authority or jurisdiction excisable by Us immediately before that day in or in relation to the said territories by treaty [etc.] shall lapse.*"

26. The Aden, Perim and Kuria Muria Act 1967 ("the 1967 Act") also provided to like effect that on the appointed day the Aden Colony would:

> "*… cease to form part of Her Majesty's dominions; and on and after that day Her Majesty's government in the United Kingdom shall have no responsibility for the government of that territory.*"

The appointed day order for the purposes of section 1(1) of the 1967 Act was 30 November 1967.

27. These materials, he submitted, illustrated the statute's clear intention to make provision for independence and separate political identity. They did not sever the links in respect of nationality; they did not effect any change to the ability to derive CUKC status from the United Kingdom.

28. The Claimants point to further materials of relevance as including those dealing with loss of nationality or citizenship. The Defendant, by contrast emphasises that these instruments deal only with loss of nationality or citizenship, not acquisition.

29. The effect upon nationality was reflected in Paragraph 1(1) of the Schedule to the 1967 Act headed "Modifications of British Nationality Acts Change of Citizenship". It stated that:

> "*1(1) 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."

30. There were some particular exceptions provided in the Schedule as follows:

"*(3) A person shall not cease to be a citizen of the United Kingdom and Colonies under paragraph 1 of this Schedule in consequence of his connection with a territory designated by an order under that paragraph if on the date specified in the order he is ordinarily resident in the United Kingdom or in a colony or an associated state.*

(4) A woman who is the wife of a citizen of the United Kingdom and Colonies shall not cease to be such a citizen under paragraph 1 of this Schedule unless her husband does so.

(5) Subject to sub-paragraph (6) of this paragraph, the reference in sub-paragraph (1)(b) of this paragraph to a person naturalised in the United Kingdom and Colonies shall include a person who would, if living immediately before the commencement of the British Nationality Act 1948, have become a person naturalised in the United Kingdom and Colonies by virtue of section 32(6) of that Act (persons given local naturalisation before the commencement of that Act).

(6) For the purposes of the operation of this paragraph, as read with paragraph 1 of this Schedule, in relation to a territory designated by an order under paragraph 1 of this Schedule—

(a) any reference in this paragraph to a colony shall be construed as not including any territory to which section 1 of this Act applies or any territory (not being one to which that section applies) which has ceased to be a colony before the date specified in the order, and

(b) any reference in this paragraph to a protectorate or protected state shall be construed as not including any territory for the time being comprised in the Protectorate of South Arabia or Kamaran, and as not including any territory not so comprised which has ceased to be a protectorate or protected state before the date specified in the order; and sub-paragraph (1) of this paragraph shall not apply to a person by virtue of any certificate of naturalisation granted or registration effected by the governor or government of a territory which by virtue of this sub-paragraph is excluded from references in this paragraph to a colony, protectorate or protected state.

> *(7) Part III of the British Nationality Act 1948 (supplementary provisions) shall have effect for the purposes of this paragraph as if this paragraph were included in that Act.*"

31. The British Nationality (People's Republic of Southern Yemen) Order 1968 ("the 1968 Order") 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.*"

32. The effect of this latter instrument was that a person who had South Yemeni nationality resulting from connection with the People's Republic of Southern Yemen on 14 August 1968, and who was a CUKC immediately before 14 August 1968, ceased to be a CUKC on 14 August 1968, with some limited exceptions as specified.

33. In the Law of South Yemen (No 4 of 1968) which came into force on 4 August 1968 the local law provided by Article 1 relevantly as follows:

> "*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.*"

Article 2 of Southern Yemen's nationality law provided :

> "*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.*"

34. The Defendant points out (as is recorded by Lang J in *Nooh*) that, following settlement of a judicial review claim in (*R (Botan) v Secretary of State for Foreign and Commonwealth Affairs* CO/1484/2009), the Defendant accepts 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 14 August 1968, they did not, as a matter of birth, possess Southern Yemeni nationality on 14 August 1968.

35. The short point made by the Defendant is that the Claimants were not persons who were, immediately before 14 August 1968, entitled as CUKC. When they were born, Aden was not territory, living in which, conferred that status. There was therefore no status to preserve as an exception to the general position of removal of citizenship.

THE CLAIMANTS SUBMISSIONS

36. The Claimants' main submission is that Parliament intended that they should have the benefit of British protection until, at least, local laws were in place. The legislation is they say capable of a reading that preserves the ability of the colony to grant CUKC status, alternatively, by virtue of the mischief rule, the mischief being the avoidance of statelessness, it should be read in a way that preserves the power to grant it notwithstanding the change in position after November 1967.

37. They highlight the resulting statelessness on the Defendant's case, and that they remained so, after the Republic adopted its own citizenship law. Mr Berry sought to draw a distinction between the position in Aden and the position in other post-colonial territories such as Jamaica and Kenya where the status of CUKC was not lost until a new nationality was obtained, and thus no person was rendered stateless. As they point out in their skeleton argument to the Court, the time lag was the result of the fact that British Rule terminated abruptly due to NLF activity, and that when the colony came to an end, there was no Southern Yemini nationality under local law - that was brought into effect only in August 1968, accordingly, what the Claimants call the "standard decolonisation formula, namely to prescribe loss of CUKC stats on independence day" was not followed.

38. The Claimants argue that in the result the 1948 Act operated "unamended as regards British nationality" with respect to CUKCs connected to Aden during the "gap", until the local law came into being so as to mitigate the consequences of the failure to enact a local law. The draftsman could never have intended statelessness. In other words, Aden was still to be regarded as a colony for the purposes of nationality during the "gap", even if not for the purpose of independence. British nationality was therefore conferred by the 1948 Act upon each of the Claimants. Furthermore, because they did not receive PRSY nationality, they have never lost their British nationality.

39. Mr Berry submitted that the 1967 independence legislation had the dual purpose of making provision for independence and also to provide for the transition from one

nationality to another. The political aspects of independence informed what he described as a "self-contained interpretative function" by which I understood him to mean that the particular context and legislative environment of the enactment of the relevant instruments informed the interpretation which, with a purposive construction, should produce a reading in which the power to confer British nationality continued up to 14 August 1968.

40. He supported the submission by reference to the word "colony" arguing that when used in what he called "independence legislation", it differed in its meaning from that used in "nationality legislation". He referred to the history. Originally a colony was a possession of the Crown, its subjects were British subjects, under the Crown. Whereas in a Protectorate, the citizens were not British subjects rather aliens who enjoyed protection, taking effect under prerogative powers until 1 January 1949 and the coming into force of the 1948 Act. Thereafter the power was found in an Order, rather than the prerogative. Aden had been a Colony since 1839 and was treated as such, even when with other territories which were Protectorates, it joined the Federation and became South Yemen, the different statuses applied. The Federation (of Colony and Protectorates) did not become a Sovereign State and able to confer nationality until later, in November 1967 when, hastily, the NLF declared the PRSY – which was a Sovereign State.

41. The Claimants rely on the fact that until 14 August 1968 and the provision under 1968/1310 of the 1968 Order it stated that as a matter of United Kingdom law a person lost CUKC status when by virtue of birth in the colony of Aden they acquired South Yemen nationality on or before 14 August 1968. They point to the fact there was no other way in which CUKC status could be lost until that date. There was no other provision, they argue that ceased the application of the 1948 Act to those born in Aden – in other words, this meant that the provisions that conferred citizenship upon those living in the territory of the old colony still operated to confer citizenship until such time as a local law was enacted. This was their first argument to the effect that the 1948 Act was to be construed such that the meaning of "colony" within it was unaffected by the 1967 Act in so far as it dealt with nationality.

42. This was supported by the fact that under the 1948 Act the definition of "colony" gives no indication of when a place ceases to be a colony, no "steps were taken" to indicate what happens in respect of those connected to Aden at the point of independence, November 1967. Mr Berry argued that the 1968 Order is a "marker of the end of the period during which the 1948 Act was to continue to apply to British nationality law in respect of Aden": there was no amendment to British nationality law that took account of independence: the law as to the grant of citizenship within the "colony" therefore did not change until the 14 August 1968. Since the Claimants are not within the new law, and obtained no new nationality, they retain their CUKC status. The only logical alternative is that, having ceased to have British citizenship, and not yet entitled to Yemeni citizenship, they would have been stateless, and the law always leans against such a position. Accordingly, it was intended that those born after independence but before the promulgation of the South Yemen nationality law on 4 August 1968 should be - that is to say should remain and/or become - UK citizens.

43. The Claimants seek to fortify their second argument (which overlaps the primary case), that the statute should be read in light of a draughtsman's intention that the mischief of statelessness should be avoided, by reference to the legislation governing other

erstwhile colonies, as above. Mr Berry showed the Court a series of enactments dealing with post-colonial transfers of authority elsewhere in the world where the ending of the power to grant British citizenship was co-terminus with the inception of a new state power to confer nationality.

44. The Claimants also express it as follows: they were not born in the People's Republic of South Yemen "for nationality purposes", since no such State existed in relation to nationality, and all those present in Aden on or after 30 November 1967 retained (or acquired) British nationality until at least 14 August 1968. By the Aden, Perim and Kuria Muria Islands Act 1967 (Appointed Day) Order 1967 SI 1967/1761 the 'appointed day' in relation to Aden is 30 November 1967. However, this 'appointed day' has no relevance for citizenship purposes, relating merely to the day on which the Colony of Aden ceased to exist.

45. In oral argument Mr Berry submitted that the 1948 Act represented a "separate approach from the issues of independence". Although the legal instruments made with reference to independence also mentioned nationality, they were different from and did not affect, the approach contained in the 1948 Act. He referred to the Interpretation Act 1889, relying on section 18 to suggest that this gave support to the contention that the 1948 Act continued to confer the power to create citizenship in those territories that were originally colonies and, there being no contrary intention in terms of nationality, were unaffected by the 1967 Act and other instruments. Section 18 of the 1889 Act provides materially as follows:

> "*18. In this Act, and in every Act passed after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely :–*
>
> *(1.) The expression "British Islands" shall mean the United Kingdom, the Channel Islands, and the Isle of Man.*
>
> …
>
> *(3.) The expression "colony" shall mean any part of Her Majesty's dominions exclusive of the British Islands, and of British India, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony.*"

46. No "contrary intention" does appear, and no other steps were taken at the time to indicate what would happen to citizens in Aden Colony. The actual and operative change only came about in 1968 once PRSY had enacted legislation dealing with nationality issues. That 1968 instrument "triggered" the change from old Colony status in the 1948 Act - itself an instrument dealing with nationality matters. In this way,

anyone born into the old Colony of Aden took the benefit of the 1948 Act which granted them CUKC status - until the PRSY acted.

47. In answer on behalf of the Secretary of State Mr Irwin makes two simple, general submissions:

i) The only relevant provision is that which deals with the acquisition of nationality: namely section 4 of the 1948 Act. It is of central relevance that this law is a *jus soli*, relating purely to birth in a territory: the status of the territory, conditions the acquisition of status. Unless the Claimants can show they acquired status their claims must necessarily fail. The subsequent PRSY materials are of only marginal, if any, relevance, as are materials dealing with loss of CUKC status.

ii) The dominant purpose of the relevant UK legislation on Aden is not the avoidance of statelessness; although avoiding statelessness is desirable where possible, it does not drive the legislation such that it requires the preservation of power to grant citizenship to be written in, which would distort the statute. Further, the overwhelming majority of people would not have been stateless in the events which happened, it is not possible to spell out a general purpose from these Claimants' particular circumstances.

48. The simple point Mr Irwin makes is that is that because the Claimants were born after Aden gained its independence from the UK there was no claim to British nationality through birth in Aden because it was no longer a Colony at the time of the Claimants' birth.

49. As succinctly expressed in his skeleton argument:

> "*2. For the Claimants to succeed, they must satisfy the Court that – notwithstanding that Aden's independence was recognised by a statutory instrument in the form of a Proclamation; and in primary and secondary legislation; and notwithstanding that de facto control by the UK of Aden ceased on 30 November 1967 - for the purposes of nationality law they were born "in the United Kingdom and Colonies," that being the test for acquisition of CUKC status under s.4 BNA 1948. In other words, they must show that for British nationality law purposes Aden remained a British colony after it had gained de facto independence and its independence had been recognised by Parliament and the Queen in Council; or should be treated as having remained a colony.*
>
> *...*
>
> *17. The Secretary of State respectfully submits that the combined effect of the 1967 Proclamation, s.1(1) of the 1967 Act, and the 1967 Order is that Aden ceased to be a colony on 30 November 1967. There is no ambiguity whatsoever about the status of Aden after that date; it was part of an independent state – PRSY – and its independence was recognised in UK primary and secondary*

legislation. After independence Aden no longer formed part of Her Majesty's dominions.

18. The primary legislative picture is – it is respectfully submitted – perfectly clear:

a. "Colony" is defined in s.18(3) of the Interpretation Act 1889 as meaning one of Her Majesty's dominions other than the British Islands and British India.

b. For the purposes of s.4 BNA 1948, "Colonies" must be construed consistently with the definition of colony given by s.18(3) of the Interpretation Act.[1]

c. Pursuant to s.1(1) of the 1967 Act, Aden ceased to form part of Her Majesty's dominions on 30 November 1967.

d. Accordingly, a person born in Aden after 30 November 1967 was not born in the Colonies for the purposes of s.4 BNA 1948; and as such did not acquire CUKC status.

…

20. To succeed in their claims, the Claimants must show that for the purposes of British nationality law Aden fell within the definition of "the UK and Colonies" even after Aden as a political entity ceased to exist and the independence of the PRSY including all the territory formerly comprising the Colony of Aden was expressly recognised by Parliament and the Crown."

50. Mr Berry relied on a passage from the judgment of Lang J in the case of *Nooh*.

51. In that case the Court heard oral evidence where the underlying facts were not agreed. The Court held as a matter of fact, the Claimants were whom they claimed to be – which the Secretary of State had not accepted.

52. In considering the different issue in that case of the loss of CUKC status by those born before the 30 November 1967 formation of the PRSY, Lang J, in summarising the history said the following:

> "*21. 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() and 2(b) and so did not automatically become*

[1] *The Secretary of State does not understand the Claimants to advance any competing construction of "colony" or to submit that the use of the plural in s.4 BNA 1948 in any material way affects the definition of colony/colonies.*

> *Southern Yemenis from 14 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.*
>
> *22. A CUKC who lacked a right of abode in the UK or equivalent right in a remaining British Dependent territory became a BOC from 1 January 1983 by virtue of s.26 of the British Nationality Act 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. As they did not meet the requirements of section 11 of the British Nationality Act 1981, they were not eligible to become British Citizens.*"

53. The Defendant agrees with all of the above save for the line: "*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*." That line is strictly obiter to her decision in respect of the Claimants in that case he submits. The Defendant contends that part (only) of her judgment was in error.

54. Mr Irwin denied that the "contrary intention" provision of section 18 of the Interpretation Act 1889 was of any assistance at all - it did not provide a contrary reading of the meaning of "colony". The Interpretation Act, by contrast, made clear that in no way was a colony (which was effective to grant nationality) a sovereign state. Here, it was undeniable that the PRSY was a sovereign state by 30 November 1967 - there was absolutely no way to read "colony" as extending to such a territory. It was clear from section 18(7) in particular that a colony had the character of a British possession - a colony imported the notion as did the other relevant areas, of possession and of control. The PRSY was no way capable of being so described at the relevant times. The Claimants were wrong to suggest "colony" had different meanings when the issue was nationality from the meaning for independence.

55. The 1967 Act was, contrary to the submissions of the Claimants entirely relevant – it was the end of the grant of CUKC status by reason of that territory. The August 1968 date of coming into force of the PRSY nationality law was a date of no relevance to the grant or acquisition of CUKC status. The modifications allowed for within the instruments were all to do with the <u>preservation</u> of citizenship, and not its grant, which was the issue of relevance to the Claimants.

DISCUSSION

56. It is not in dispute that following *R (Harrison) v Secretary of State for the Home Department* [2003] EWCA Civ 432 at paragraphs [31] to [34], the resolution of whether that assertion as to nationality or citizenship is correct is a matter for this Court to decide. However, in my judgement, as the arguments prefigured, the issue in this case revolves around a pure question of statutory interpretation. The factual background is agreed: the question is whether, on these facts, the Claimants have BOC status.

57. As to the first argument of the Claimants, that the 1948 Act shows that CUKC status was conferred on those born within the territory of the old Aden Colony until the 1968 Yemeni nationality act, I find it impossible to read the statute in this manner for the following reasons:

    i) The very nature of the conferring of nationality under the 1948 Act, reflecting an old and established model, is that of a *jus soli.* Nationality depends upon sovereignty over the soil. Nationality may be conveyed only in this way. The Act is unequivocal about this. The sovereignty of the relevant soil was, at the time when this Claimants were born, quite clearly, no longer British: that is unarguably the case, the conditions of the 1889 Act definition were no longer fulfilled either. The 1948 Act does not purport to do more than explain the mechanism for the acquisition of nationality or other status. It is necessary - and always has been - to look elsewhere to determine whether any particular soil bears a character which carries with it, the grant of nationality or other status.

    ii) As Mr Irwin submitted, it was extraordinary if Parliament had intended that there should be a territory where the United Kingdom had relinquished all control – save only that it still granted citizenship to those who continued to be born there. This is made the more unlikely in my view since HM Government and Parliament would have had no idea on 30 November 1967 when any nationality Law was certainly to be brought in, at a date or at all, by the new Sovereign state. Were such a result to have been intended it would have been very clearly spelt out in the statute dealing with nationality by way of express amendment or other legislative instrument as was given effect in respect of other parts of the world and erstwhile colonial territories. No available reading of the 1948 Act allows such a meaning to be spelt out.

    iii) The 1967 Act in my judgement shows a contrary intention: namely that there should be a swift and a clean break with Aden, any continuation of colony status is inconsistent with this Act. I do not accept the submission that the "independence" part of the 1967 Act is distinct from the "nationality" section. There is no mandate for such a reading in the language of the statute and is inconsistent with the nature of a *jus soli*.

    iv) The drafting of the 1967 Act which makes particular reference to the 1948 Act in its Schedule giving detailed exceptions to the loss of citizenship provisions, although obviously drafted after the 1948 Act, is quite inconsistent with any understanding of the 1948 Act and its reference to "colony" and a meaning as argued by the Claimants. Any exceptions to the effect of a plain reading of the Act are set out in the Schedule to the 1967 Act. It contains nothing relating to the position of the Claimants. It could have done, but does not.

58. As to the argued "purposive" construction of the Act so as to avoid statelessness, I agree with Mr Irwin, that the avoidance of statelessness is desirable but it cannot be converted into a mischief so as to support a construction of the 1948 Act, the sole relevant source of power to confer citizenship, which flies firmly in the face of its clear wording. There is no dispensing power at all.

59. There is no such powerful driver of the meaning advanced as by the Claimants. The natural meaning of the words is the start and the end of the proper construction exercise in this case. For the reasons advanced in relation to the construction of the wording, absent a mischief rule interpretation, the conclusion for which they argue is, rather, highly unlikely in the field of nationality law and colonial withdrawal, and especially unlikely here.

60. Further, as stated it seems to me likely that the draughtsman intended the natural meaning and effect of what was drafted, for sound reasons derived from the context which both parties drew to my attention: Aden did not represent a measured transfer of colonial power. There had been a sudden political upheaval and a unilateral declaration of independence, with a new Sovereign State emerging immediately, in November 1967. Control had expressly been relinquished, specially at the end of November 1967.

61. The crucial point in this case is that it argues for the acquisition by newborns of one sovereign state, of the nationality of another state which has no other power or responsibility for them. The arguments are not concerned with the preservation of already acquired status in certain circumstances: that was the issue covered in the statutory materials – and also dealt with by Lang J, whose Claimants were born before 30 November 1967. I cannot find any such unusual intention in any available reading of the statutory materials.

62. I am constrained to agree that the observation of Lang J as to acquisition of CUKC status cannot apply to those born when these Claimants were born. The point was not in issue in that case and the remark was not an analysis of the law, because not relevant to the Claimants in that case.

63. I am clear this application must be dismissed.