Neutral Citation Number: [2012] EWCA Civ 358

Case No: T2/2011/1371

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
Mr Justice Keith, Senior Immigration Judge Jordan and Mr CD Glyn-Jones
Appeal No: SC/66/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/03/2012

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE STANLEY BURNTON
and
LORD JUSTICE GROSS

- -

Between :

Hilal Abdul-Razzaq Ali Al-Jedda	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Richard Hermer QC and Tom Hickman (instructed by **Public Interest Lawyers**) for the **Appellant**
Jonathan Swift QC and Rodney Dixon (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing dates : 13-15 December 2012

- -

Judgment

Lord Justice Richards :

Introduction

1. The appellant, Mr Al-Jedda, came to the United Kingdom in 1992 as a refugee from the regime of Saddam Hussein. He was granted asylum and in 2000 he was granted British nationality. In 2004 he travelled to Iraq, where he was detained by British forces on grounds of suspected involvement with terrorism. He sought unsuccessfully to challenge his detention. On 30 December 2007 he was released from detention without charge. Just prior to his release, on 14 December 2007, the Secretary of State for the Home Department made an order under section 40(2) of the British Nationality Act 1981 depriving him of his British nationality. The appellant wants to return to the United Kingdom but the consequence of the order is that he has no right to do so. At the time of the judgment under appeal he was living with his family in Turkey.

2. Section 40 of the 1981 Act provides:

> "(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.
>
> …
>
> (4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless."

3. The appellant lodged an appeal to the Special Immigration Appeals Commission ("SIAC") against the Secretary of State's order, on grounds directed both to subsection (2) and to subsection (4) of section 40. The grounds relating to subsection (2) were dismissed by SIAC on 7 April 2009. Prior to that, on 23 May 2008, SIAC had determined on a preliminary issue in relation to subsection (4) that the order depriving the appellant of his British nationality did not make him stateless. That decision, however, was subsequently quashed by the Court of Appeal on procedural grounds. Following a fresh hearing before a constitution presided over by Keith J, SIAC reached the same determination in a judgment handed down on 26 November 2010. That is the judgment against which the present appeal is brought.

4. Even though the focus of subsection (4) is on whether the *Secretary of State* is satisfied as to the effect of the order, it was common ground below that, in the context of an appeal to SIAC (as opposed to an application for judicial review) it was for SIAC to decide for themselves whether the order depriving the appellant of his British nationality made him stateless, and that there was no question of affording any deference to the view expressed by the Secretary of State that the order did not make him stateless: see SIAC's judgment at [8].

5. At the time when he first came to the United Kingdom, the appellant had Iraqi nationality. The effect of his being granted British nationality in 2000 was that, under the law of Iraqi as it existed at the time, he lost his Iraqi nationality. The main issue for SIAC to determine was whether his Iraqi nationality had been automatically restored to him by one or other of a number of Iraqi legislative instruments enacted

following the occupation of Iraq by coalition forces in 2003. This required SIAC to consider the effect of the legislation as a matter of Iraqi law, and for that purpose to receive expert evidence on the subject. As SIAC put it at [13]:

> "Whether the effect of the order depriving Mr Al-Jedda of his British nationality was to make him stateless is a matter of English law, but the answer turns on the Iraqi law of nationality. It is trite law that the determination of foreign law is a question of fact to be decided on expert evidence …."

6. At the hearing before SIAC both the appellant and the Secretary of State relied on expert evidence from Iraqi lawyers. Dr Abdul Rahman Mohsin, an experienced practitioner in nationality law, was instructed on behalf of the appellant. Mr Ammar Naji, who was a practising lawyer and the honorary legal adviser to the British Ambassador to Iraq but who had no practical experience in nationality cases, was instructed on behalf of the Secretary of State. SIAC made a number of observations at [13]-[17], to which no exception is taken, about the general approach to such evidence and about the two experts themselves. Their comments on the experts included these:

> "17. Dr Mohsin gave evidence in Arabic through an interpreter. Mr Naji gave evidence in English. We have borne in mind that some parts of Dr Mohsin's evidence might not have got across quite as he intended, and that Mr Naji was giving evidence in a language which was not his first language. Having said that, the expertise of the witnesses (save for when it came to questions of international law) was not in doubt, and we are satisfied that they were doing their best to give their evidence impartially. No doubt for cultural reasons, Dr Mohsin had some difficulty in giving direct answers to the questions he was asked when his opinions were tested, and that undermines to some extent the value of the opinions he expressed."

7. It is apparent from the judgment as a whole that SIAC's choice between the views expressed by the two experts on the various substantive issues was based on specific consideration of their evidence in relation to the particular issues rather than on any general assessment, based for example on the impression they made when giving evidence, that one of the experts was more reliable than the other.

8. SIAC referred at [18]-[19] to evidence produced at a very late stage of the proceedings, in the form of a letter to Dr Mohsin from Major-General Al-Yasiri, Iraq's Director General of Nationality, and extracts from a textbook by Major-General Al-Yasiri on Iraqi nationality law. Whilst before SIAC there was an objection by the Secretary of State to the admissibility of that evidence, SIAC said that they would take it into account for the time being; and they proceeded to take it into account in their consideration of the substantive issues without any further ruling on its admissibility. Sensibly, the objection as to admissibility has not been maintained before us.

9. SIAC concluded that the appellant had had Iraqi nationality restored to him automatically either by the Law of Administration for the State of Iraq for the

Transitional Period ("the TAL"), adopted on 8 March 2004 by the Governing Council of Iraq during the period of occupation by coalition forces, or by Iraqi Law No.26 of 2006 ("the 2006 Nationality Law") which came into force on 7 March 2006 following the end of the occupation, the expiry of the transitional period and the approval of a new Iraqi Constitution.

10. SIAC's conclusion rested on findings as to the meaning of the relevant Iraqi legislation which are findings of fact, albeit findings of fact "of a very different character from the normal issue of fact" (*Delmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyds Rep 223, 286 per Megaw LJ). An appeal to this court from SIAC's decision lies only on a point of law: see section 7(1) of the Special Immigration Appeals Commission Act 1997. Mr Jonathan Swift QC, for the Secretary of State, laid proper stress on the limited scope that this gives to an appellate court for interfering with SIAC's conclusion: it is not sufficient for this court to decide, however strongly, that it would have reached a different conclusion as to Iraqi law. Mr Richard Hermer QC, for the appellant, was fully cognisant of that limitation and put his case firmly on the basis that SIAC's findings of fact were vitiated by errors of law in the underlying analysis.

11. Whether or not Mr Hermer is correct in his identification of errors of law, I should say at once that the clarity of SIAC's judgment and the evident care taken in its drafting make it an extremely helpful platform for consideration of what I have found to be the difficult issues raised in this appeal.

12. I will proceed by examining the relevant Iraqi legislation and the main findings made by SIAC in relation to it, before turning to consider the appellant's criticisms of SIAC's reasoning.

The Iraqi legislation and SIAC's findings on it

The legislation pre-2003

13. SIAC dealt at [20]-[23] with Iraqi nationality between 1923 (when Iraq became an independent State) and 1963, in particular the Law of Nationality of 1924 ("the 1924 Nationality Law"). Under that law the appellant, who was born in 1957, acquired Iraqi nationality at birth.

14. The Law of Nationality of 1963 ("the 1963 Nationality Law") and related regulations ("the 1965 Regulations") were examined by SIAC at [24]-[32]. Articles 2, 3 and 4 of the 1963 Nationality Law "considered" certain people to be Iraq nationals through birth or parentage. Article 11 prohibited dual nationality, in terms similar to those previously contained in Article 13 of the 1924 Nationality Law . It provided:

> "1. Each Iraqi who has acquired a foreign nationality in a foreign country upon his free choice will be denied the Iraqi nationality.
>
> 2. If the person who lost the Iraqi nationality upon paragraph (1) has returned to Iraq in a legal manner and has lived in it for one year [that person] can be considered by the Minister as acquiring the Iraqi nationality after that year and as from the

> date of returning if submitting an application to retain the nationality before the lapse of said period of time."

SIAC found at [27] that the Iraqi courts would decide that someone who lost his Iraqi nationality under Article 11(1) and who applied for its restoration under Article 11(2) could have it refused on national security grounds even if he had been an Iraqi national by birth.

15. Article 25 of the 1963 Nationality Law provided for the issue of by-laws and regulations "to facilitate the operation of the provisions herein". The 1965 Regulations were made pursuant to that provision. Article 2A of the regulations empowered the Director General of Nationality to grant a certificate of Iraqi nationality to individuals meeting, *inter alia*, the conditions of Articles 2, 3 and 4 of the 1963 Nationality Law, on completion of a prescribed form. Article 2B of the regulations empowered the Director General to grant a certificate of Iraqi nationality to persons meeting, *inter alia*, the conditions of Article 11(2) (SIAC were satisfied that the reference in the text to Article 11(3) was a mistake for Article 11(2)), following checks, the completion of a prescribed form and an approval decision by the competent authority. SIAC found, in effect, that persons acquired nationality through the operation of the 1963 Nationality Law itself and that the certificate granted pursuant to the 1965 Regulations was merely proof of nationality rather than an additional precondition to the acquisition of nationality.

16. SIAC's overall conclusion on the effect of the 1963 Nationality Law and the 1965 Regulations was set out at [32]:

> "32. For these reasons, we find that the Iraqi courts would have decided that someone who was 'considered' an Iraqi national under Arts. 2, 3 and 4 of the 1963 Nationality Law did not need to apply for a certificate of nationality to be an Iraqi national. However, anyone who lost Iraqi nationality as a result of the prohibition on dual nationality in Art. 11(1) of the 1963 Nationality Law could only re-acquire Iraqi nationality if they applied for it under Art. 11(2), provided that they had returned to Iraq lawfully and had lived in Iraq for a year. That application could be refused on grounds of national security, but if it was successful, the issue of the certificate of Iraqi nationality followed automatically. That was the consequence of Art. 11(2) rather than the effect of the 1965 Regulations. It is now accepted that Mr Al-Jedda lost his Iraqi nationality pursuant to Art. 11(1) on 12 June 2000 when he was granted British nationality. It is also accepted that no application was made by Mr Al-Jedda for the restoration of his Iraqi nationality under Art. 11(2) – whether while the 1963 Nationality Law remained in force or subsequently."

The events of 2003

17. At [33] SIAC considered the immediate aftermath of the invasion and occupation of Iraq in 2003, including the formation of the Coalition Provisional Authority ("the CPA") by the occupying powers in May 2003 to exercise the powers of government

on a temporary basis, and the formation of the Governing Council in July 2003 as the principal body of the Iraqi interim administration. Later in this judgment I will consider the status of the CPA and the Governing Council, together with a series of UN Security Council resolutions relating to the occupation of Iraq and the transition to a democratically elected representative government.

18. The Secretary of State relied on Resolutions 111 and 117 of the Governing Council as the first instruments to have had the effect of automatically restoring Iraqi nationality to the appellant. SIAC considered that issue at [34]-[36] and concluded that the Iraqi courts would decide that the resolutions never took effect. There is no appeal against that finding.

The Transitional Administration Law (the TAL)

19. As already mentioned, the TAL was adopted by the Governing Council in March 2004. SIAC explained at [38] that it was drafted in English but that the Iraqi courts would use the Arabic version and that an English translation of the Arabic version had therefore been provided, but that there was no suggestion that there was any material difference between the original English text of Article 11 and the English translation of the Arabic version. We were taken in argument to the original English text of a number of other provisions, again with no suggestion of any material difference between that and the English translation of the Arabic version. Like SIAC, therefore, I will refer generally to the original English text.

20. I need to summarise the overall scope of the TAL, since it is relevant to the submissions on the appeal. The Preamble (which, by Article 1(C), was an integral part of the TAL) stated that the people of Iraq "have determined that they shall hereafter remain a free people governed under the rule of law" and affirmed "their respect for international law". It said that the TAL was "established to govern the affairs of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being".

21. Chapter 1 was headed "Fundamental Principles". Within that chapter, Article 2 defined the "transitional period" as "the period beginning 30 June 2004 and lasting until the formation of an elected Iraqi government pursuant to a permanent constitution as set forth in this Law, which in any case shall be no later than 31 December 2005 …". The first phase was to begin with the formation of a fully sovereign Iraqi Interim Government taking power on 30 June 2004; the second phase was to begin after the formation of the Iraqi Transitional Government following elections for the National Assembly as stipulated in the Law. By Article 3(A), the Law was to be the supreme law of the land and binding in all parts of Iraq, and by Article 3(B) any legal provision that conflicted with it was null and void. Article 4 related to the general character of the system of government in Iraq. Article 6 provided that the Iraqi Transitional Government was to take effective steps "to end the vestiges of the oppressive acts of the previous regime arising from", *inter alia*, deprivation of citizenship for political, racial or sectarian reasons. Articles 7 to 9 governed matters such as the official religion, the State flag and the official languages of Iraq.

22. Chapter 2, headed "Fundamental Rights", included the provisions of Article 11 on nationality to which I will come in a moment. It also included provisions relating to such matters as non-discrimination, freedom of expression and fair trial. Chapter 3 dealt with the constitution and powers of the Iraqi Transitional Government (consisting of the National Assembly, the Presidency Council, the Council of Ministers and the judicial authority), Chapter 4 with the transitional legislative authority (the National Assembly), Chapter 5 with the transitional executive authority (the Presidency Council, the Council of Ministers and its presiding Prime Minister), Chapter 6 with the federal judicial authority, Chapter 7 with the Iraqi Special Tribunal and national commissions, Chapter 8 with the regions, governorates and municipalities, and Chapter 9 with certain general provisions concerning the transitional period.

23. Returning to Article 11, I should set out its provisions in full:

> "Article 11
>
> (A) Anyone who carries Iraqi nationality shall be deemed an Iraqi citizen. His citizenship shall grant him all the rights and duties stipulated in this Law and shall be the basis of his relation to the homeland and the State.
>
> (B) No Iraqi may have his Iraqi citizenship withdrawn or be exiled unless he is a naturalized citizen who, in his application for citizenship, as established in a court of law, made material falsifications on the basis of which citizenship was granted.
>
> (C) Each Iraqi shall have the right to carry more than one citizenship. Any Iraqi whose citizenship was withdrawn because he acquired another citizenship shall be deemed an Iraqi.
>
> (D) Any Iraqi whose Iraqi citizenship was withdrawn for political, religious, racial, or sectarian reasons has the right to reclaim his Iraqi citizenship.
>
> (E) Decision Number 666 (1980) of the dissolved Revolutionary Command Council is annulled, and anyone whose citizenship was withdrawn on the basis of this decree shall be deemed an Iraqi.
>
> (F) The National Assembly must issue laws pertaining to citizenship and naturalization consistent with the provisions of this Law.
>
> (G) The Courts shall examine all disputes [arising] from the application of the provisions relating to citizenship.

Decision 666 of the Revolutionary Command Council, referred to in Article 11(E), related to the denial of Iraqi nationality to "each Iraqi of a foreign origin" if their loyalty to Iraq was suspect.

24. The effect of Article 11 was considered at [40]-[55] of SIAC's judgment. Attention was drawn to the difference in language between, on the one hand, the second sentence of Article 11(C) and Article 11(E) ("shall be deemed to be an Iraqi") and, on the other hand, Article 11(D) ("has the right to reclaim his Iraqi citizenship"). SIAC observed that in the normal course of events they would have been reluctant to decide an issue of this kind on the basis of linguistic differences in the text of a document in a foreign language; but they were considering a document which was originally drafted in English, and the difference in language was reflected in the English translation of the Arabic version. The difference was so marked that something of importance must have been intended. The question was what was intended:

> "42. … Was it intended that those who had lost their Iraqi nationality as a result of the prohibition on dual nationality should regain it automatically (as should those who had lost it by virtue of decision 666 of the Revolutionary Command Council), whereas those who had lost it for political, religious, racial or sectarian reasons had to apply for it? That was Mr Naji's position. Or was it intended that anyone who had lost their Iraqi nationality – for whatever reason – had to apply for its restoration, the difference between those to whom Arts. 11(C) and 11(E) applied and those to whom Art. 11(D) applied being that the former were entitled to have it restored once they had established either that they had originally had Iraqi nationality but that they subsequently acquired a foreign nationality, or that they had lost it by virtue of decision 666, whereas the latter could have their application refused on other grounds, for example, because they posed a threat to national security? Or could the distinction be that those who had their Iraqi nationality restored under Arts. 11(C) or (E) were to be regarded as having never lost it, whereas those who had it restored under Art. 11(D) were to be regarded as not having had it during the years when it had been withdrawn?"

25. In answering that question, SIAC examined various points raised by Mr Naji and Dr Mohsin. They also examined what was said by Major-General Al-Yasiri to the effect that as no laws were issued to "regulate" nationality pursuant to Article 11(F), the Directorate of Nationality Affairs did not "apply" Article 11. They observed that the Iraqi courts would no doubt conclude that effect should have been given to Article 11, because the 1965 Regulations remained in force (save to the extent that they were inconsistent with the provisions of the TAL) until new laws and regulations were promulgated. They concluded:

> "51. … We are left with the language of the TAL, and its aim for those who had been deprived of their Iraqi nationality by the previous regime to have their Iraqi nationality restored. That would be inconsistent with some of them – those to whom Art. 11(D) applied – having their application for the restoration of their Iraqi nationality refused on, say, national security grounds. It would also be inconsistent with some of them – again those to whom Art. 11(D) applied – not subsequently

> being treated as having been Iraqi nationals all along during the period when they had lost their Iraqi nationality. We are driven to the conclusion that the Iraqi courts would decide that the difference which the TAL intended between those to whom Arts. 11(C) and 11(E) applied and those to whom Art. 11(D) applied was that the former should regain their Iraqi automatically, whereas the latter had to apply for its restoration."

26. They went on to examine how that fitted in with Dr Mohsin's evidence, based on his experience as an Iraqi lawyer who handled many nationality cases, that as a matter of practice someone who had lost their Iraqi nationality as a result of the prohibition on dual nationality had to apply for its restoration. They concluded that the examples given were of persons who were applying for *a certificate* of Iraqi nationality and that this was not inconsistent with Iraqi nationality having been restored to them automatically.

27. SIAC therefore concluded at [55] that "subject to the international law point", the appellant automatically re-acquired Iraqi nationality pursuant to Article 11(C) of the TAL on 28 June 2004 when it came into force. It appears from [75] of the same judgment that the international law point that SIAC had in mind was "whether [the appellant's] Iraqi nationality would have been recognised as a matter of international law, and [was] therefore capable of being asserted by or against the UK". They said in that paragraph that their conclusion on Article 10.1 of the 2006 Nationality Law (see below) made it unnecessary for them to consider the point: they had concluded that the appellant's Iraqi nationality was restored to him under Article 10.1 if international law would not have recognised its restoration under the TAL. A central element in the appellant's case on the appeal is that SIAC erred in law in failing to consider a different and more important international law point relied on by the appellant in relation to the interpretation of Article 11 itself.

The 2006 Constitution of Iraq

28. A new Iraqi Constitution ("the 2006 Constitution") came into force on 20 May 2006. By Article 143 it annulled the TAL, save for a small number of specified provisions. Article 18 deals with Iraqi nationality and provides:

> "(1) Iraqi citizenship is a right for every Iraqi and is the basis of his nationality.
>
> (2) Anyone who is born to an Iraqi father or mother shall be considered an Iraqi. This should be regulated by law.
>
> (3) A. An Iraqi citizen by birth may not have his citizenship withdrawn for any reason. Any person who had his citizenship withdrawn shall have the right to demand its reinstatement. This shall be regulated by a law.
>
> …
>
> (4) An Iraqi may have multiple citizenships …."

29. SIAC referred at [56] to three important features of those provisions. First, dual nationality is permitted. Secondly, someone is entitled as of right to Iraqi nationality if one of their parents is an Iraqi. Thirdly, if someone had Iraqi nationality but had it removed for some reason (for example, if they lost it because of the prohibition on dual nationality), they have the right to "demand" its reinstatement. SIAC rejected an argument by the Secretary of State that the last two sentences of Article 18(3)A relate only to someone whose Iraqi citizenship is withdrawn after the Constitution came into force.

30. As to the requirement that the provisions of Article 18(2) and (3)A were to be "regulated by law", SIAC considered that this related to the manner of proof that the conditions were satisfied, and that once this was proved it would be inconsistent with the Constitution for the person to be denied Iraqi nationality on other grounds. But as to the effect of the provision in Article 18(3)A that a person who had his citizenship withdrawn shall have the right to *demand* its reinstatement, they said this:

> "57. … But the fact that they have only the right 'to demand' the reinstatement of their Iraqi nationality if they have previously lost it suggests that the Constitution envisaged something other than its automatic restoration. Having said that, the fact that they have the right to 'demand' it, rather than just to apply for it, is significant. 'Demand' is a strong word, and the Iraqi courts would conclude, we think, that it means that if an Iraqi citizen by birth had their Iraqi nationality withdrawn in the past, it *has* to be restored to them if they ask for it back. However, it was because they have to ask for it back that Mr Naji acknowledged in the course of his cross-examination – and confirmed to us at the end of it – that *if* Mr Al-Jedda had not acquired Iraqi nationality automatically under the TAL (or under resolutions 111 or 117 of the Governing Council), he could not have acquired it *automatically* under the Constitution.
>
> 58. How does this reading of Art. 18(3)A fit in with Mr Naji's opinion that the Iraqi courts would treat Mr Al-Jedda as having acquired Iraqi nationality automatically under Art. 11(C) of the TAL? At first blush, the answer would appear to be not well: if those who had lost their Iraqi nationality as a result of the prohibition on dual nationality automatically had it restored by Art. 11(C) of the TAL when the TAL came into force, where is there any room for an application of the type which the Constitution appears to have been envisaging? That was a question which Mr Naji was *not* asked, and it is plain that the point simply had not occurred to him when he acknowledged that the Constitution required Mr Al-Jedda to apply for the restoration of his Iraqi nationality if he had not already had it automatically restored under the TAL. The answer which the Iraqi courts would give has to be, we think, that the need envisaged by the Constitution to apply for the reinstatement of one's Iraqi nationality when it had previously been withdrawn

> applies only to those who had *not* had it automatically restored under the TAL. In other words, the need to apply for it applies to those who had their Iraqi nationality withdrawn for reasons other than the prohibition on dual nationality or decision 666 of the Revolutionary Command Council. These include, for example, those to whom Art. 11(D) of the TAL related, i.e. those who had their Iraqi nationality withdrawn for political, religious, racial or sectarian reasons. So although Mr Naji was entirely correct to acknowledge that the Constitution envisaged the need to apply for the restoration of one's Iraqi nationality, he was wrong to acknowledge that that applies to someone like Mr Al-Jedda who had lost their Iraqi nationality as a result of the prohibition on dual nationality."

The 2006 Nationality Law

31. The 2006 Nationality Law came into force on 7 March 2006. That was before the 2006 Constitution came into force, but as the 2006 Constitution had been approved many months earlier SIAC proceeded on the basis that the provisions of the 2006 Nationality Law had to be compatible with it.

32. Article 3 of the 2006 Nationality Law provides that any person born to an Iraqi father or mother, and any person born in Iraq to unknown parents, is deemed to be Iraqi. SIAC thought it plain that such persons acquire Iraqi nationality automatically, and the contrary was not argued.

33. The position concerning dual nationality is dealt with in Article 10, which provides:

> "1. An Iraqi who acquires a foreign nationality shall retain his Iraqi nationality, unless he declares in writing his renunciation of Iraqi nationality.
>
> …
>
> 3. An Iraqi who renounces his Iraqi nationality may regain it, if he legally returns to Iraq and stays there for at least one year. The Minister may, on expiry thereof, consider him to have acquired Iraqi nationality from the date of his return if he submits an application to regain Iraqi nationality before the end of the aforementioned period. He may avail himself of his rights on only one occasion."

34. Other material provisions relating to the restoration of Iraqi nationality are contained in Articles 17 and 18, which provide in material part:

> "17. Decision No. 666 of 1980 issued by the (defunct) Revolutionary Command Council shall be repealed and Iraqi nationality shall be restored to any Iraqi who has forfeited his Iraqi nationality in accordance with that decision and all the unjust decisions issued by the (defunct) Revolutionary Command Council in that respect.

> 18.1 An Iraqi who forfeits his Iraqi nationality on political, racist or sectarian grounds may regain it by submitting an application to that effect ….”

35. Article 21 provides that the 1963 Nationality Law is repealed and that the directives issued under it (i.e. including the 1965 Regulations) are to remain in force to the extent that they do not conflict with the provisions of the 2006 Nationality Law, until such time as they are replaced or repealed.

36. At the end of the Law is a paragraph headed “Justifications”, which SIAC treated as the equivalent of the explanatory memorandum attached to a UK legislative instrument. The paragraph reads:

> “In order to standardise the provisions relating to Iraqi nationality, to repeal the provisions relating to the forfeiture of Iraqi nationality by an Iraqi who acquires a foreign nationality, to enable an Iraqi who has been arbitrarily deprived of Iraqi nationality to regain it in accordance with the regulations and to bind an Iraqi to his homeland wherever he is in the world and encourage him to maintain his links with Iraqi soil despite having acquired another nationality, this law has been enacted.”

37. SIAC referred at [64] to Dr Mohsin’s evidence that Article 10.3 applies to someone like the appellant who lost their Iraqi nationality as a result of the prohibition on dual nationality, and to the similar view expressed in Major-General Al-Yasiri’s letter to Dr Mohsin. SIAC rejected that approach:

> “65. … The critical question is whether Art. 10.3 applies to someone like Mr Al-Jedda who lost their Iraqi nationality as a result of the prohibition on dual nationality. On that issue, Mr Naji disagreed with Dr Mohsin. He thought that Art. 10.3 did not apply to someone like Mr Al-Jedda. Here, we prefer the evidence of Mr Naji. Art. 10.3 is all about someone who *renounces* their Iraqi nationality, i.e. people who give it up of their own accord. That is the natural meaning of the word ‘renounce’, and we think that Mr Naji’s view is fortified by one of the other translations of Art. 10.3 which translates the relevant Arabic word as ‘relinquished’. Indeed, despite what he said in his letter to Dr Mohsin, that was what Major-General Al-Yasiri was asserting in his textbook, when commenting on the circumstances in which Art. 10.3 applies. In case 1 of topic 5, he wrote:
>
> > ‘A person shall relinquish Iraqi nationality voluntarily after he acquires another nationality. This is the essence of the matter, since we are talking about an Iraqi who has lost his Iraqi nationality *voluntarily* and *of his own accord* acquired the nationality of another state and resided there. He has subsequently returned to Iraq wishing to regain his Iraqi nationality.’ (Emphasis supplied)

> Dr Mohsin said in answer to that that someone who acquires a foreign nationality would be treated as having renounced his Iraqi nationality. He did not explain why, and we do not believe that the acquisition of a foreign nationality could be treated as the renunciation of Iraqi nationality, simply because the consequence of the acquisition of a foreign nationality was the loss of Iraqi nationality. In this respect, we agree with the evidence of Mr Naji that the Iraqi courts would decide that Art. 10.3 does not apply to those who had their Iraqi nationality withdrawn without their consent."

38. SIAC referred next, at [67], to Articles 17 and 18 of the 2006 Nationality Law. They pointed to the difference in language between "shall be restored" (Article 17) and "by submitting an application" (Article 18), and to the language of the corresponding provisions of the TAL, namely Article 11(E) and Article 11(D) respectively. They considered that the difference in language between Articles 17 and 18 strongly supported Mr Naji's reasoning in respect of the TAL that the difference in language was intended.

39. Turning to Article 10.1, SIAC referred to Major-General Al-Yasiri's view that its effect is to prevent the loss of Iraqi nationality by those who acquire a foreign nationality in the future, and that it is not dealing with the position of those like the appellant who had *previously* lost their Iraqi nationality as a result of the prohibition on dual nationality. SIAC rejected that view, for these reasons:

> "68. … Such a literal reading of Art. 10.1 would produce the highly surprising result that their position would not have been dealt with anywhere in the 2006 Nationality Law, and therefore when 'the explanatory memorandum' referred to the purpose of the 2006 Nationality Law being, amongst other things, 'to enable an Iraqi who has been arbitrarily deprived of Iraqi nationality to regain it', it was referring only to those who had lost it as a result of decision 666 of the Revolutionary Command Council or for political, racial or sectarian reasons, and not to those who had lost it as a result of the prohibition on dual nationality.
>
> 69. In our view, Art. 10.1 has to be considered from the standpoint of the Iraqi courts, and in the absence of any evidence about the rules of construction which the Iraqi courts would apply to it, Art. 10.1 should be construed in accordance with the English rules of statutory construction, one of which is that the construction which best avoids an anomalous result should be adopted. Mr Naji's evidence in effect was that the Iraqi courts would decide that Art. 10.1 *did* apply to someone like Mr Al-Jedda … – presumably reading the words '[a]n Iraqi who acquires a foreign nationality' as including '[a]n Iraqi who acquired a foreign nationality and therefore lost his Iraqi nationality', and reading the words 'shall retain his Iraqi nationality' as including 'shall have his Iraqi nationality restored to him'. Such a construction of Art. 10.1 would not

> offend against the presumption against retrospectivity in Iraqi law to which Major-General Al-Yasiri referred to in his letter: it would simply be restoring nationality to someone who had previously lost it. We accept Mr Naji's evidence, because it would be astonishing if Art. 10.1 looked only to the future, and did not also seek to rectify the injustices of the past. Dr Mohsin did not deal with the effect of Art. 10.1 – no doubt because he regarded Art. 10.3 as decisive – but the fact remains that Dr Mohsin did not express a view about the effect of Art. 10.1 if the court preferred Mr Naji's evidence on whether Art. 10.1 was the provision which applied to someone like Mr Al-Jedda."

40. SIAC went on to hold at [70] that Article 10.1 did not require someone in the appellant's position to apply for a certificate of Iraqi nationality under Article 2B of the 1965 Regulations in order to have his Iraqi nationality restored to him. Although Article 21 provided that the 1965 Regulations were to remain in force to the extent that they did not conflict with the provisions of the 2006 Nationality Law, "Art. 2B of the 1965 Regulations *was* inconsistent with the provisions of the 2006 Nationality Law to the extent that it applied to applications under Art. 11(2) of the 1963 Nationality Law, because Art. 11(2) was inconsistent with the 2006 Nationality Law which imposed no conditions on the entitlement of those who had lost their Iraqi nationality as a result of the prohibition on dual nationality to have it restored" (original emphasis).

41. As to Dr Mohsin's evidence that as a matter of current practice someone who lost their Iraqi nationality as a result of the prohibition on dual nationality had to apply for its restoration, just as he claimed they had to do when the TAL was in force, SIAC observed at [74] that the documents relied on did not paint an entirely consistent picture but one could not exclude the possibility that the authorities currently treat such a person as having to apply for its restoration, and not merely as having to apply for a certificate of Iraqi nationality following automatic restoration of their Iraqi nationality. They continued:

> "74. … However, the fact that that may be what the authorities currently do does not mean that that is what the law requires to be done for Iraqi nationality to be restored to those who have lost it as a result of the prohibition on dual nationality. Whether the law requires that to be done depends on the proper interpretation of Art. 18 of the new Constitution and Art. 10 of the 2006 Nationality Law. For the reasons we have given, we have concluded that the Iraqi courts would decide that someone who lost their Iraqi nationality as a result of the prohibition on dual nationality does not have to apply for a certificate of Iraqi nationality to have their Iraqi nationality restored to them. The consequence is that Mr Al-Jedda did not have to apply for a certificate of Iraqi nationality to have his Iraqi nationality restored to him. It was restored to him automatically, though under Art. 10.1 of the 2006 Nationality Law he was entitled to renounce it in writing. Since he had not done so by 14

> December 2007 when he lost his British nationality, he was still an Iraqi national on that date."

The issues on the appeal

42. The grounds advanced by Mr Richard Hermer QC on behalf of the appellant are in summary as follows.

43. As to the TAL, it is submitted that in reaching the conclusion that the appellant's Iraqi nationality was restored automatically by Article 11(C), SIAC erred in law in that they:

    i) failed to consider a core element of the appellant's case, that the Iraqi courts would interpret Article 11(C) in a manner consistent with (or least inconsistent with) international law, and that it would be contrary to international law for such a fundamental alteration to the law of nationality to be effected during a belligerent occupation;

    ii) failed to attribute any or any adequate weight to the evidence that the Iraqi courts would be unlikely to reach an interpretation of Iraqi law that had the extraordinary practical consequence that some 1.5 million people in the diaspora who had previously divested themselves of Iraqi nationality pursuant to the 1963 Nationality Law by voluntarily acquiring another nationality had had their Iraqi nationality automatically restored to them, whether they wanted it or not and irrespective of its potential consequences for them, e.g. as regards tax status; and

    iii) failed to take any or any adequate account of the evidence as to custom and practice, namely the evidence of Dr Mohsin that it was necessary in practice for a person in the appellant's position to make an application for the restoration of his Iraqi nationality, and the evidence of Major-General Al-Yasiri that the Directorate of Nationality did not apply Article 11 owing to the absence of implementing laws and that it was necessary in practice for a person in the appellant's position to make an application under the 2006 Nationality Law for the restoration of his nationality.

44. As to the 2006 Nationality Law, it is submitted that SIAC erred in law in concluding that the appellant had his Iraqi nationality restored to him automatically by Article 10.1 if it had not already been restored by Article 11(C) of the TAL, in that the conclusion:

    i) was in conflict with the agreed expert evidence that Article 10 did not have that effect; and

    ii) was an illogical and irrational reading of Article 10, subverting the plain meaning of the article taken as a whole.

45. The grounds of appeal included a further argument of international law raised before SIAC. This was an argument to the effect that if the provisions of Iraqi law had the effect of restoring the appellant's automatically, it constituted forced naturalisation which could not be asserted against, and ought not to be recognised by, other States.

The point was based on the judgment of the International Court of Justice in *Lichtenstein v Guatemala (The Nottebohm Case)* [1955] ICJ 4. Mr Hermer made clear in his oral submissions, however, that he was not pursuing the point before us. I need therefore say no more about it, and all further references to the international law issue are to the separate international law issue summarised at [43(i)] above.

46. The Secretary of State resists each of the grounds pursued by the appellant. In addition, by a respondent's notice, the Secretary of State contends that even if the relevant provisions of Iraqi nationality law did not have the effect of restoring the appellant's Iraqi nationality automatically, the Secretary of State's decision to deprive him of British nationality did not make him stateless: the appellant's statelessness was the result of his own failure to make the application he was entitled to make for the restoration of his Iraqi nationality.

The interpretation of Article 11(C) of the TAL

The international law argument

47. The first step in the appellant's argument is that the Iraqi courts would seek to interpret Article 11 of the TAL in a manner consistent with international law. There was evidence from Dr Mohsin to that effect in his supplementary written report. The joint experts' memorandum expressed no disagreement on the point. Dr Mohsin was cross-examined along the lines that it was private international law, not public international law, that would be taken into account by the Iraqi courts, but that line of questioning ended inconclusively when Keith J indicated that Dr Mohsin's expertise in respect of public international law had not been established. In the course of re-examination of Dr Mohsin, however, the judge accepted that even if Dr Mohsin did not have expertise in public international law he was able to give evidence, as an expert in Iraqi national law, on whether the Iraqi courts could take account of arguments of public international law in relation to the interpretation of Article 11(C) of the TAL. Dr Mohsin then confirmed that the Iraqi courts could take account of such arguments.

48. When Mr Naji was asked about this issue in his evidence in chief, he said that international treaty law "adopted by a domestic law" would be considered and applied as part of domestic law. The judge queried whether that answered the question whether the principles of international humanitarian law relied on by the appellant would be taken into account in the interpretation of Iraqi law. Counsel for the Secretary of State said that it did answer the question, since the relevant principles were contained in treaties, and the point was not pursued further in evidence. I share the judge's doubts about the completeness of Mr Naji's answer, but I do not think that it matters.

49. The important point is that Mr Naji said nothing by way of contradiction of Dr Mohsin's evidence on this issue; and the only proper conclusion to be drawn from the expert evidence taken as a whole is that the Iraqi courts would have regard to public international law in the interpretation of Article 11(C) of the TAL.

50. The next step in the appellant's argument takes one to the substance of the international law point. In essence, it is submitted that international law prohibits an occupying power from making fundamental changes to the laws of the occupied

territory, and that the interpretation of Article 11(C) adopted by SIAC would cause the article to be in serious breach of international law because it involves a fundamental change to the law of nationality. The argument requires consideration not only of the general position of an occupying power under international law but also of the specific position of Iraq and the status and powers of the Governing Council.

51. These matters were covered in a detailed report prepared by an international law expert, Professor Vera Gowlland-Debbas, for the purposes of the appeal to the Court of Appeal against SIAC's previous judgment on the statelessness issue (which, as explained at [3] above, was set aside on procedural grounds). The report was then placed before SIAC in the further proceedings to which the present appeal relates, but Professor Gowlland-Debbas was not an expert witness in those proceedings and there was a dispute about the status of her report. Before us, Mr Hermer sought in effect to adopt the report as a form of submission. Viewed in that light I consider it unobjectionable, but as a submission it cannot derive any additional weight from the status of the author of the report.

52. As to the general position, Article 43 of the 1907 Hague Regulations provides, in relation to an occupying power:

> "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

In an article entitled *The Administration of Occupied Territory in International Law* (published in *International Law and the Administration of Occupied Territories*, OUP, 1992, pages 241 et seq.), Professor Christopher Greenwood (now Sir Christopher Greenwood, a judge of the International Court of Justice) states that from this text may be deduced the four principles which lay down the international legal framework for the government of occupied territory: (1) the occupant acquires temporary authority, not sovereignty, over the occupied territory; (2) the occupying power is permitted and required to administer the occupied territory; (3) the occupant has the duty, unless absolutely prevented, to respect the existing law; and (4) the powers of the occupant are constrained by the specific duties and prohibitions imposed by international law. In relation to (2), however, he notes that the duty to restore public order and safety reaches far beyond the mere restoration of public order and extends to the conduct of the whole social, commercial and economic life of the country; and in relation to (3) he notes that the exceptions to the general duty of respect for existing law are extensive.

53. Article 43 of the Hague Regulations is reinforced by Article 64 of the Fourth Geneva Convention, which provides that the penal laws of the occupied territory shall remain in force, subject to certain exceptions, and that the occupying power may subject the population of the occupied territory to provisions "which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power …". The ICRC's commentary on that article observes that the idea of the continuity of the legal system applies to the whole of the law (civil and penal) in the

occupied territory and that there is no reason to infer, from the fact of express reference only to penal law, that the occupying power is not also bound to respect the civil law of the country.

54. Taken by themselves, those provisions appear to me to provide powerful support for the contention that it would be contrary to international law for an occupying power to make fundamental changes to the law of nationality of the occupied territory, such as a change which had the effect of conferring citizenship automatically on some 1.5 million people who had lost it under the existing national law by the acquisition of a foreign nationality.

55. It is necessary, however, to consider the special situation obtaining in Iraq, and in particular the fact that, although the TAL was adopted at a time when Iraq was an occupied territory, it was adopted not by the CPA itself but by the Governing Council established as a step towards the formation of a democratically elected representative government for Iraq, and the TAL itself was replete with fundamental provisions relating to the rights of the Iraqi people and to the government of Iraq in the transitional period.

56. In that connection the Secretary of State places reliance on a series of UN Security Council resolutions, most of them made under Chapter VII of the Charter of the United Nations and creating binding obligations under international law. A general theme of the resolutions was to reaffirm the sovereignty of Iraq and to encourage efforts by the people of Iraq to form a representative government. The various steps in that process were covered in the individual resolutions.

57. By UNSCR 1483 (2003), of 22 May 2003, the Security Council:

> "4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.
>
> …
>
> 8. *Requests* the Secretary-General to appoint a Special Representative for Iraq …
>
> 9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority."

58. UNSCR 1500 (2003), of 14 August 2003, welcomed the establishment of the Governing Council on 13 July 2003 as an important step towards the formation by the

people of Iraq of a representative government. On 9 September 2003 the Arab League recognised the Governing Council as entitled to represent Iraq in the organisation.

59. UNSCR 1511 (2003), of 16 October 2003, said more about the respective positions of the CPA and the Governing Council. The Security Council:

> "1. *Reaffirms* the sovereignty and territorial integrity of Iraq, and *underscores*, in that context, the temporary nature of the exercise by the Coalition Provisional Authority (Authority) of the specific responsibilities, authorities, and obligations under applicable international law recognised and set forth in resolution 1483 (2003), which will cease when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the Authority, inter alia through steps envisaged in paragraphs 4 through 7 and 10 below;
>
> …
>
> 4. *Determines* that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority;
>
> 5. *Affirms* that the administration of Iraq will be progressively undertaken by the evolving structures of the Iraqi interim administration;
>
> 6. *Calls upon* the Authority, in this context, to return governing responsibilities and authorities to the people of Iraq as soon as practicable …;
>
> 7. *Invites* the Governing Council to provide to the Security Council, for its review, … a timetable and programme for the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution …."

60. UNSCR 1546 (2004), of 8 June 2004, referred in its preamble to the dissolution of the Governing Council (on the formation of an Interim Government) and welcomed the progress made in implementing the arrangement for Iraq's political transition referred to in UNSCR 1511 (2003). The Security Council:

> "1. *Endorses* the formation of a sovereign Interim Government of Iraq … which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional

> Government of Iraq assumes office as envisaged in paragraph four below;
>
> 2. *Welcomes* that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty ….”

61. In an article entitled *Transformative Military Occupation: Applying the Laws of War and Human Rights* (published in The American Journal of International Law, vol. 100:580, at page 618), Professor Sir Adam Roberts commented as follows on paragraph 1 of that resolution:

> “This important limitation on ‘taking any actions affecting Iraq’s destiny beyond the limited interim period’ reportedly resulted from pressure by various Iraqi groups fearful that the position of Kurds, Shiites, or others might be undermined irrevocably by actions taken by the ‘sovereign’ Interim Government. This constraint placed the Interim Government, paradoxically, in a position analogous to that of an occupying power. The CPA interpreted the provision as limiting the Interim Government’s power to conclude treaties. The constraint bears obvious similarities to the obligations on occupying powers to refrain from making fundamental changes in the legal system of the occupied territory, and to behave generally in a trustee-like manner. The fact that the term ‘caretaker government’ was often used with reference to the Interim Government confirmed this interpretation. Thus, ironically, a transformative occupation challenging the very foundations of the law of the Hague Regulations and the Fourth Geneva Convention had the effect of leading to a reassertion of the conservative principles that underlie occupation law – even at the moment when the occupation was deemed to be at an end.”

62. Mr Swift submitted nonetheless that by its resolutions the UN Security Council determined that the Governing Council represented Iraqi sovereignty, and in so doing effectively dismissed the possibility that the Governing Council was no more than an arm or puppet of the CPA. Thus, the Governing Council was not to be treated in the same way as an occupying power and was not constrained by the restrictive provisions to which occupying powers are subject under international law. Mr Swift submitted further that the resolutions expressly accepted the competence of the Governing Council to prepare for and produce a new constitution, and that it was as part of this constitutional process that the TAL was adopted. The welcome given to the arrangements introduced by the TAL constituted a further endorsement of the status of the Governing Council and of the legitimacy of the TAL. Additional international recognition of the Governing Council and of the TAL is to be found in the decisions of the European Court of Human Rights in *Al-Saadoon and Mufdhi v United Kingdom* (Application no. 61498/08), at paragraph 10 of the admissibility decision of 30 June 2009 and paragraph 18 of the substantive decision of 2 March 2010. Further, the validity of the TAL is assumed by the 2006 Constitution of Iraq, Article 143 of which annuls the TAL save for specified provisions; and it was the

evidence of Mr Naji that the Iraqi courts had made hundreds of decisions based on the TAL.

63. It seems clear that the occupation of Iraq was very far from an ordinary occupation and that it did not fit comfortably within the normal rules of international law: Professor Roberts describes it as "a transformative occupation challenging the very foundations of the law of the Hague Regulations and the Fourth Geneva Convention". I do not think, however, that Mr Swift is correct in his submissions as to the status of the Governing Council and its freedom from the restraints placed by international law on an occupying power.

64. The function of the CPA was to "exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration" (CPA Regulation No.1, of 16 May 2003, Section 1). The CPA retained that function until it ceased to exist on the assumption of responsibilities by the Iraqi Interim Government in June 2004. In the meantime the CPA "recognised" the Governing Council as the principal body of the Iraqi interim administration (CPA Regulation No.6 of 13 July 2003, Section 1) and required the two bodies to consult and co-ordinate "on all matters involving the temporary governance of Iraq, including the authorities of the Governing Council" (*ibid.*, Section 2). Consistently with that, the CPA "recognised" the appointment of Interim Ministers by the Governing Council (CPA Memorandum No.6, of 2 September 2003) but asserted "exclusive authority" to appoint Deputy Ministers (CPA Memorandum No.9, of 25 February 2004). In none of this can I discern the acquisition by the Governing Council of a status displacing that of the CPA, or of powers more extensive than those of the CPA.

65. Although paragraph 4 of UNSCR 1511 (2003) states that the Governing Council "embodies the sovereignty of the State of Iraq during the transitional period", it is difficult to attribute any concrete legal effect to that statement. The resolution does not confer on the Governing Council, or suggest that the Governing Council has acquired from some other source, an authority to govern distinct from that of the occupying powers as represented by the CPA. On the contrary, paragraph 6 calls on the CPA "to return governing responsibilities and authorities to the people of Iraq as soon as practicable"; and it is that transfer of responsibility and authority to the sovereign Interim Government, and the ending of the occupation, to which reference is made in paragraphs 1 and 2 of UNSCR 1546 (2004). Until that point the international law of occupation continued to apply.

66. It is not, however, any part of the appellant's case before us that the Governing Council lacked the authority to make the TAL in general or Article 11 in particular. The *validity* of the TAL is not in issue, even if that is how the point is put in some of the material relied on. On the case as presented to us, the international law point relates only to how Article 11 is to be *interpreted*. It is true that part of the appellant's argument on interpretation is that the Governing Council had no power to adopt a law of such a fundamental character as Article 11 would have on SIAC's interpretation of it, and that this should lead to a restrictive interpretation of the article; but the issue of validity is not an essential feature of the argument, since the international law point is relied on as favouring a restrictive interpretation even if Article 11 would not be invalid on the interpretation given to it by SIAC. In my view, to bring in questions of validity is to add a layer of complexity which is unhelpful and unnecessary for the proper resolution of the dispute as to interpretation.

67. Mr Swift submits that once it is conceded that the Governing Council had the authority to adopt the TAL, the appellant's argument as to interpretation can get nowhere: the TAL contained a package of fundamental measures and there is no warrant for picking out one provision, Article 11, for special treatment on the basis that the international law of occupation prohibits fundamental changes to national law. At first sight that is a powerful submission. But it is also necessary to keep in mind that the TAL was a *transitional* law: as stated in the Preamble, it was "established to govern the affairs of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being" (see [20] above). It is understandable that it should contain measures, however fundamental, that were needed for the purpose of governance during the transitional period and for achieving the move to a democratically elected representative government; and whether or not the adoption of such measures tested or stretched the normal limits of the international law of occupation, they were encouraged and endorsed by the Security Council resolutions. But the normal limits of international law, together with the transitional nature of the law, can still be said to militate against reading Article 11 as effecting as fundamental a change to the law of nationality as found by SIAC – a change that went beyond anything necessary either for the governance of Iraq during the transitional period or for the move to a democratically elected representative government.

68. In that connection it is interesting to note the report given to the Security Council by Mr Brahimi, the Special Adviser to the Secretary-General, on 27 April 2004. In relation to the TAL he said:

> "… I welcome the clarification made recently by Ambassador Paul Bremer, the Administrator of the Coalition Provisional Authority, who, among other things, stressed that 'the interim Government will not have the power to do anything which cannot be undone by the elected Government which takes power early next year'.
>
> The fact is that the Transitional Administrative Law is exactly what is says it is: a transitional administrative law for the transition period. It is not a permanent constitution. Indeed, it is not a constitution at all. The Transitional Law – or any other law adopted in the present circumstances – cannot, in our opinion, tie the hands of the national assembly, which will be elected in January 2005 and will have the sovereign responsibility of freely drafting Iraq's permanent constitution."

69. A similar concern can be seen in paragraph 1 of UNSCR 1546 (2004), quoted at [56] above, in relation to the interim period after the occupation had come to an end but full democracy had not yet been established: it endorses the formation of the Iraqi Interim Government which is to resume full responsibility and authority for governing Iraq "while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office".

70. An important but in my view incidental function of Article 11 during the transitional period was that it was drawn on for establishing eligibility to vote in the elections for

the National Assembly. Chapter 4 of the TAL made general provision for the members of the National Assembly to be elected. CPA Order No. 96, of 7 June 2004, contained the detailed electoral law. Section 5 of that Order laid down entitlement to vote:

> "(1) To be eligible to vote in the election of the National Assembly, a person must:
>
> (a) According to Article 11 of the TAL, be deemed an Iraqi citizen, be entitled to reclaim Iraqi citizenship or be eligible for Iraqi citizenship;
>
> (b) Have been born on or before 31 December 1986; and,
>
> (c) Be registered to vote according to procedures issued by the Commission [i.e. the Independent Electoral Commission established by CPA Order No.9].
>
> (2) The Commission shall interpret Article 11 of the TAL in an inclusive manner. The Commission shall not be dependent on the conclusion of any administrative or legal processes undertaken by the Iraqi Interim Government in order to implement Article 11 of the TAL.
>
> (3) The decisions of the Commission shall not prejudice future administrative or legal processes undertaken by the Iraqi Transitional Government in order to implement Article 11 of the TAL."

71. Thus, the franchise was extended to persons falling within the descriptions in Article 11 irrespective of whether they had actually become Iraqi citizens pursuant to that article. Whilst that was no doubt a convenient way of dealing with the matter, it does not appear to me that that can have been the primary intended function of Article 11 (and I do not read the expert evidence as compelling the view that it was). On its face the article is concerned with citizenship, not with eligibility to vote, and it is the meaning and effect of the article as a law on citizenship that must be considered. The CPA Order dealing with eligibility to vote provides no real illumination on that.

72. Where does all this lead one? In the development of his argument as to the constraints on making any fundamental change to the law on nationality during the period of occupation, Mr Hermer submitted in summary that (1) the Iraqi courts would interpret Article 11 as not having any effect at all as a citizenship law (as opposed to its use for the purposes of determining the electoral franchise) unless and until the National Assembly made implementing laws pursuant to Article 11(F); alternatively, (2) the Iraqi courts would adopt an interpretation of Article 11(C) least in conflict with international law, and that construction is one whereby the article gives a right to apply for Iraqi nationality rather than conferring nationality automatically.

73. Mr Swift's counter-argument was in summary that (1) there is no basis for interpreting Article 11 as having no effect pending the making of implementing laws

by the Nationality Assembly – the 1965 Regulations continued in force, save in so far as inconsistent with the TAL, and enabled Article 11 to be operated without more; and (2) a provision conferring citizenship automatically is no more fundamental than one providing for the grant of citizenship on application, if no additional criteria have to be met for the application to be successful, and a law restoring Iraqi nationality automatically to those who had previously lost it is one that made good sense in the political context in which the TAL was adopted.

74. In my judgment, the international law issue considered at length above is highly material to the assessment of those rival contentions. I am also satisfied that the issue was raised squarely in submissions before SIAC. Mr Swift seized on a passage in closing submissions to SIAC in which Mr Hermers put the point in terms that "there is more than sufficient evidence to suggest that, if a clause is *ambiguous*, then it would be permissible for an Iraqi court to consider international law when deciding on which interpretation to prefer" (my emphasis). That enabled Mr Swift to contend that there was no finding by SIAC that Article 11(C) was ambiguous (SIAC's conclusion rested on the clear difference in language between different provisions of Article 11) and that this entire line of argument therefore fell away and did not need to be considered by SIAC. Mr Hermer's reference to ambiguity was infelicitous but when the appellant's written and oral submissions before SIAC are looked at as a whole I have no doubt that the point being advanced was the wider one considered above. Yet SIAC did not refer to it. Of course, SIAC do not have to mention every point that they have taken into account, and this court will be slow to find that matters have been left out of account simply because they are not mentioned expressly (see *MA (Somalia) v Secretary of State for the Home Department* [2011] UKSC 49, [2011] 2 All ER 65, at [45]). But it seems to me in the particular circumstances of this case that SIAC could not have taken the international law issue into account without dealing with it as an express part of their reasoning on Article 11(C). Accordingly, I am satisfied that they failed to take it into account.

75. That failure was a material error of law. It has the consequence that SIAC's finding on Article 11(C) cannot stand. Although that finding was not determinative for their overall conclusion, since they found that the appellant had his Iraqi nationality restored automatically by Article 10.1 of the 2006 Nationality Law even if it was not conferred on him by the TAL, I consider the correct interpretation of Article 11(C) to be important for two reasons: first, because it provides the proper starting-point for an assessment of the 2006 Nationality Law; and secondly because, as explained later in this judgment, I consider that SIAC erred in law in finding that Article 10.1 of the 2006 Nationality Law applied to the appellant and had the effect of restoring his Iraqi nationality.

76. I should also mention a suggestion made in argument that SIAC's conclusion on Article 11(C) was in conflict with, or failed to take into account, the agreed position of the experts that the TAL was not intended to make fundamental changes. It was Dr Mohsin who stated in his supplementary report that the TAL "was not intended to make permanent or fundamental changes". The joint experts' memorandum expressed no disagreement with the relevant paragraph in that report. In the course of his oral evidence, however, Mr Naji qualified this by saying that the TAL was not intended to make fundamental changes "to the extent possible" but that it was necessary to confer citizenship automatically on the 1.5 million people who had

previously lost it by acquiring another nationality, because "they wanted to prove to the world that Saddam's time was a very bad time and because Saddam has made those 1.5 million Iraqis to flee the country, this is a new government and they shall give them a new opportunity to rejoin Iraq". It is difficult to see why the *automatic* conferment of citizenship would have been necessary for that purpose; but the very fact that Mr Naji said what he did means that one cannot identify a clear-cut agreement between the experts that the TAL was not intended to make any fundamental changes, such that SIAC could be said to have fallen into material error by failing to take into account or to give effect to the agreed expert evidence on the point. Mr Naji's evidence also provides a convenient link with the next matter to be considered.

The consequences of SIAC's interpretation

77. This part of the appellant's case relates to the consequences of SIAC's interpretation of Article 11(C) of the TAL, namely that Iraqi nationality was automatically restored to some 1.5 million people in the diaspora who, in the terms of Article 11(1) of the 1963 Nationality Law, had "by their free choice" acquired a foreign nationality and thereby lost their Iraqi nationality; and that this result occurred notwithstanding the potential implications that this might have for them, e.g. as to their tax status. Dr Mohsin considered that such a result was incorrect and illogical. The point is distinct from, but has an obvious overlap with, the international law issue already considered.

78. SIAC addressed the issue in terms, at [49]:

> "We have not overlooked Dr Mohsin's point that hundreds of thousands of Iraqis in the diaspora – possibly as many as 1.5 million people – would on Mr Naji's view have automatically re-acquired Iraqi nationality – even if (a) they had no wish to have Iraqi nationality, and (b) the acquisition of Iraqi nationality would cause problems for them in their adopted country – without the completion of any administrative formalities whatsoever. … [SIAC rejected an argument based on the absence of official press statements to that effect, and continued:] Nor do we think that any difficulties would have been caused to those who were having the restoration of their Iraqi nationality 'thrust' on them. If they did not want it, they could renounce it, and we were not told of any insuperable problems which that might involve."

79. Mr Hermer criticised that last sentence on the basis that, apart from the obvious problem that people who do not know that they have had Iraqi nationality conferred on them cannot be expected to renounce it, the possibility of renunciation *under the TAL* (as opposed to the possibility of renunciation under the later 2006 Nationality Law) was not relied upon by Mr Naji and was not supported by any expert evidence.

80. I accept that SIAC's point about the ability to renounce under the TAL is at the very least a doubtful one. Our attention was not drawn to anything in the TAL itself or in the expert evidence to show that it was possible under the TAL to renounce the Iraqi nationality automatically conferred by Article 11(C) if SIAC were correct in their interpretation of that provision. By contrast, express provision is made in Article 10

of the 2006 Nationality Law for renunciation of Iraqi nationality which would otherwise be retained on acquisition of a foreign nationality.

81. More generally, I take the view that the consequences of SIAC's interpretation militate strongly against that interpretation. For a State to confer nationality automatically and irrespective of their wishes on some 1.5 million foreign nationals (albeit former Iraqi nationals) spread around the world would be a very surprising step even in the absence of the constraint imposed by the international law of occupation and even in the special circumstances of Iraq in the post-Saddam era. Whilst this is a consideration to which, unlike SIAC, I would attach real weight in my own assessment of Article 11(C), it does not establish an error of law by SIAC.

The evidence as to custom and practice

82. The final part of the appellant's case in relation to Article 11(C) concerns the evidence as to custom and practice that was before SIAC. Dr Mohsin said this by way of general comment, at paragraph 63 of his supplementary report:

> "The idea of automatic conferral of citizenship is against the well-understood custom and practice in Iraq. The Iraqi Courts would not give Article 11(C) such a meaning".

Dr Mohsin gave evidence that he had dealt with many cases where individuals had applied for nationality under Article 11(C), and he provided documents relating to some of those cases. He also produced at a late stage Major-General Al-Yasri's letter, which had been prompted by the Secretary of State's very proper production of the relevant part of Major-General Aj-Yasri's textbook.

83. Mr Hermer criticised SIAC for failing to treat existing practice as a guide to interpretation at all, and failing to address the evidence that an Iraqi court would be influenced by the established procedures relating to citizenship. I do not regard that criticism as well-founded. The evidence did not go so far as to establish with sufficient clarity that the Iraqi courts would treat custom and practice as a guide to interpretation. The passage I have quoted from Dr Mohsin's supplementary report is the high point of the evidence relied on. The comment he makes in it about the Iraqi courts is bound up closely with his view about the correct interpretation of Article 11(C). It cannot be treated as a stand-alone point about the approach of the Iraqi courts towards evidence of custom and practice.

84. Nevertheless SIAC addressed at some length the actual evidence of custom and practice, and in my view they were right to do so. The expert views of Dr Mohsin were informed by his experience as a practitioner in the field, including the various cases about which he gave specific evidence. Moreover, even if custom and practice are not a direct guide to interpretation, there can be real value in testing a particular interpretation of a legislative provision against the way it is applied in practice. It is a striking feature of the present case that SIAC's interpretation of the Iraqi law of nationality is at odds with the practice and official position of the government of Iraq as explained by its Director General of Nationality. That does not show that SIAC's interpretation is wrong but it does raise a significant question-mark about it.

85. I do not need to go into the detail of the case studies presented by Dr Mohsin. SIAC considered them at [52]-[54] and analysed them in way that was consistent with SIAC's interpretation of Article 11(C). There is no separate challenge to that aspect of SIAC's reasoning, which gets round an obstacle to SIAC's interpretation rather than providing positive support for that interpretation.

86. The evidence of Major-General Al-Yasiri concerning the TAL is to be found primarily in his letter to Dr Mohsin, which was written in his capacity as Director General of Nationality. In that letter he summarises the factual background of the appellant's case and states that the Iraqi nationality law "is very simple and clear in this case". He refers first to the appellant's loss of Iraqi nationality, pursuant to Article 11(1) of the 1963 Nationality Law, on acquiring British nationality willingly in 2000. He continues:

> "2. The General Directorate for Nationality in Iraq did not apply the provisions of Article (11) of the TAL, which was issued in 2004. This is due to the fact that no laws were issued to regulate the terms of nationality and naturalization in accordance with the wording of the foregoing Article, as it provides for general principles that the Iraqi legislator must follow when legislating laws related to nationality and naturalization. Therefore, those who lost their Iraqi nationality as a result of acquiring another nationality did not benefit from the provision of this Article."

He goes on to examine the relevant provisions of the 2006 Nationality Law, explaining that the appellant, like all those who lost their Iraqi nationality under the 1963 Nationality Law on the acquisition of a foreign nationality, must submit an application for the restoration of his Iraqi nationality in accordance with Article 10.3 of the 2006 Nationality Law.

87. Major General Al-Yasiri refers in his letter to Chapter 5 of his textbook on Iraqi Nationality Law (2nd ed., 2010), in which he deals with a number of cases concerning restoration of Iraqi nationality. "Case I" is restoration of Iraqi nationality to a person who has relinquished it and voluntarily acquired a foreign nationality. The text considers the position only under Article 10.3 of the 2006 Nationality Law and makes no reference to the TAL. This is of course consistent with the position in his letter that the General Directorate of Nationality did not apply the TAL owing to the absence of implementing laws. But if, as SIAC found, Article 11(C) of the TAL had the effect of restoring Iraqi nationality automatically to all who had lost it under the 1963 Nationality Law on acquiring a foreign nationality, the absence of any reference to it in the textbook would be a very serious omission indeed.

88. Mr Hermer sought to deploy Major-General Al-Yasiri's evidence in support of his submission that the Iraqi courts would interpret Article 11 as not having any effect at all as a citizenship law unless and until the National Assembly made implementing laws pursuant to Article 11(F). He acknowledged an obvious anomaly, in the form of Dr Mohsin's evidence that applications for restoration of Iraqi nationality previously lost through the acquisition of a foreign nationality were being made, and made successfully, during the time when the TAL was in force; but he submitted that this must yield to the evidence of Major-General Al-Yasiri as to the correct position.

Indeed, he placed considerable weight on the fact that SIAC's interpretation of Article 11(C) is inconsistent with the practice of the Iraqi State, and the official position of the Iraqi State, as explained by its Director General of Nationality.

89. I do not accept that SIAC fell into legal error in its treatment of Major-General Al-Yasiri's evidence. They were entitled to proceed, as they did at [46], on the basis that "just because the Directorate of Nationality Affairs did not give effect to Art. 11 did not mean that Art. 11 should not have been given effect to". They were entitled in any event to place only limited weight on his evidence on this point, given the contradiction between it and the practice described in the evidence of Dr Mohsin.

90. For my part, I consider the evidence of Major-General Al-Yasiri to be much more important in relation to the current position under Article 10 of the 2006 Nationality Law than in relation to the position that existed under the TAL.

Conclusion on Article 11(C) of the TAL

91. I have found that SIAC's failure to take into account the international law issue amounted to a material error of law, sufficient to vitiate their finding in respect of Article 11(C). I have expressed a number of other concerns about SIAC's reasoning, none of which would be sufficient in itself to justify interfering with their finding but each of which can properly be taken into account on any fresh assessment.

92. The next question is whether, subject to consideration of SIAC's finding in respect of Article 10 of the 2006 Nationality Law, we should remit the matter for reconsideration by SIAC or should proceed to make a fresh assessment of our own. In my judgment, this is a case in which we can and should adopt the latter course. All the relevant materials are before us. We are in as good a position to review the evidence, including in particular the expert evidence, as SIAC were: as I have said at [7] above, SIAC's choice between the views expressed by the two experts was based on specific consideration of their evidence in relation to the particular issues rather than on any general assessment that one of the experts was more reliable than the other. Considerations of judicial economy and avoidance of further delay tell strongly in favour of our dealing with the matter ourselves rather than remitting.

93. I propose therefore to make my own assessment of how the Iraqi courts would interpret Article 11(C) of the TAL. In so doing, I will give due weight to SIAC's analysis whilst taking into account the various matters covered above.

94. I do not accept Mr Hermer's submission that Article 11 had no effect at all as a citizenship law unless and until the National Assembly made implementing laws under Article 11(F). Article 11 must have been intended, in my view, to operate as a legally effective law of citizenship in the transitional period. I have already expressed the view that, although it was drawn on for the purposes of determining eligibility to vote in the elections for the National Assembly, that was an incidental function rather than its primary purpose; and had it been a law about eligibility to vote, I would have expected it to include some reference to the point. I would also have expected Article 11(F) to be expressed very differently if the intention had been for the substantive provisions of Article 11 to remain in suspense until implementing measures were made by the National Assembly.

95. There was, moreover, no obvious need for implementing measures in respect of, or any reason for wanting to defer the effective date of, a provision such as the prohibition in Article 11(B) on the withdrawal of Iraqi citizenship or of exile. A similar point can be made about the first sentence of Article 11(C), conferring the right to carry more than one citizenship. On the face of it, that provision simply meant that the acquisition of a foreign nationality by an Iraqi national after the date when the TAL came into force no longer resulted in the automatic loss of Iraqi nationality: in conjunction with Article 3(B) of the TAL, which provided that any legal provision that conflicted with the TAL was null and void, it displaced Article 11(1) of the 1963 Nationality Law. There are, as it seems to me, strong reasons for believing that an Iraqi court would hold that such provisions had legal effect notwithstanding the absence of any implementing laws. And once it is found that some provisions of Article 11 had legal effect, I can see no sensible basis for holding that others did not. The precise legal effect of individual provisions (and in particular whether the second sentence of Article 11(C) conferred citizenship automatically or required an application to be made for the purpose) is a different question. If the effective operation of a provision required additional regulations, there was nothing to prevent the continued operation of the 1965 Regulations to the extent that they were relevant and consistent with Article 11.

96. I acknowledge that Mr Hermer derives support for his submission from the international law argument, in that *any* change to the law of nationality of the occupied territory might be considered to be a fundamental change. Strong as it is, however, I do not think that the argument would be sufficient to persuade the Iraqi courts that Article 11 had no legal effect at all. As to the evidence of Major-General Al-Yasiri that in the absence of implementing laws the General Directorate of Nationality did not apply Article 11, I have already explained the limited weight that I attach to that evidence, given the contradictory evidence of what happened in practice.

97. In my judgment there is much greater force to Mr Hermer's alternative submission that the Iraqi courts would interpret the second sentence of Article 11(C) as giving a right to apply for Iraqi nationality rather than as conferring nationality automatically. SIAC were right to point to the difference in language between, on the one hand, the second sentence of Article 11(C) and Article 11(E) and, on the other hand, Article 11(D), and to note that the difference was so marked that something of importance must have been intended (see the summary at [24] above). But they were also right to observe that one possibility was that it was intended that anyone who had lost his Iraqi nationality had to apply for its restoration, the difference between those to whom Articles 11(C) and (E) applied and those to whom Article 11(D) applied being that the former were entitled to have it restored once they had established that they came within the relevant provision whereas the latter could have their application refused on other grounds, for example because they posed a threat to national security. In my view there might be other differences as regards the basis on which an application could be refused, but that is not important for present purposes. The key point is that the difference in language between the various provisions is consistent in itself with an interpretation of Article 11(C) whereby the restoration of citizenship is dependent on the making of a successful application and does not happen automatically. The route by which SIAC got from there to the conclusion that Article 11(C) conferred citizenship automatically is not one that I find persuasive. In my judgment, when account is taken of the additional considerations set out below, the balance comes

down firmly in favour of the conclusion that Article 11(C) required an application to be made.

98. First, I consider that the international law argument tells strongly in favour of a restrictive interpretation of Article 11(C). I do not accept Mr Swift's contention that a provision conferring citizenship automatically is no more fundamental than one providing for the grant of citizenship on application, even if no additional criteria have to be met for the grant of citizenship on application (I will proceed on the assumption that an application would have to be granted if the applicant came within the terms of Article 11(C), but I would leave open the question whether an application might lawfully have been refused on other grounds). To enlarge the pool of Iraqi citizens at one stroke by some 1.5 million people, all of them foreign nationals and most of them living outside Iraq, is on any view a fundamental change. To give the same group of people the right to apply for Iraqi citizenship might have the same theoretical potential for enlargement of the pool of citizens but could realistically be expected to have a very much smaller effect in practice. Both would appear to be incompatible with the international law of occupation, but the former would be a more obvious and far-reaching breach, whereas the latter would affect only those who made an application during the transitional period when the law remained in force.

99. Even leaving the international law argument on one side, I have already indicated why in my view the consequences of SIAC's interpretation, both from the point of view of the State of Iraq and from the point of view of the individuals affected, militate strongly against that interpretation.

100. It also seems to me that the more restrictive interpretation fits better with the terms of the 2006 Constitution and the 2006 Nationality Law. As explained at [28]-[30] above, Article 18(3)A of the 2006 Constitution provides that any person who had his citizenship withdrawn shall have the right to "demand" its reinstatement. SIAC accepted that this required an application to be made but, in the light of their conclusion regarding Article 11(C) of the TAL, they read it as applying only to those whose citizenship was not restored automatically under the TAL. I find that a rather artificial approach and think it much more plausible that the Iraqi courts would adopt a consistent interpretation of the various provisions, to the effect that restoration of citizenship was and is dependent in each case on the making of an application. The reasons why I consider that a like interpretation would be given to Article 10 of the 2006 Nationality Law are set out in the next section of this judgment.

101. For those reasons I conclude that Article 11(C) of the TAL did not operate to restore the appellant's Iraqi nationality citizenship automatically; and since he made no application for its restoration, he did not become an Iraqi citizen by virtue of the TAL.

The interpretation of Article 10 of the 2006 Nationality Law

102. As I have explained at [39]-[40] above, SIAC's approach towards Article 10 of the 2006 Nationality Law was first to dismiss the applicability of Article 10.3 on the basis that a person who had acquired foreign nationality and thereby lost his Iraqi nationality pursuant to the 1963 Nationality Law had not "renounced" Iraqi nationality. SIAC went on to find that Article 10.1 applied to a person in the appellant's position and that it had the effect of restoring Iraqi nationality automatically. In finding that it applied to a person in the appellant's position, SIAC

relied at [68]-[69] on two main considerations. One was that it would avoid what would be (in the light of SIAC's view of Article 10.3) the anomalous result that such a case was not covered by the 2006 Nationality Law at all. The other was that SIAC accepted what it understood to be Mr Naji's evidence to the effect that the Iraqi courts would decide that Article 10.1 *did* apply to someone like the appellant; and in so doing they observed that it would be astonishing if Article 10.1 looked only to the future and did not also seek to rectify the injustices of the past. The further finding that Article 10.1 did not require someone in the appellant's position to apply for a certificate of Iraqi nationality was based on SIAC's view that Article 2B of the 1965 Regulations, which governed applications for the restoration of Iraqi citizenship under Article 11(2) of the 1963 Nationality Law, was inconsistent with the 2006 Nationality Law and was therefore no longer in force.

SIAC's interpretation in conflict with the agreed expert evidence

103. Mr Hermer submitted first that SIAC's conclusion that the appellant's Iraqi nationality was restored automatically by Article 10.1 had no evidential basis to it and was in conflict with the agreed evidence of the two experts. Dr Mohsin's view was that the situation was governed by Article 10.3, which required the appellant to apply for the restoration of his Iraqi nationality; and for that reason he dealt only with Article 10.3 and not with Article 10.1. Mr Naji's written evidence was that Article 10.3 did not apply; it was not clear as to the effect of Article 10.1. In cross-examination it was put to him that if the appellant had not regained his Iraqi nationality under the TAL or under Resolutions 111 and 117 prior to the coming into force of the 2006 Nationality Law, there was nothing in the 2006 Nationality Law itself that would automatically and immediately change the position. In one answer he said that "Article 10 speaks about the Iraqi who acquires another nationality shall keep his Iraqi nationality, so that applies". SIAC referred specifically to that answer as representing his evidence that the Iraqi courts would decide that Article 10.1 did apply to someone like the appellant. Mr Hermer submitted that that was a misunderstanding of the particular passage of Mr Naji's evidence but that in any event, and much more importantly, SIAC's finding that the appellant's Iraqi nationality, if not restored by the TAL, was restored automatically by Article 10.1 ran directly counter to the effect of the evidence given by Mr Naji in his cross-examination taken as a whole.

104. At the end of his cross-examination Mr Naji was asked some questions by Keith J which put his evidence on this matter beyond doubt:

> "Q. Mr Naji, at the beginning of this morning you said in response to questions from Mr Hermer that, if Mr Al-Jedda had not regained Iraqi nationality either under the TAL or under decisions [i.e. resolutions] 111 or 117, he could not have reacquired Iraqi nationality either under the Constitution or under the nationality law of 2006.
>
> A. Correct.
>
> Q. If that is correct … what it means is that whether Mr Al-Jedda reacquired Iraqi nationality is going to be dependent on the TAL or decisions 111 and 117.

> A. I would say and/or.
>
> Q. Very well and/or. It means, therefore, that either way on your evidence the meaning and effect of the Constitution and the meaning and effect of the 2006 nationality law are not material for the commission because, if he acquired nationality under the TAL or decisions 111 or 117, we do not have to consider the Constitution or the nationality law of 2006; alternatively, if he did not acquire nationality under the TAL or decisions 111 or 117, equally we do not have to consider the Constitution or the nationality law of 2006 because you have agreed with Mr Hermer that they would not give him nationality if he had not got it already.
>
> A. Assuming the assumption that Mr Hermer has given that he did not regain it under the resolution.
>
> Q. Of course. I just wanted to make sure that I understood the effect of your evidence …."

105. SIAC referred to that exchange at [57] in the context of their consideration of the effect of the 2006 Constitution. They did not refer to it when considering the effect of the 2006 Nationality Law. Mr Hermer submitted that the limited circumstances in which a court may reject uncontradicted expert evidence (see Dicey, Morris and Collins on *The Conflict of Laws*, 2006 ed., vol.1, para 9-016) do not apply here and that SIAC erred in law in reaching a conclusion in conflict with the expert evidence.

106. Mr Swift sought to deal with this point by submitting that there was no relevant agreement between the experts. For that purpose he took us back to Mr Naji's written report and submitted that SIAC were entitled to understand it as being to the effect that Article 10.1 applied to restore the appellant's Iraqi nationality automatically. I do not accept that the report supports that conclusion, let alone that there is anything in it capable of displacing the clear answers to the contrary effect given by Mr Naji in his oral evidence. Nor is it the way Mr Swift dealt with the evidence in his closing submissions before SIAC, in which he argued that what the evidence came to was that an application had to be made under Article 10 of the 2006 Nationality Law but such an application could not lawfully be refused.

107. In my judgment, Mr Hermer's submissions on this issue are well founded. Whilst it was open in principle for SIAC to reject the view of the experts if there was good reason to do so, no such good reason has been shown to exist in the circumstances of this case. SIAC's conclusion on Article 10.1 not only lacks support in the evidence of the experts but departs without adequate justification from the common position of the experts. That constitutes a material error of law.

The alleged irrationality of SIAC's conclusion

108. Mr Hermer submits further that SIAC's reading of Article 10 is illogical and irrational, subverting the plain meaning of the article taken as a whole. SIAC's rejection of the evidence of Dr Mohsin and Major-General Al-Yasiri that Article 10.1 did not apply to a person in the appellant's position was based on their view that this

would have the anomalous result that such a person would not be covered by the 2006 Nationality Law at all. But the supposed anomaly arose only because of SIAC's rejection of the evidence that Article 10.3 was applicable to such a person. The rejection of that evidence was based in turn on SIAC's view that a person who had lost his Iraqi nationality as a result of the prohibition on dual nationality could not be said to have "renounced" his Iraqi nationality, because the natural meaning of "renounce", and the meaning it has in this context, is to give up of one's own accord. But it does no violence to the language of Article 10.3 to say that a person "renounced" his Iraqi nationality by acquiring a foreign nationality of his own free will and thereby losing his Iraqi nationality pursuant to the 1963 Nationality Law. It does far greater violence to the language of Article 10 to read "shall retain" in Article 10.1 as "shall have restored to him", which is what SIAC did in order to find that Article 10.1 applied to the appellant. That reading also gives Article 10.1 a retrospective effect, contrary to the evidence that a law does not have retrospective effect unless it expressly so provides. SIAC's reliance on the aim of rectifying the injustices of the past was also misplaced, since the prohibition on dual nationality (as opposed to the deprivation of citizenship for reasons referred to in Articles 17 and 18 of the 2006 Nationality Law) was not in itself an injustice.

109. In my judgment there is considerable force in those submissions. Even leaving aside the points made above about SIAC's departure from the common position of the experts, it seems to me that Article 10.3 applies more naturally than Article 10.1 to a person in the appellant's position. SIAC's principal reason for rejecting the applicability of Article 10.3 was that they did not think that the appellant could be said to have "renounced" his Iraqi nationality (or, on another translation, to have "relinquished" it). But I agree with Mr Hermer that it does not involve any great stretching of language to say, as Dr Mohsin did, that someone who voluntarily acquired a foreign nationality and thereby lost his Iraqi nationality by operation of Iraqi law "renounced" his Iraqi nationality; whereas I also agree that SIAC's interpretation of Article 10.1 does far greater violence to the language of that provision. It was only after rejecting the applicability of Article 10.3 that SIAC moved to consider Article 10.1; and it was only because they had rejected the applicability of Article 10.3 that they were able to reason that an anomalous result would arise if Article 10.1 did not apply to the appellant. But if the two provisions are looked at together, Article 10.3 is the better fit; and if Article 10.3 applies, the suggested anomaly falls away and there is no need to adopt a strained interpretation of Article 10.1.

110. I do not need to go so far as to find that SIAC's conclusion is illogical or irrational, which I would hesitate to do. I have already found a material error of law in their departure from the evidence of the two experts, which means that their conclusion has to be reconsidered. My concerns about SIAC's reasoning can be taken into account in my own assessment of Article 10.

111. I should mention for completeness that Mr Swift suggested that the grounds of appeal did not cover SIAC's conclusion on Article 10.3, so that SIAC's finding as to the inapplicability of Article 10.3 would remain untouched even if their conclusion on Article 10.1 were found to be flawed. I disagree. The point may not be expressed as clearly as it might have been in the written grounds, but the appellant's case plainly

involved a challenge to SIAC's conclusion in relation to Article 10 as a whole; and Mr Swift was equally plainly ready with submissions in support of that conclusion.

The evidence as to custom and practice

112. Although the argument about custom and practice was developed by Mr Hermer in the context of the TAL, it applies equally to the 2006 Nationality Law and I need to say something about it here.

113. Dr Mohsin's evidence as to current practice in relation to the 2006 Nationality Law was considered by SIAC at [71]-[74]. SIAC accepted that they could not exclude the possibility that the Iraqi authorities treated someone who had lost his Iraqi nationality as a result of the prohibition on dual nationality as having to apply for its restoration; but again they made the point that what the authorities currently do does not mean that that is what the law requires. There was no error of law in that reasoning.

114. SIAC also considered the evidence of Major-General Al-Yasiri about the 2006 Nationality Law. In that evidence he explains the practice of the General Directorate of Nationality within the context of his understanding of Article 10. Thus, in his letter to Dr Mohsin he states:

> "5. The wording of [Article 10.1] … does not apply to the applicant as he lost his nationality before [the 2006 Nationality Law] had come into force, as a law may not be applied in Iraq unless after its enforcement. This means that a law may not be applied retrospectively, unless the new law contains a provision providing to the contrary. This is according to Article (10) of the Iraqi Civil Law No. (40) of 1951.
>
> 6. The applicant, like all those who lost their Iraqi nationality in accordance with the annulled [1963 Nationality Law] on the ground of acquiring a foreign nationality, must submit an application to the Ministry of Interior expressing his desire to restore his Iraqi nationality, in accordance with the conditions stated in [Article 10.3 of the 2006 Nationality Law].
>
> 7. Such persons who apply to regain their nationality in accordance with the provisions of [Article 10.3] may be in the position of the applicant and have lost their nationality in accordance with [the 1963 Nationality Law] on the ground of acquiring another nationality, or may have relinquished their nationality in writing in accordance with [Article 10.1 of the 2006 Nationality Law]. The procedures and the application process are the same in both cases.
>
> 8. Therefore, the case of the application represents an example of the explanation given in my Book …, in (Case I) of (Chapter 5) …. The five conditions included under this Chapter must be fulfilled, as if not fulfilled by the application; his nationality will not be restored, and therefore he will not be considered an Iraqi citizen.

> 9. The Minister of Interior has the absolute and full discretion to accept or reject the application submitted under [Article 10.3 of the 2006 Nationality Law]. However … the applicant may appeal the rejection decision before an Iraqi court. Until now, no appeals have been filed, yet if an appeal is made, then the court will require justification for the rejection decision from the Minister of Interior. The Minister may cite concerns related to the Country's security. Undoubtedly, the court will take these concerns into consideration when taking its final decision.
>
> We have many applications for nationality restoration made by individuals who lost their Iraqi nationality in accordance with [the 1963 Nationality Law] due to acquiring a foreign nationality upon their free choice. All those applications must fulfil the conditions stated in [Article 10.3 of the 2006 Nationality Law], as explained in this letter."

The five conditions stipulated in "Case I" of Chapter 5 of the textbook reflect Article 10.3 of the 2006 Nationality Law and include a requirement that an application be submitted and a provision that the Interior Minister may approve or refuse the application at his discretion, subject to a right of challenge to the decision before the Iraqi courts.

115. SIAC referred to that evidence at [68] but rejected it for the general reasons given by them for interpreting Article 10.1 as they did. Although their treatment of the evidence gives rise to no errors of law additional to those already considered, the evidence is in my view important for any fresh assessment of Article 10: coming as it does from the Director General of Nationality, it should carry considerable weight.

Conclusion on Article 10 of the 2006 Nationality Law

116. In the light of the discussion above, I can be brief in stating my conclusion on Article 10. I am satisfied that SIAC's analysis involved a material error of law, that their conclusion cannot stand and that the matter must be reconsidered. As in the case of Article 11 of the TAL, I am satisfied that we can and should carry out that fresh assessment for ourselves.

117. In my judgment, the relevant factors come down strongly in favour of the view that the Iraqi courts would find the appellant's situation to be covered by Article 10.3, not by Article 10.1, and that the restoration of his Iraqi nationality depends on his meeting the conditions of Article 10.3, including the making of an application for its restoration. Article 10 does not operate to restore it to him automatically. Despite their differences of view about Article 10, the experts were at least agreed that it requires an application to be made. That is also the clear view of Iraq's Director General of Nationality, and it accords with the practice of the General Directorate of Nationality. The language of the provisions supports it. It also sits comfortably with the 2006 Constitution, Article 18(3)A of which, as SIAC themselves held, requires a person who has had his citizenship withdrawn to make a "demand" to have it reinstated. It is unnecessary to decide whether any application, once made, has to be granted if the basic conditions are fulfilled or whether there exists a residual

discretion to refuse it. What matters is that an application has to be made if Iraqi nationality is to be restored.

118. Accordingly, in the absence of any application by the appellant, Article 10 has not operated to restore Iraqi nationality to him.

The respondent's notice

119. By the respondent's notice the Secretary of State raises an argument that was advanced before SIAC but did not need to be decided by them owing to their conclusion that the appellant's Iraqi nationality had been restored to him automatically. It is said that even if the restoration of the appellant's Iraqi nationality depended on his making an application for the purpose, such an application could be made and would be bound to succeed; and in consequence it was not the Secretary of State's decision to deprive him of his British nationality that made him stateless, but his own failure to apply for the restoration of his Iraqi nationality; or at least, in the terms of section 40(4) of the British Nationality Act 1981, the Secretary of State was entitled in the circumstances not to be satisfied that the order would make him stateless.

120. I am prepared to assume that if an application were made for the restoration of the appellant's Iraqi nationality it would be bound to succeed, though the point is by no means free from doubt. I also put to one side the objections raised by Mr Hermer as to the practicality of the appellant making an application at all: he submitted that an application would have to be made by the appellant in person, and for that purpose the appellant would have to enter Iraq legally and would therefore require a visa, which would lie in the discretion of the State and could be refused on national security grounds.

121. I would reject the Secretary of State's argument for the straightforward reason that section 40(4) requires the Secretary of State (and, on appeal, the court) to consider the effect of the *order* made under section 40(2): would the *order* make the person stateless? If Iraqi nationality was not restored to the appellant automatically under the Iraqi legislation considered above, he was not an Iraqi national at the time of the order: his only nationality at that time was British nationality. The effect of the order would therefore be to make him stateless. That would be the effect of the order irrespective of whether he could previously have acquired another nationality had he chosen to do so, or whether he could do so in the future.

122. In the course of submissions on this issue we were referred to the discussion of statelessness in SIAC's open judgment of 5 November 2010 in *Abu Hamza v Secretary of State for the Home Department* (Appeal No: SC/23/2003). Having considered the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction Statelessness, SIAC stated at [5]:

> "The obvious, and, we are satisfied, only proper conclusion is that Parliament intended that the Secretary of State should not make a deprivation order in respect of a person who is not considered as a national by any state under the operation of its law – the definition in Article 1.1 of the 1954 Convention. Such an interpretation has the advantage of aligning domestic

> law with the United Kingdom's international obligations. As to the burden and standard of proof, we are satisfied that the burden is on the Appellant and that he must prove that he would be made stateless on the balance of probabilities."

123. None of that was in dispute before us. I am satisfied that in this case the appellant has proved to the requisite standard that at the time of the Secretary of State's order he was not considered as a national by the State of Iraq under the operation of Iraqi law, even though it would have been open to him and would still be open to him to make an application for the restoration of Iraqi nationality under that law. There is no suggestion that he was considered as a national by any other State save the United Kingdom. In those circumstances the order depriving him of his British citizenship plainly made him stateless.

Overall conclusion

124. For the reasons I have given I would allow the appeal and quash the Secretary of State's order depriving the appellant of his British nationality.

125. In one way that result is deeply unsatisfactory, in that the Secretary of State is satisfied, for reasons upheld by SIAC, that to deprive the appellant of his British nationality is conducive to the public good. But it needs to be borne firmly in mind that the British Government took the positive step of granting the appellant British nationality in 2000 and that Parliament has legislated in clear terms that an order depriving a person of his British nationality may not be made unless deprivation is conducive to the public good *and* the order would not make him stateless. It appears that at the time of making the order the Secretary of State was unaware that the grant of British nationality to the appellant had caused him to lose his Iraqi nationality, and that the issue of statelessness was therefore not given the consideration it would otherwise have been given.

Lord Justice Stanley Burnton :

126. I am grateful to Lord Justice Richards for having set out the relevant material, the parties' submissions and his conclusions so clearly and comprehensively. I agree with his conclusions and his reasons for them. Indeed, I consider that clear evidence would have been required to justify a conclusion that the courts of Iraq would interpret their laws as automatically conferring Iraqi nationality on very many former citizens of Iraq, who now live in this country, in France, in the USA, in Israel (where many went as refugees in the late 1940s), who would have no knowledge of their re-acquisition of their former nationality and would not want to re-acquire it. I also consider that a conclusion that is inconsistent with the practice of the Iraqi administration would require clearer evidence than that before SIAC and this Court.

127. I therefore agree that the appeal must be allowed. Like Lord Justice Richards, this is a conclusion in relation to this appellant I have come to reluctantly. Section 40(3) of the Immigration Act 1981, as originally enacted, conferred power on the Secretary of State, in terms similar to those in section 20 of the British Nationality Act 1948 to deprive a person of his British citizenship if he

> "(a) has shown himself by act or speech to be disloyal or disaffected towards Her Majesty; or
>
> (b) has, during any war in which Her Majesty was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist an enemy in that war ; or
>
> (c) has, within the period of five years from the relevant date, been sentenced in any country to imprisonment for a term of not less than twelve months."

The restriction of Secretary of State's power to persons who would not be rendered stateless by the deprivation of British citizenship was confined to ground (c). In 1975 the Convention on the Reduction of Statelessness came into force. Article 8 prohibited the deprivation of the nationality of a Contracting State, such as the UK. However, paragraph 3 of that Article authorised a State to retain the power to deprive a person of his nationality, even if it would render him stateless, if at the time of signature, ratification or accession to the Treaty it specified its retention of that right on one or more of specified grounds existing in its national law at that time. Those grounds included that "inconsistently with his duty of loyalty to the Contracting State", the person had "conducted himself in a manner seriously prejudicial to the vital interests of the State" or had "given definite evidence of his determination to repudiate his allegiance to the Contracting State". The United Kingdom made the appropriate express declaration and therefore retained the right reserved by Article 8.3. However, for reasons of which I am unaware, the Government did not legislate to retain that right when the 1981 Act was amended by the Nationality, Immigration and Asylum Act 2002: as we have seen, the prohibition in section 40(4) is unrestricted.

128. I refer to this legislative history and to the Convention because it appears to me that if the Secretary of State had retained the right to deprive a person of his citizenship on the grounds originally set out in the 1981 Act, and permitted by the Convention, the appellant's actions may have been such that she could have deprived the appellant of his citizenship notwithstanding that he would thereby have become stateless. As it is, she had no power to do so.

Lord Justice Gross :

129. For the reasons given by Richards and Stanley Burnton LJJ, with which I agree, I too feel driven to allow this appeal. I do so with great reluctance, in circumstances where the appellant's case is conspicuously lacking in merit and where the Secretary of State has determined that depriving the appellant of his British nationality is conducive to the public good. Unfortunately, however, s.40(4) of the British Nationality Act 1981 (as amended) leaves no scope for the exercise of any discretion.

130. Still more unfortunately, as highlighted by Stanley Burnton LJ (*supra*), when Parliament came to enact the amendments to the 1981 Act, for whatever reason, the opportunity of qualifying s.40(4) was lost. On the materials available to this Court, such qualification would not have entailed any tension with this country's

international obligations. The 1961 Convention on the Reduction of Statelessness, which came into force in 1975, provided in Art. 8 as follows:

> "1. A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.
>
> …..
>
> 3. Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:
>
> (a) That, inconsistently with his duty of loyalty to the Contracting State, the person:
>
> ….
>
> (ii) Has conducted himself in a manner seriously prejudicial to the vital interests of the State….."

131. Had the power set out in Art. 8.3(a)(ii) of the Convention been incorporated in domestic legislation, the landscape of this litigation is likely to have been very different. As it is, we have no choice but to apply s.40(4) in accordance with its terms.