Michaelmas Term
[2013] UKSC 62
On appeal from: [2012] EWCA Civ 358

JUDGMENT

Secretary of State for the Home Department (Appellant) *v* Al-Jedda (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Wilson
Lord Carnwath

JUDGMENT GIVEN ON

9 October 2013

Heard on 27 June 2013

Appellant
Jonathan Swift QC
Rodney Dixon

(Instructed by Treasury Solicitors)

Respondent
Richard Hermer QC
Guy Goodwin-Gill
Tom Hickman
(Instructed by Public Interest Lawyers)

Intervener
James A. Goldston
Laura Bingham
Simon Cox
(Instructed by Open Society Justice Initiative)

LORD WILSON (with whom Lord Neuberger, Lady Hale, Lord Mance and Lord Carnwath agree)

A: INTRODUCTION

1. The Secretary of State for the Home Department cannot make an order which deprives a person of his British citizenship on the ground that it is conducive to the public good if she is satisfied that the order would make him stateless. This appeal seeks to raise the question: if at the date of the Secretary of State's order it were open to the person to apply for citizenship of another state and if that application would necessarily be granted, is it her order which would make him stateless or is it his failure to make the application which would do so?

2. The Secretary of State appeals against an order of the Court of Appeal (Richards, Stanley Burnton and Gross LJJ) dated 29 March 2012, by which it quashed her order dated 14 December 2007 which purported to deprive Mr Al-Jedda ("the respondent") of his British citizenship.

3. The Secretary of State made her order pursuant to section 40(2) of the British Nationality Act 1981 ("the Act"). In its current form, which reflects substitutions made by section 4 of the Nationality, Immigration and Asylum Act 2002 and by section 56(1) of the Immigration, Asylum and Nationality Act 2006, section 40 of the Act provides as follows:

> "40. Deprivation of citizenship
>
> (1) ...
>
> (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.
>
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of –

(a) fraud,

(b) false representation, or

(c) concealment of a material fact.

(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.

(5) Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying –

(a) that the Secretary of State has decided to make an order,

(b) the reasons for the order, and

(c) the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c 68).

(6) ..."

So the issue is whether the Secretary of State's order in respect of the respondent was invalidated by subsection (4) above.

B: HISTORY

4. The respondent was born in Iraq in 1957 and inherited Iraqi nationality. In 1992 he and his first wife came to the UK and sought asylum. In 1998 they and their four children were granted indefinite leave to remain in the UK and on 15 June 2000 they were granted British nationality. The effect of his acquisition of British nationality was that the respondent automatically lost his Iraqi nationality pursuant to article 11 of the Iraqi Nationality Law No 43 of 1963.

5. In 2002, following divorce from his first wife and while he was temporarily abroad, the respondent married a second wife, by whom he had a child; and there he also entered into a polygamous marriage with a third wife, by whom he had three children. In 2008 he was divorced from his second wife. He is currently living in Turkey with his third wife and all eight of his children.

6. In September 2004 the respondent travelled from the UK to Iraq. In October 2004 US forces in Iraq arrested him and transferred him into the custody of British forces. For more than three years, namely until 30 December 2007, British forces detained him in Iraq, without charge, on grounds of his suspected membership of a terrorist group. Following his release he remained in Iraq until 3 February 2008, when he travelled to Turkey. In proceedings for judicial review which he had issued in 2005 the respondent contended that his internment violated his rights under article 5(1) of the European Convention on Human Rights. His contention was rejected both by the Divisional Court of the Queen's Bench Division and on his appeal to the Court of Appeal and also, by order dated 12 December 2007, on his further appeal to the House of Lords *(R (Al-Jedda) v Secretary of State for Defence* (*JUSTICE intervening*) [2007] UKHL 58, [2008] AC 332). Much later, however, namely on 7 July 2011, the Grand Chamber of the European Court of Human Rights held that his internment had violated his rights under article 5(1): *Al-Jedda v United Kingdom* (2011) 53 EHRR 789.

7. In 2006 the respondent had brought a separate claim for habeas corpus in which he asserted that his internment had become unconstitutional under Iraqi law. Following his release from detention he re-pleaded his claim as one for damages. In due course the claim was dismissed and the Court of Appeal upheld the dismissal (*Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, [2011] QB 773).

8. The order by which the Secretary of State deprived the respondent of British citizenship was therefore made shortly prior to his release from internment. As required by section 40(5) of the Act, her order was preceded by a letter, dated 12 December 2007, by which she notified him that she had decided to make the order on the ground that, for four reasons which she specified, she was satisfied that it would be conducive to the public good. Pursuant to section 40A(2) of the Act, she certified in the letter that the decision was taken wholly or partly in reliance on information which in her opinion should not be made public, with the result that, under section 2B of the Special Immigration Appeals Commission Act 1997, his right of appeal lay to that Commission ("the Commission") rather than to the First Tier Tribunal ("the Tribunal").

9. In the domestic proceedings which, as described above, ended in the House of Lords on 12 December 2007, it was recorded as a fact that the respondent had

dual British and Iraqi nationality (Lord Bingham of Cornhill, para 1). Apparently it was not then understood that, upon acquiring British nationality, the respondent had lost his Iraqi nationality. When, however, on 11 January 2008 he issued his notice of appeal to the Commission against the Secretary of State's order dated 14 December 2007, one of his grounds of appeal was that the order had made him stateless and was therefore void. The Commission resolved to treat this ground as a preliminary issue and, having refused the respondent's application for an adjournment, it determined it on 23 May 2008. The Commission found that, upon acquiring British nationality, the respondent had indeed lost his Iraqi nationality; and that fact then became no longer in issue. The Commission, however, proceeded to conclude (or, more strictly, to hold that the respondent had not established otherwise on the balance of probabilities) that he had regained Iraqi nationality under article 11(c) of the Law of Administration for the State of Iraq for the Transitional Period ("the TAL") which had been in force between June 2004 and May 2006. The Commission therefore rejected the respondent's contention that the Secretary of State's order had made him stateless. By further judgments, open and closed, dated 7 April 2009, the Commission rejected the respondent's remaining grounds of appeal against the order; and the dismissal of the appeal enabled the respondent to appeal to the Court of Appeal against the rejection of his contention that the order had made him stateless. On 12 March 2010 the Court of Appeal upheld his submission that the Commission had been wrong to refuse his application for an adjournment of the hearing in May 2008 and the court directed it to rehear the issue ([2010] EWCA Civ 212).

10. On 26 November 2010 the Commission, differently constituted, again concluded that the respondent had regained Iraqi nationality prior to the date of the Secretary of State's order, which had therefore not made him stateless. It found that he had regained it automatically either under article 11(c) of the TAL or under article 10(1) of the Iraqi Law of Nationality 2006 which had in effect replaced the TAL. In the light of its conclusion the Commission observed that it had no need to address the Secretary of State's alternative contention, raised before it for the first time, that, if on 14 December 2007 the respondent had not been an Iraqi national, it had been open to him to regain it by application and that it had been his failure to make the application, rather than her order, which had made him stateless.

11. By its order under current appeal, the Court of Appeal set aside, as erroneous in law, the Commission's conclusion that prior to 14 December 2007 the respondent had automatically regained Iraqi nationality, whether under article 11(c) or under article 10(1). This court has not permitted the Secretary of State to challenge the Court of Appeal's disposal of that issue. But the effect of its disposal was to require that court to address the Secretary of State's alternative contention, which she had preserved by a respondent's notice. In a judgment with which Stanley Burnton and Gross LJJ agreed, Richards LJ rejected the alternative contention in the following terms:

> "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."

It is against this determination that the appeal is brought.

C: STATELESSNESS

12. The evil of statelessness became better understood following the re-drawing of national boundaries at the end of the two world wars of the twentieth century and following, for example, the Reich Citizenship Law dated 15 September 1935 which provided that all Jewish people should be stripped of their citizenship of the German Reich. The Universal Declaration of Human Rights, adopted by the United Nations on 10 December 1948, provides in article 15:

> "(1) Everyone has the right to a nationality.
>
> (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

The European Convention on Human Rights 1950 does not identify a right to a nationality but the European Court of Human Rights recognises that the arbitrary denial of citizenship may violate the right to respect for private life under Article 8 of the Convention (*Karassev v Finland*, Application No 31414/96, 12 January 1999). In his dissenting judgment in *Perez v Brownell*, 356 US 44, 64 (1958), Warren CJ described a right to nationality as "man's basic right for it is nothing less than the right to have rights". Although the international growth of human rights during the past fifty years has to some extent succeeded in establishing that a person's right to have rights stems, instead, from his existence as a human being, worldwide legal disabilities with terrible practical consequences still flow from lack of nationality: see the illuminating article by Weissbrodt and Collins entitled "The Human Rights of Stateless Persons", Human Rights Quarterly, 28 (2006) 245.

13. On 1 May 2013 the Home Office issued guidance on "Applications for leave to remain as a stateless person" referable to changes in Immigration Rules which had recently come into effect. It states, at para 2(1):

> - Statelessness occurs for a variety of reasons, including discrimination against minority groups in nationality legislation, failure to include all residents in the body of citizens when a state becomes independent (state succession) and conflicts of laws between states. The dissolution of the Soviet Union and the Yugoslav Federation in the early 1990's, for example, caused internal and external migration that is reported to have left hundreds of thousands stateless throughout Eastern Europe and Central Asia. In some countries, citizenship is lost automatically after prolonged residence in another country. The absence of proof of birth, origins or legal identity can also increase the risk of statelessness.
>
> - Statelessness has been estimated to affect up to 12 million people worldwide. Possession of nationality is essential for full participation in society and a prerequisite for the enjoyment of the full range of human rights. Those who are stateless may, for example, be denied the right to own land or exercise the right to vote. They are often unable to obtain identity documents; they may be detained because they are stateless; and they can be denied access to education and health services or blocked from obtaining employment."

14. Until 1964 the ability of the Secretary of State in limited circumstances to deprive a person of British citizenship acquired by naturalisation or registration was not qualified by any obligation not thereby to make that person stateless. A power to deprive had been introduced by section 7(1) of the British Nationality and Status of Aliens Act 1914, which had enabled the Secretary of State to revoke a certificate of naturalisation on the ground that it had been obtained by misrepresentation or fraud. Section 1 of the British Nationality and Status of Aliens Act 1918 had converted the power into a duty and had extended it to grounds of public interest: it was to apply to acts of disloyalty to the Crown and, provided that the Secretary of State was satisfied that the continuance of the certificate was not conducive to the public good, to any of five further facts. In turn these provisions were replaced by section 20 of the British Nationality Act 1948, which converted the Secretary of State's duty back into a power and which specified grounds for its exercise which loosely reflected those which had been identified in 1914 and 1918.

15. Shortly after 1948, however, came two important United Nations conventions in relation to statelessness.

16. The first was the Convention relating to the Status of Stateless Persons adopted on 28 September 1954 ("the 1954 Convention"). The UK signed it on that day and ratified it on 16 April 1959; and it came into force on 6 June 1960. It recited the "profound concern" of the United Nations for stateless persons and the desirability of regulating and improving their status. By article 1(1), it defined a stateless person in terms which have become internationally authoritative, namely, as a "person who is not considered as a national by any State under the operation of its law". By the articles which followed, it identified a minimum level of treatment in specified respects which contracting states were required to afford to stateless persons within their territories. But it did not address the deprivation of citizenship when such was to cause statelessness.

17. The second was the Convention on the Reduction of Statelessness adopted on 30 August 1961 ("the 1961 Convention"). The UK signed it on that day and ratified it on 29 March 1966; and it came into force on 13 December 1975. Concerned, as its title suggests, with the reduction of statelessness rather than with the rights of stateless persons, the 1961 Convention obliged states to grant nationality to certain persons who would otherwise be stateless. But it also addressed the deprivation of citizenship when such was to cause statelessness. Article 8(1) prohibited a state from depriving a person of his nationality if such was to cause him to be stateless. Para 2 of the article specified two exceptions to the prohibition, of which the second was the situation in which the nationality had been obtained by misrepresentation or fraud. Para (3)(a) of the article provided the opportunity for a state to escape more widely from the prohibition if (i) at the time of its ratification of the Convention, its law were to provide for deprivation on, in

effect, the ground of conduct seriously prejudicial to the vital interests of the state and (ii) at the time of ratification the state declared its retention of the right to deprive a person of citizenship on that ground.

18. By 1964 the UK had resolved to ratify the 1961 Convention. Parliament passed the British Nationality (No 2) Act 1964 in order (as was noted in Halsbury's Statutes, Second Edition, Vol 44, p 80) to enable the government to ratify it. The Act implemented the obligation cast by the 1961 Convention to grant nationality to certain persons who would otherwise be stateless. In relation to the deprivation of citizenship the government proposed that, when ratifying the Convention, it should make the declaration permitted by article 8(3)(a). It realised however that, notwithstanding the proposed declaration, three of the grounds for deprivation set by the 1948 Act would fall outside the exemptions permitted by the 1961 Convention and could therefore not form the basis of an order if its effect would be to make the person stateless. By section 4(2) of the 1964 Act two such grounds for deprivation were abolished altogether. Parliament resolved to maintain the third ground (namely that, within five years of naturalisation, the person had been sentenced to imprisonment for not less than a year: section 20(3)(c) of the 1948 Act); so, by section 4(1) of the 1964 Act, it provided that the Secretary of State could not make an order for deprivation on that ground "if it appears to him that that person would thereupon become stateless". Thus was the link between deprivation and statelessness first forged in domestic law.

19. Upon ratification of the 1961 Convention on 29 March 1966, the UK Government duly made the declaration permitted by article 8(3)(a) of it.

20. The provisions for deprivation of citizenship in section 20 of the 1948 Act and section 4 of the 1964 Act were in effect consolidated in the original version of section 40 of the Act.

21. On 6 November 1997 the Council of Europe promulgated the European Convention on Nationality. Article 7(1) provided that a contracting state could not deprive a person of its nationality save on seven specified grounds, of which the second was that the person had obtained nationality by misrepresentation or fraud and the fourth was that his conduct had been seriously prejudicial to the vital interests of the state. But, save in relation to the second ground, para 3 of article 7 prohibited deprivation if such was to cause statelessness. Thus no escape from the prohibition was permitted in relation, for example, to the fourth ground, which reflected the public interest ground on which, in accordance with the 1961 Convention, the UK had retained its right to deprive even when such was to cause statelessness.

22. The UK has not ratified nor even signed the European Convention on Nationality. But, as Lord Falconer of Thoroton informed a Committee of the House of Lords on 8 July 2002 (Hansard, HL Debs, vol 637, col 537), the government then hoped to ratify it. He was promoting the bill which became the Nationality, Immigration and Asylum Act 2002. The aspiration to ratify the European Convention explains the Act's dramatic expansion of the prohibition against orders for deprivation when such were to cause statelessness. By section 4(1), fresh sections 40 and 40A were substituted for the original version of section 40 of the Act. The grounds for making an order for deprivation were reduced to two. The first remained misrepresentation or fraud in obtaining citizenship and, as before, the prohibition against orders which caused statelessness did not extend to orders on this ground: section 40(3) and (4), set out at para 3 above. The second, namely the public interest ground, echoed the terms of the European Convention in referring to acts "seriously prejudicial to the vital interests" of the UK (section 40(2)(a)). By section 56 of the Immigration, Asylum and Nationality Act 2006, however, this second ground was recast into its current form, namely that "deprivation is conducive to the public good": section 40(2), set out at para 3 above. For present purposes, however, the crucial change wrought by the 2002 Act was the fresh subsection (4), set out at para 3 above, which prohibited an order on the second ground if the Secretary of State was satisfied that it would make a person stateless. It is clear therefore, that, in enacting the subsection, Parliament went further than was necessary in order to honour the UK's existing international obligations.

D: PREMISE

23. The Secretary of State invites the court to determine the appeal on a premise. It is that on 14 December 2007 the respondent could have applied to the Iraqi authorities for restoration of his Iraqi nationality; that under Iraqi law he then had a right to have it restored to him; and that its restoration would have been effected immediately. Pressed by the court to explain whether her argument extended to a person's right to obtain a nationality never previously held – such as, perhaps, a Jewish person's right to obtain Israeli nationality or a wife's right to obtain the nationality of her husband – Mr Swift QC, on behalf of the Secretary of State, explained that the argument did not extend beyond the restoration of a former nationality. Pressed further to explain whether the argument extended to a person who, prior to her order, had had a right to secure the restoration of his former nationality but who, by the date of the order, had lost that right, Mr Swift explained that the focus was upon what the person could achieve in response to the order and thus that the argument did not extend that far.

24. It was Mr Swift's submission at the hearing (which the Secretary of State has subsequently withdrawn: see para 27 below) that if, on the suggested premise, it were to allow the appeal, this court should remit the respondent's appeal against

the order for deprivation back to the Commission for it to consider whether the premise is valid as a matter of Iraqi law. Mr Swift stressed that the Commission's two previous lengthy hearings were concerned with whether on 14 December 2007 the respondent had Iraqi nationality, not with whether he then had a right to secure its restoration.

25. An appellate court has no need to address argument founded on a premise which it considers unrealistic and, in the absence of any other ground for the appeal, can dismiss it without doing more than to explain why it considers the premise to be unrealistic. In my view, at least on the findings made below, the present appeal comes close to deserving that unusual treatment. In rejecting the Secretary of State's contention that the respondent had regained Iraqi nationality automatically under article 10(1) of the Iraqi Law of Nationality 2006, which was in force on 14 December 2007, Richards LJ said:

> "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(3) provides:

> "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."

It is clear, therefore, that paragraph (3) of the article would have required the respondent (a) to return to Iraq legally, (b) to stay there for at least one year, as well as (c) to apply in the course of the year for restoration of his Iraqi nationality. In the event that the respondent fulfilled these requirements, the Minister "may" restore Iraqi nationality to him, with retrospective effect to the date of his return; and, although the Court of Appeal made no finding in this regard, Mr Swift has not taken issue with the contention of Mr Hermer QC, on behalf of the respondent, that in the end all the experts who gave evidence at the second hearing before the Commission were agreed that, as one would expect, the word "may" connotes that the Minister nevertheless retains a discretion to refuse the application.

26. It seems to me, therefore, that there was an element of indulgence on the part of the Court of Appeal towards the Secretary of State in its accession to her invitation to proceed on the suggested premise; and that, were it to proceed likewise, this court would be extending an analogous indulgence. On balance, however, and in the light of the time, effort and expense which has now been devoted to the substantive argument, I consider that this court should adopt the suggested premise and proceed to determine the clean point, namely whether an order for deprivation made against a person who, at its date, can immediately, by means only of formal application, regain his other, former, nationality is invalid under section 40(4) of the Act.

27. I add, as a postscript to this section of the judgment, that following the hearing in this court the Secretary of State has drawn to its attention what she contends to be important further information recently provided to her by the Iraqi authorities. It is that on 20 January 2008, namely three weeks after his release, the respondent applied in Baghdad for an Iraqi passport; that his application form, a photocopy of which the Secretary of State has produced to the court, shows that it was accompanied by a certificate of his Iraqi nationality purportedly issued on the same date in Kirkuk; that on 28 January 2008 the Iraqi authorities issued a passport, number G1739575, to the respondent; and that the passport is genuine and betokens a valid grant of nationality to the respondent. The information has emboldened the Secretary of State to withdraw Mr Swift's submission that if, on the suggested premise, it were to allow the appeal, the court should remit the respondent's appeal to the Commission. For she suggests that the new information incontrovertibly demonstrates the validity of the premise.

28. When asked by the court to comment on these allegations, the respondent, by his solicitors, has said:

(a) from an early stage of the protracted proceedings referable to his appeal against the Secretary of State's order, he had averred that, in order to travel from Iraq to Turkey on 3 February 2008, he had used a "fake" Iraqi passport: see, for example, his witness statement dated 10 October 2008 which was placed before the Commission;

(b) in 2008 he had also filed a report by a Turkish lawyer who stated that she had reviewed a scanned copy of what purported to be an Iraqi passport referable to him issued in Baghdad on 28 January 2008 and stamped with a Turkish entry visa dated 3 February 2008;

(c) in the course of cross-examination of him at a hearing before the Commission in January 2009 Mr Swift had never sought to challenge

his assertion that the Iraqi passport by which he had travelled to Turkey was fake;

(d) in January 2008, in Kirkuk, he had in fact acquired two fake passports, one in his name and one in another name, on the black market by payment of about US$750 which he borrowed from his family;

(e) he had provided his payee with details about himself and photographs of himself but not with a certificate of Iraqi nationality because he did not have one;

(f) the fake passport in his own name, which the payee provided to him, was indeed numbered G1739575 and it stated that it had been issued on 28 January 2008; this was the passport which he had elected to use for his travel to Turkey on 3 February 2008;

(g) he is unaware of the documents which his payee may have completed or caused to be completed in the course of procuring the passports;

(h) he, the respondent, never completed the application form a copy of which the Secretary of State has produced to the court and he has never previously seen it;

(i) the passport G1739575 is therefore fake, by which he appears to mean that it was forged, or, more probably, that it was fraudulently obtained; and

(j) since 2000 he has never held Iraqi nationality and in the above circumstances the passport is no evidence to the contrary.

29. It is not the function of this court to resolve an issue whether an Iraqi passport was regularly obtained and therefore betokens a valid grant of nationality under Iraqi law. In my view it should set the issue to one side and, not that it matters, should therefore resist concluding that the Secretary of State's new allegations add significantly to the validity of the suggested premise upon which the argument is founded. Were this appeal to be dismissed, the Secretary of State might perhaps make a further deprivation order on the basis that, in the light of the passport, no such order would now make the respondent stateless. He would

evidently dispute that conclusion and it appears that he might also contend that the Secretary of State is estopped from alleging the validity of the passport at so late a stage. This court should make no comment on any of these possibilities.

E: ARGUMENT

30. The Secretary of State places great weight on the word "satisfied" within the terms of the prohibition in section 40(4) of the Act against making an order for deprivation "if [she] is satisfied that the order would make a person stateless". In providing for her satisfaction in this regard, the subsection replicates the requirement in subsections (2) and (3) that she be "satisfied" of the existence of one or other of the two grounds for making the order. The word "satisfied" in the subsections should, if possible, be given some value. I confess, however, that I do not find it easy to identify what that value should be. Parliament has provided a right of appeal against her conclusion that one or other of the grounds exist and/or against her refusal to conclude that the order would make the person stateless; and it has been held and is common ground that such is an appeal in which it is for the appellate body to determine for itself whether the ground exists and/or whether the order would make the person stateless (albeit that in those respects it may choose to give some weight to the views of the Secretary of State) and not simply to determine whether she had reason to be satisfied of those matters (*B2 v Secretary of State for the Home Department* [2013] EWCA Civ 616, Jackson LJ, para 96). Mr Hermer suggests that the word "satisfied" means only that the Secretary of State must bring her judgement to bear on the matters raised by the subsections. His suggestion may afford some slight significance to the word in subsections (2) and (3). But does it work in relation to subsection (4)? If an order would make a person stateless but the Secretary of State has failed even to bring her judgement to bear on the possibility of that consequence, the order can hardly escape invalidity on the basis that the Secretary of State was never satisfied that the order would have that effect. Irrespective, however, of whether the word "satisfied" in subsection (4) can sensibly be afforded any significance at all, I am clear that it cannot bear the weight which Mr Swift seeks to ascribe to it. He contends that it confers latitude upon the Secretary of State – and, in the event of an appeal, upon the Tribunal or the Commission – to look beyond the ostensible effect of the order to the active cause of any statelessness and, in particular, to the facility of the person to secure restoration of his previous nationality. But a requirement that I should be satisfied of a fact does not enlarge or otherwise alter the nature of the fact of which I should be satisfied. Whether the requirement is that the fact should exist or that I should be satisfied of it, the nature of the fact remains the same; it is only the treatment of the fact in my mind which, subject to the context, is governed by the word "satisfied".

31. Although the word "satisfied" therefore adds nothing to it, the Secretary of State's argument still remains that section 40(4) requires the "active" or "real"

cause of any statelessness to be identified. The word in the subsection is "make" and the argument is that, although no doubt a number of factors contributed to "making" the respondent stateless on 14 December 2007 (including, presumably, even his initial loss of Iraqi nationality by acquisition of British nationality in 2000), the subsection requires identification of the factor which "actively" or "really" made him stateless, namely (if such it was) his failure to secure immediate restoration of his Iraqi nationality. The argument is said to reflect a properly purposive construction of the subsection: where a ground for making a deprivation order exists, why disable the Secretary of State from making it in circumstances in which it remains open to the person so easily and so immediately to avoid becoming stateless? Does the law (asks Mr Swift) allow him to complain of a state of affairs of his own "making"?

32. I reject this argument. Section 40(4) does not permit, still less require, analysis of the relative potency of causative factors. In principle, at any rate, the inquiry is a straightforward exercise both for the Secretary of State and on appeal: it is whether the person holds another nationality at the date of the order. Even that inquiry may prove complex, as the history of these proceedings demonstrates. But a facility for the Secretary of State to make an alternative assertion that, albeit not holding another nationality at the date of the order, the person could, with whatever degree of ease and speed, re-acquire another nationality would mire the application of the subsection in deeper complexity. In order to make his argument less unpalatable to its audience, Mr Swift, as already noted, limited it to the re-acquisition of a former nationality, as opposed to the acquisition of a fresh nationality. But, with respect, the limitation is illogical; if valid, his argument would need to extend to the acquisition of a fresh nationality. Yet a person might have good reason for not wishing to acquire a nationality available to him (or possibly even to re-acquire a nationality previously held by him).

33. In section 12 of the Act Parliament provided for the renunciation of British citizenship by declaration and for the declaration to be registered. Article 7 of the 1961 Convention had required a renunciation to be ineffective unless the person "possesses or acquires" another nationality and, by section 12(3), Parliament implemented that requirement in the following terms:

> "A declaration made by a person in pursuance of this section shall not be registered unless the Secretary of State is satisfied that the person who made it will after the registration have or acquire some citizenship or nationality other than British citizenship; and if that person does not have any such citizenship or nationality on the date of registration and does not acquire some such citizenship or nationality within six months from that date, he shall be, and be deemed to have remained, a British citizen notwithstanding the registration."

For present purposes the significance of the subsection is that, as an addition to the person who will "have" another nationality on the date of registration, Parliament, reflecting the terms of the 1961 Convention, there refers to the person who will "acquire" another nationality. Parliament would have been capable of making an analogous addition to section 40(4). After the words "would make a person stateless", it could have added the words "in circumstances in which he has no right immediately to acquire the nationality of another state". But it did not do so; and the Secretary of State therefore invites the court to place a gloss, as substantial as it is unwarranted, upon the words of the subsection.

34. On 20 February 2012 the United Nations High Commissioner for Refugees issued "Guidelines on Statelessness No 1", HCR/GS/12/01, in which he addressed some of the effects of the authoritative definition of a stateless person in article 1(1) of the 1954 Convention. Para 43 of his guidelines, entitled "Temporal Issues", has been incorporated, word for word, into the Home Office guidance on "Applications for leave to remain as a stateless person" dated 1 May 2013, referred to at para 13 above. The guidance provides:

> "3.4 ... An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures have not been completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention. Similarly, where requirements or procedures for loss, deprivation or renunciation of nationality have not been completed, the individual is still a national for the purposes of the stateless person definition."

The Secretary of State's own guidance eloquently exposes the fallacy behind her appeal.