Case No: C4/2012/1441

Neutral Citation Number: [2013] EWCA Civ 1253

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Singh
[2012] EWHC 1841 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2013

Before :

LORD JUSTICE RIMER
LORD JUSTICE TOMLINSON
and
LORD JUSTICE McFARLANE

- -

Between :

THE QUEEN ON THE APPLICATION OF MINAXI VAGH	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Zane Malik and **Mr Nazir Ahmed** (instructed by **Sultan Lloyd Solicitors**) for the **Appellant**
Mr Bilal Rawat (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date: 28 June 2013

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Judgment

Lord Justice Rimer :

Introduction

1. This appeal, by Minaxi Vagh, is against Singh J's order in the Administrative Court on 3 May 2012 dismissing with costs her application for judicial review of a decision of the Secretary of State for the Home Department made on 2 March 2011 refusing her application for registration as a British Citizen under section 4B of the British Nationality Act 1981. The challenged decision re-confirmed a decision first taken on 14 January 2010 and confirmed on 27 September 2010. The appellant's case was that the decision was irrational. His Honour Judge Purle QC granted permission to bring the claim and also extended the appellant's time for bringing it, and no question as to her delay in doing so arose before either Singh J or this court.

2. Longmore LJ, on the papers on 5 October 2012, refused permission to appeal for robustly expressed reasons to the effect that there was no arguable irrationality in the Secretary of State's decision. Munby LJ (as he then was), granted permission at a renewed oral application on 29 November 2012. Munby LJ was also not convinced that an appeal had any real prospect of success. He said that, whilst it was arguable that the judge had fallen into error, he was far from persuaded that he had, and he gave his permission 'with some reluctance'.

3. The appellant also advanced an alternative argument to the judge, namely that a rejection of her primary argument would lead to an interpretation of section 4B that was said to be incompatible with her rights under the Human Rights Act 1998. The argument was that such an interpretation should, if possible, be avoided; alternatively, that the court should make a declaration of incompatibility under section 4 of the 1998 Act. The judge also rejected that argument, and although Munby LJ's permission extended to its re-running on the appeal, Mr Malik, for the appellant, indicated at the outset of the appeal that he did not pursue it before us. Mr Malik did not represent the appellant before the judge, and before us he led Mr Ahmed, who did.

The facts

4. I gratefully take these, in part verbatim, from the judge's judgment, but I have supplemented them by reference to the documents. The judge described the case as 'in a sense arising out of the end of Empire'.

5. The appellant was born on 10 January 1966 in Aden. Aden was then a British territory in what, in 1967, became South Yemen and later merged with North Yemen into the modern state of Yemen. Her father was a citizen of the United Kingdom and Colonies under the British Nationality Act 1948. It followed that the appellant was, by descent, at birth also such a citizen under the same Act (see section 5). Her status changed, however, to that of a British Overseas Citizen ('BOC') when the British Nationality Act 1981 came into force on 1 January 1983.

6. The appellant has, since October 1967, lived for most of her life in India. She was issued with an Indian passport on 26 August 2008. On 21 April 2009, she entered the United Kingdom on a six-month visitor's visa. On 6 August 2009, she was issued with a BOC passport. During her visit, and following conversations with relatives here, she formed the view that she might be entitled to be registered as a British

Citizen. She applied for such registration on 23 September 2009. Her application was made under section 4B of the British Nationality Act 1981.

The legislation

7. Section 4B was inserted into the British Nationality Act 1981 with effect from 30 April 2003 by section 12 of the Nationality, Immigration and Asylum Act 2002; and subsection (1)(d) (which is immaterial), subsection (3) and the words 'the relevant day' in subsection (2)(c) were inserted into section 4B with effect from 13 January 2010 by section 44 of the Borders, Citizenship and Immigration Act 2009. Section 4B, as so amended, provides materially:

> '**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 …
>
> (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.'

8. There is no issue that the appellant satisfies the condition in subsection (1) or that she applied for registration under section 4B so as thereby to satisfy subsection (2)(a). The issue is as to whether she also satisfied subsection (2)(b). Her case is that it ought to have been clear to the Secretary of State that she had no citizenship or nationality other than that of a BOC; and that, in failing so to be satisfied, the Secretary of State made an irrational decision.

More facts

9. The appellant's application of 23 September 2009 was made on her behalf by Bhavsar Patel Solicitors. In their covering letter, they explained that she was a BOC and that she had never had any other nationality, including Indian nationality. They asserted that 'normally, under Indian nationality law, anyone who is not born in India can only become an Indian national by duly applying to become an Indian national by way of

naturalisation or registration as the case may be', whereas the appellant had never made such an application.

10. The response of the UK Border Agency ('UKBA') was a request for, inter alia, confirmation from the country authorities that the appellant did not have, and had never held, Yemeni or Indian nationality; and for provision of the passport or Home Office letter under which she was granted leave to enter the UK. The solicitors' reply repeated the assertion that the appellant was a BOC with no other nationality. They asserted their understanding that 'in such circumstances, our client is not required to prove that she had leave to enter the UK', and that neither the Indian nor the Yemeni authorities would ever provide any kind of evidence in relation to a person who is not their national. They did not provide the Indian passport under which the appellant had entered the UK on 21 April 2009.

11. The UKBA, perhaps unsurprisingly, was unimpressed by that reply, and pressed for the provision of the passport by which the appellant had entered the UK. They said that if it was an Indian one, they required 'written confirmation from the Indian authorities stating that the document was issued in error, and that [the appellant] was *at no time* a citizen of India or lost Indian citizenship on a specific date'. That led to the production by the appellant's solicitors of her Indian passport, which they asserted 'was clearly issued in error by the Indian authorities'. They repeated the assertion summarised in the last sentence of paragraph 8 above. They added that even if the appellant had acquired Indian nationality during her minority, she would have lost it automatically upon attaining her majority unless at the age of 18 she had renounced her British nationality, which she had not. They repeated the assertion that the issue of the Indian passport to her 'was clearly an error'. It is a matter of some surprise that they made no attempt to explain the alleged error. Passports do not arrive uninvited through one's letterbox. They have to be applied for. It must have been obvious to the solicitors that the appellant owed the UKBA an explanation as to what she had done that resulted in the issue to her of an Indian passport and, ideally, to provide a copy of the application form (or a sample of it) that she had completed in order to obtain it. But she did nothing to that end or, therefore, towards explaining the 'error'.

12. The outcome of the correspondence was that on 14 January 2010 the UKBA notified the appellant's solicitors that the Secretary of State had refused her application on the ground that she 'cannot be satisfied that [the appellant] meets the requirements to register' under section 4B. In particular, the production of the Indian passport was evidence of Indian citizenship and no letter from the Indian authorities had been produced to show that it had been issued in error. The appellant therefore failed to satisfy the condition in section 4B(2)(b).

13. After a long pause, the appellant's solicitors took the matter up again on 6 July 2010. They requested the Secretary of State to re-consider the application. They said that in response to the UKBA's letter of 14 January 2010, the appellant had travelled to India and made a personal visit to the passport office at Ahmedabad from which the Indian passport had been issued to her. She had been advised by that office to write to it, which she did on 28 May 2010, and a copy of her letter is in evidence. She explained in it that when she had applied for her Indian passport for the purposes of travelling to the United Kingdom, she was unaware that she had 'the right to be a British Citizen'. She wrote that she had surrendered her Indian passport and had obtained a certificate of such surrender from the Consulate General of India in Birmingham. She asked for

written confirmation from the Indian authorities: (i) that her Indian passport was issued in error, and (ii) that she was at no time a citizen of India or had lost Indian citizenship on a specific date. She enclosed with her letter a copy of her Indian passport, but did not enclose a copy of her application form leading to its issue or explain the basis on which she had applied for it.

14. The solicitors explained that the appellant had received no response to her letter and that she had then visited the passport office personally on 11 June 2010, when Mr Shah of the Policy Department had 'acknowledged verbally that the passport was issued in error' but had refused to confirm it in writing. The solicitors repeated the same case in support of the appellant's application as they had made before. This time, however, they added expressly that Indian law does not permit dual nationality and repeated that it followed that as the appellant had never renounced her British nationality, she lost her Indian nationality (if she ever had one) in 1984 at the age of 18. They enclosed by way of supporting material a copy letter of 28 October 2003 from The High Commission of India to the Home Office, but I shall first quote the material parts of the earlier *Note Verbale* dated 28 May 2003 from the Ministry of External Affairs, New Delhi, to the British High Commission:

> 'Ministry of External Affairs presents its compliments to the High Commission for Britain and has the honour to inform that a large number of British Overseas Citizens living in India are approaching the Ministry of Home Affairs of the Government of India for issue of non-citizenship certificates stating that they have not acquired Indian citizenship.
>
> It is understood that the esteemed High Commission is insisting on production of non-citizenship certificates from the Government of India. In this regard, the Ministry of Home Affairs has requested this Ministry to convey to the esteemed High Commission that a foreigner who is staying in India on a valid foreign passport and visa can not be a citizen of India at the same time, as dual citizenship is not permitted by the Government of India so far. Likewise, a citizen of India who acquires foreign citizenship automatically ceases to be a citizen of India under Section 9(1) of the Citizenship Act, 1955 of the Government of India.
>
> Accordingly, the esteemed High Commission is, therefore, requested not to insist on non-citizenship certificates issued by the Government of India, from each and every individual. Instead, a certificate issued by the Foreigners' Regional Registration Office of the Government of India to the effect that the person is registered with them as a foreigner should suffice for this purpose. …'

15. I now quote from the letter of 28 October 2003, of which a copy had been provided by the appellant's solicitors:

> 'A large number of British Overseas Citizens of Indian origin living in the UK have been approaching us for issue of certificates stating that they are Indian citizen [sic].
>
> We write to confirm that under the provisions of the Indian Constitution and the Citizenship Act 1955, an Indian Citizen ceases to be an Indian national if he/she acquires the Citizenship of any foreign state. Therefore any person of Indian origin holding a foreign passport including British Overseas Citizenship passport,

would cease to be a citizen of India and any Indian Passport held by him/her would be void. It is also confirmed that current Indian Laws do not permit dual nationality. In this context, a copy of note verbal [sic] No T-432/3/2003 dated 28 May 2003 addressed to the British High Commission, New Delhi issued by the Ministry of External Affairs, New Delhi is enclosed herewith for information [and I have just quoted from it].

In view of the above we would be grateful if you would not insist on individual certificates from people of Indian origin holding any foreign passport including British Citizen passport.'

16. Neither document has any direct application to the appellant's case. The former explains (i) that a foreigner staying in India on a valid foreign passport cannot be an Indian citizen at the same time; and (ii) that an Indian citizen who acquires foreign citizenship ceases to be an Indian citizen. The appellant did not hold a valid foreign passport during her time in India prior to her acquisition of her Indian passport in 2008, and so limb (i) of the *Note Verbale* does not apply to her. Limb (ii) of the *Note Verbale* relates to the case of an Indian citizen who acquires a foreign citizenship. That is not in point either, since the appellant denies she is or ever was an Indian citizen, although the Secretary of State's position is that she was not satisfied that the appellant did not have Indian citizenship, the badge of which was her Indian passport. The letter of 28 October 2003 focusses simply on limb (ii) of the *Note Verbale.* The most that the appellant can derive from it is that the issue to her of her BOC passport in 2009 resulted in her losing any Indian citizenship she had held. It does not, however, demonstrate that which she also had to show, namely that she had not since 4 July 2002 renounced or lost any Indian citizenship (see section 4B(2)(c)).

17. By a letter of 27 September 2010, the UKBA explained that no grounds had been shown justifying a re-consideration of the decision of 14 January 2010 refusing the application. The letter said that the application was refused because 'we did not receive a letter from the Indian authorities confirming that the passport [the appellant] holds was issued in error'. It concluded:

'One of the requirements for registration under Section 4B … is that the applicant does not hold another citizenship. [The appellant] has supplied an Indian passport with her application but has not been able to provide a specific letter from the Indian authorities confirming that this was issued in error and that she is not now a citizen of India. Although Indian citizenship law would indicate that [the appellant] may have lost her Indian citizenship at the age of eighteen the fact is that she arrived in the United Kingdom on an Indian passport and in line with our policy we will require a specific letter from the Indian authorities confirming that it was issued in error and that she is not now a citizen of India.'

18. Faced with another rejection, the appellant changed solicitors and instructed Sultan Lloyd Solicitors. They wrote to the UKBA on 10 January 2011. Their letter set out the undisputed facts and once again asserted that the appellant's Indian passport was 'issued in error'. They, like their predecessors, made no attempt to explain what the error was or how it arose. They quoted from the *Note Verbale* of 28 October 2003, apparently without recognising that it had no direct application to the case. Their letter added nothing new to the case that had already been made but, against a threat of judicial review proceedings, asked the UKBA to re-consider the application. Despite

the terms of the refusal letter of 27 September 2010, the appellant made no renewed attempt to obtain a letter from the Indian authorities that the Indian passport was issued in error.

19. The UKBA responded on 2 March 2011, explaining why there were no grounds for a re-consideration. It is the decision in this letter that is formally the subject of challenge, and so I shall refer to it fairly fully. The letter said:

> 'The application was considered under Section 4B … but was refused because we could not be satisfied that [the appellant] met the statutory requirement not to have renounced, voluntarily relinquished or lost through action or inaction any citizenship or nationality.
>
> [The appellant] arrived in the United Kingdom on an Indian passport and only obtained a [BOC] passport on 6 August 2009 when she was in the United Kingdom. Under the terms of Indian citizenship law she is regarded as having lost Indian citizenship at the age of 18 as she held another citizenship.
>
> However, for the purposes of consideration of applications under section 4B … I enclose below an extract from the Nationality Staff Instructions [in Annex D to Chapter 12 of such Instructions]:
>
> > '2.4 Where it appears that an applicant has been issued with a formal document (e.g. a passport or certificate) describing the person as a citizen of another country, but information held about that country's nationality laws indicates that dual nationality is not permitted, it should not be assumed that the document was issued incorrectly. Instead, further enquiries should be made along the lines of 2.3 above. In particular, the applicant should be asked to provide a letter from the relevant authorities confirming that:
> >
> > • the document concerned was issued in error, and
> >
> > • the applicant was *at no time* a citizen of that country or lost the citizenship of that country on a specific date.'

The letter continued:

> 'Applicants are requested to provide this information with their application but we also wrote to [the appellant's] representatives on 30 October 2009 requesting this information but, when it was not forthcoming, the application was refused correctly in line with our procedures.
>
> Citizenship, and the means by which it may be acquired, is defined in the British Nationality Act 1981 and the regulations made under it. The policy on which working practices in the [UKBA] is based is set out in the Nationality Staff Instructions which are available for viewing on the Home Office Website [the address of which was then given]. Generally applications are decided by reference to this guidance. Where individual circumstances are not precisely covered by policy guidance and there may be scope for exercising discretion, beyond that which is contained in the staff instructions, then the application will be considered according to its particular merits by reference to agreed precedents,

or in especially compelling cases by creating a precedent where this can be justified. Applications which are not covered by staff instructions or matched by agreed precedents or which justify the creation of a new precedent must fall for refusal.'

20. The UKBA's letter did not also set out paragraph 2.3 of Annex D referred to, but I shall:

> '2.3 If applicants claim to have tried, unsuccessfully, to obtain a letter confirming non-possession of another citizenship, they should be asked to give their written consent to our writing direct to the authorities of the country concerned. If applicants do not give their consent to this within a reasonable time, after being reminded, they will not have established their entitlement to registration and they should be notified that their applications are refused.'

21. In this case, the appellant was not asked to give her consent to the UKBA writing direct to the Indian authorities. Nor was it part of her grounds in her claim for judicial review that there was in this respect any material failure by the Secretary of State to apply her policy as reflected in the Nationality Staff Instructions, or any material procedural error undermining the decision to reject the appellant's application. The only ground on which the claim was brought was that, on what were said to be the undisputed facts, the Secretary of State's decision to refuse the section 4B application was irrational. The judge made no reference in his judgment to the substance of paragraph 2.3, no point having been made in reliance upon it. Moreover, the Secretary of State's grounds of defence to the judicial review claim explained, in a footnote to page 5, that at the relevant time it was no longer the practice of the Secretary of State to write to foreign authorities as set out in paragraph 2.3, as the practice had not proved to be effective. The note recorded that, for that reason, she was currently considering the removal of the paragraph 2.3 guidance.

22. Before coming to the judge's judgment, I shall also set out further provisions of Annex D to Chapter 12 that are relevant to the case:

> '2. Claims to have no other citizenship or nationality
>
> 2.1 If applicants have declared that they have another citizenship or nationality, they will not be eligible for registration. Even if an applicant declares that he has no other citizenship or nationality, it is possible that he will hold one because one of his parents holds a non-British citizenship or nationality or because the applicant has been registered or naturalised in a country in which he has resided. For these reasons, applicants are requested to supply statements from the authorities of the country or countries concerned confirming that they do not have have its/their citizenship or nationality. Such letters of confirmation should not be taken at face value if they appear to contradict any information we hold about the citizenship laws of the countries concerned. …
>
> 2.7 Applicants of Indian origin
>
> 2.7.1 Indian citizenship law does not, in general, allow for dual nationality. The only exception to this is for children who are dual nationals by birth. However,

even minors who are dual nationals by birth will automatically lose Indian citizenship if they acquire a passport in their other nationality.

2.7.2 More information about Indian citizenship law is contained in Annex H to Chapter 14 …' (Emphases as in the original)

23. Annex H to Chapter 14, headed 'Indian Citizenship Law', provides so far as material:

'1. The following summary of the main provisions of Indian citizenship Law reflects the provisions of Indian citizenship law and statements made by the Ministry of Home Affairs, India by letter to the Foreign and Commonwealth Office on 27 January 2006. It does not aim to be, nor should be taken as, definitive. Only the Indian authorities can provide definitive advice on their citizenship law. However, the information should normally be sufficient to determine an applicant's eligibility for British nationality where this turns on his/her possession, or not, of Indian citizenship.

2. The principal legislation is the Citizenship Act 1955, as amended by the Citizenship (Amendment) Act 1986, the Citizenship (Amendment) Act 1992 and the Citizenship (Amendment) Act 2003. …

6. Dual Nationality

6.1 Our understanding is that Indian citizenship cannot normally be held in combination with any other citizenship. Section 9 of the 1955 Act provides that

> "Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires … the citizenship of another country … shall, upon such acquisition, … cease to be a citizen of India".

6.2 This means that no adult (18 and over) can hold Indian citizenship in conjunction with any other nationality or citizenship – but see 6.6 below.

6.3 Further, if an Indian minor obtains another nationality or citizenship (for example by registration as a BN(O)) the child will automatically lose its Indian citizenship. This applies even where the registration is made by the parents/guardian on behalf of the child.

6.4 The only exception to this general ban on dual citizenship is where a child is a dual national by birth. In such cases that child can remain a dual citizen until either:

a. they obtain a passport in their other citizenship (while under the age of 18); or

b. they reach the age of majority (18)

6.5 If a child who is a dual national by birth fails to renounce their other citizenship prior to reaching the age of majority or acquires a passport in their nationality before reaching the age of 18 they will lose Indian citizenship.

> 6.6 If despite the prohibition on dual nationality, an applicant has been issued with a passport or other formal document describing him as an Indian citizen, it should not be assumed that it has been issued incorrectly. In such cases, we should write to the applicant/agent along the lines explained in paragraph 4.5 of Annex D [that is in fact a reference to paragraph 4.5 in Annex D to Chapter 14, which is in essentially the same terms as paragraph 2.4 in Annex D to Chapter 12].'

The judge's judgment

24. The appellant's case before the judge was simplicity itself. She was born a citizen of the United Kingdom and Colonies and became in 1983 a BOC. If, whilst a minor, she also had an Indian citizenship, she lost it at 18, as the Secretary of State accepted in the decision letter of 2 March 2011. She had been validly issued with a BOC passport in 2009. How, therefore, can the Secretary of State have concluded that she did not meet all the conditions of section 4B?

25. The judge noted, however, that the decision letter refusing the application also referred expressly to the Nationality Staff Instructions, from which he quoted the same passages that I have. He placed emphasis on paragraph 1 in Annex H, which stressed that the summary in Annex H of the main provisions of Indian citizenship law did not aim to be, nor should be taken, as definitive, and that 'Only the Indian authorities can provide definitive advice on their citizenship law'. The problem in the applicant's path was that she had come to this country using an Indian passport, and the judge, in paragraph 19, accepted the submission for the Secretary of State 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.'

26. Support for that submission was, the judge held, to be found in the judgment of Sales J in *R (on the application of Nhamo) v. Secretary of State for the Home Department* [2012] EWHC 422 (Admin). I shall not cite as fully from that judgment as the judge did, but the essence of its material parts is that if an English court is required to consider whether a person is or is not a national of another state, it answers that question by reference to the law of that state, whilst making its own relevant findings of fact. Sales J said, at paragraph 45:

> '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 (although 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.'

27. The heart of the judge's reasoning for dismissing the appellant's claim was expressed as follows:

> '22. … the question which the Secretary of State was called upon to ask and answer in the present context by section 4B(2)(b) is essentially a question of fact on which the primary judgment must be, as is common ground, that of the Secretary of State. As is common ground, that judgment by the Secretary of State on that question of fact can only be impugned by way of judicial review if her view of the facts was irrational, in other words one which no reasonable Secretary of State could reach on the evidence before her, if she were properly directing herself.
>
> 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 ….
>
> 26. As I have already indicated, the defendant is entitled to make a much more fundamental submission, which I accept, that it is simply not for the courts of this country to engage in their own interpretation of and possibly speculation about the meaning of Indian nationality and constitutional law. As was said in the *Mucelli* judgment [*R (Vullnet Mucelli) v. Secretary of State for the Home Department* [2012] EWHC 95 (Admin)] …, such questions of foreign law are questions which need to be addressed by evidence including expert evidence and the courts of this country, who are not well versed in the nuances of the relevant foreign constitutional and statutory instruments should not embark upon their own interpretation and analysis of those instruments.
>
> 27. The Secretary of State, in my judgment, was perfectly entitled to take the view that the apparent and lawful acquisition by the claimant of Indian nationality, at some point, perhaps it may be through marriage or long residence in India, which led to her travelling on an Indian passport to this country called for cogent explanation by and on behalf of the claimant.
>
> 28. It was perfectly reasonable, in my view, for the Secretary of State to take the view that, particularly having regard to the natural comity between nations which one expects in this context to expect a letter or some other written evidence from the Indian authorities, clearly explaining whether, for example, the issuing of an Indian passport to the claimant had simply been a mistake.'

28. The judge therefore concluded that there was no substance to the appellant's irrationality challenge and dismissed her judicial review claim.

The appeal

29. The thrust of Mr Malik's submissions on behalf of the appellant was as follows. The Nationality Staff Instructions identify the Secretary of State's policy in relation to applications for registration under section 4B. Paragraph 2.7 of Annex D to Chapter 12 explains that Indian citizenship law does not generally allow for dual nationality, the only exception relating to children who are dual nationals at birth. In the present case, however, it was accepted by the Secretary of State in the decision letter of 2 March 2011 that if as a minor the appellant was an Indian citizen, she lost that citizenship at 18.

30. Paragraph 2.4 was admittedly to the effect that, despite the Indian position with regard to dual nationality, if an applicant for registration is apparently in the possession of an Indian passport, there is no assumption that the passport was issued incorrectly. In such a case, the applicant should be asked to provide a letter from the Indian authorities confirming: (i) that the passport was issued in error, and (ii) that the applicant was at no time an Indian citizen or had lost such citizenship on a particular date. The applicant was so asked and, despite what were said to be her best efforts, was unable to provide such a letter. Mr Malik submitted that there is, however, nothing in the policy that requires the refusal of an application if such a letter cannot be produced. Whilst he accepted that the factual circumstances of the present case were not identical to the types of case referred to in the *Note Verbale* of 28 May 2003, or in the later letter of 28 October 2003, he submitted that the general principle of those letters was of a width that made it unreasonable of the Secretary of State to press for such a letter.

31. Moreover, he submitted that the Secretary of State had not followed her own policy. Paragraph 2.3 of Annex D showed that, upon the appellant's proven inability to obtain the requested letter, the Secretary of State should have asked the appellant's consent to endeavour to obtain such a letter from the Indian authorities herself, whereas the Secretary of State did not. In any event, the case was clear. It was common ground that the appellant became a BOC in 1983 and that she was still a BOC at the time of her application under section 4B. The Nationality Staff Instructions showed that dual nationality under Indian law was not possible save in the single exceptional circumstance in respect of which the Secretary of State had made a concession in the appellant's favour. It was clear that the issue of the Indian passport was made in error, and Mr Malik submitted that there was nothing more that the appellant could have done in order to make good her section 4B application. In all the circumstances, the Secretary of State's decision to refuse the application was irrational and unlawful.

Discussion and conclusion

32. I can express my reasons for disagreeing with Mr Malik's submissions relatively shortly. It is not enough, as in effect Mr Malik did, simply to point to the policy provisions in Annex D to Chapter 12 and to invite the court to conclude that because: (i) it is agreed that the appellant became a BOC in 1983 and is still a BOC, and (ii) paragraph 2.7 states that, save for a single inapplicable exception, Indian law does not recognise dual citizenship, it follows that (iii) the appellant cannot at any material time have had Indian citizenship, and (iv) that therefore the Secretary of State cannot rationally have concluded that the issue to the appellant of her Indian passport raises

any presumption that the appellant also has or had, or might also have or had, an Indian citizenship.

33. The problem with that argument is that it seeks to derive more from the Nationality Staff Instructions than is justified. Paragraph 2.7 of course says what it does. But paragraph 2.4 also shows that in a case such as this the holding by the appellant of an Indian passport still needed to be explained, and that there is no presumption that it was issued in error. That is because its holding raises a presumption of Indian nationality and it is therefore incumbent upon an applicant for registration under section 4B to rebut that presumption by showing that the passport was issued in error and that she was at no time a citizen of India, or else lost such citizenship at a specified date. It is not enough for the applicant merely to assert that the passport was issued in error. What the Secretary of State wants is documentary evidence from the issuing authorities that it was so issued. In this case, none was adduced.

34. It is said that the appellant tried to obtain such evidence and failed: she wrote her letter of 28 May 2010. With respect, it was, however, an unimpressive letter. It made no attempt to explain what the error was or how it arose. Like all the representations made to the Secretary of State, it was silent as to how the passport came to be issued to the appellant. It is one of the extraordinary omissions in the case that in all the various representations that the appellant repeatedly made to the Secretary of State, she never attempted to vouchsafe what the error was, whose error it was or how it arose. When the UKBA wrote on 27 September 2010 confirming the refusal of the application, and explaining that the appellant had not produced an explanatory letter from the Indian authorities confirming that the passport had been issued in error, one might have expected the appellant to make a renewed request for such a letter. She did not, and the refusal decision was re-confirmed on 2 March 2011.

35. It is obvious why the type of explanation required by the Secretary of State is required. As the judge correctly noted, paragraph 1 of Annex H to Chapter 14 of the Nationality Staff Instructions makes it clear that the guidance in that Annex (which repeats the substance of paragraph 2.7 in Annex D to Chapter 12) as to Indian citizenship law does not aim to be, nor is to be taken as, definitive and 'Only the Indian authorities can provide definitive advice on their citizenship law'. That is why, in a case such as this, paragraph 2.4 of Annex D requires an explanation from the Indian authorities which will enable the Secretary of State to be satisfied one way or the other as to whether the conditions of section 4B are or are not satisfied.

36. At the hearing before the judge, the appellant produced what he described as 'the current application form' for an Indian passport (see his paragraph 23, quoted in paragraph 27 above). The judge was ruling in this case on 3 May 2012 and we do not know if the form he was shown was current in 2008. We were shown what I presume was the same form. Question 14 reads:

> 'Are you a citizen of India by: (**B**)irth/ (**D**)escent/ (**R**)egistration/ (**N**)aturalisation; ….
>
> If you have ever possessed any other citizenship, please indicate previous citizenship ….'

37. The form is in English, which we were told the appellant can neither read nor write. Mr Malik told us on instructions that she answered 'yes' and 'no' respectively to those questions, although I would interpret the first question as requiring the applicant also to choose one or other of the four options and, if she did, we do not know which she chose. At the time she applied for the passport, she was unaware that she had the status of a BOC. It may be that that ignorance meant that at least her answer to the second question was erroneous. Her application form may, in that respect, therefore have been completed in error. Whether it follows that the resultant passport was issued in error, I do not know. For all this court knows, it may perhaps be that her application for an Indian passport would, according to Indian law, be regarded as involving a renunciation of her BOC status. If so, it might perhaps follow that, according to Indian law, the appellant was an Indian citizen. Since the appellant made no attempt to explain the position, neither the Secretary of State nor the court knows the answer to these questions.

38. In the event, the Secretary of State rejected the section 4B application on the ground, in short, that the appellant had not satisfied her that she did not have any citizenship other than that of a BOC. Given the exiguous material that the appellant supplied in support of her application, I agree with the judge that it cannot be said that such decision was irrational. On the contrary, it appears to me to have been a perfectly rational one.

39. There remains Mr Malik's point that the Secretary of State wrongfully failed to apply her policy in paragraph 2.3 of Annex D to Chapter 12, that is, she did not ask the appellant to authorise her to write to the Indian authorities. In my view, that is not a point that it is open to the appellant to raise in this court. It goes, if anywhere, not to the rationality of the Secretary of State's decision but rather to the fairness of the procedure that she applied in making it. No point based on paragraph 2.3 was taken before the judge, no doubt because the Secretary of State had placed her cards fairly and squarely on the table by saying that the practice in paragraph 2.3 had not proved to be effective and so she had ceased to apply it, including in this case. I cannot see that the Secretary of State can be criticised for discontinuing the application of an ineffective practice. The point was anyway not raised in either the grounds of appeal or in the appellant's skeleton argument for this court. It is a brand new point, to which I would pay no regard.

40. I would dismiss the appeal.

Lord Justice Tomlinson :

41. I agree.

Lord Justice McFarlane :

42. I also agree.