Case No: T2/2012/1974

Neutral Citation Number: [2013] EWCA Civ 616

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SPECIAL IMMIGRATION APPEALS COMMISSION
MR JUSTICE MITTING
SC1142012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2013

Before :

LORD JUSTICE JACKSON
LORD JUSTICE LLOYD JONES
and
LORD JUSTICE FLOYD

- -

Between :

B2	**Respondent**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**

- -
- -

Mr Hugh Southey QC and **Mr Alex Burrett** (instructed by **JD Spicer Zeb**) for the **Respondent**
Mr Robin Tam QC and **Ms Melanie Cumberland** (instructed by **Treasury Solicitors**) for the **Appellant**
Mr Angus McCullough QC and **Ms Shaheen Rahman** appeared as **Special Advocates**

Hearing date: Thursday 2nd May 2013

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Judgment

Lord Justice Jackson :

1. This judgment is in seven parts, namely:

Part 1. Introduction,

Part 2. The facts,

Part 3. The present proceedings,

Part 4. Statelessness,

Part 5. The Nationality Laws of Vietnam,

Part 6. The status of B2 under Vietnamese Nationality Laws,

Part 7. Decision.

Part 1. Introduction.

2. This is an appeal from the Special Immigration Appeals Commission in which the issue is whether the Secretary of State for the Home Department was entitled to deprive a British Citizen originating from Vietnam of British nationality following his alleged involvement in terrorism related activities. The Secretary of State alleges that she was so entitled. The respondent contends that the Secretary of State was not so entitled, because the effect would be to render him stateless.

3. In this judgment I shall refer to the Special Immigration Appeals Commission as "SIAC". I shall refer to the United Nations High Commissioner for Refugees as "UNHCR".

4. The respondent to this appeal, who was the appellant before SIAC, is a man referred to in the pleadings as "B2". I shall so refer to him.

5. I shall refer to the British Nationality Act 1981 as "the 1981 Act". Section 40 of the 1981 Act provides:

> "(1) In this section a reference to a person's "citizenship status" is a reference to his status as —
>
> (a) a British citizen,
>
> (b) a British overseas territories citizen,
>
> (c) a British Overseas citizen,
>
> (d) a British National (Overseas),
>
> (e) a British protected person, or
>
> (f) a British subject.

> (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.
>
> (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. For reasons which will be developed later in this judgment, the word "stateless" is used in two different senses. One is "*de jure*" stateless and the other is "*de facto*" stateless. There is no dispute that in the context of section 40 (4) what is meant is *de jure* stateless.

7. I shall set out the relevant provisions of Vietnamese law in Part 5 below, using the English translations in the bundle with one exception. That one exception concerns article 2 of Decree No. 37/HDTB. B2's expert witness says that the verb in the first sentence should be translated as "relinquishing", not "losing". When I come to that enactment, I shall adopt the translation preferred by B2's expert.

8. After these introductory remarks, I must now turn to the facts.

Part 2. The facts

9. B2 was born in Mongai, Vietnam on 9th February 1983. When he was a baby his parents took him to Hong Kong, where they lived for some years. In 1989 the family arrived in the UK and claimed asylum. They were granted indefinite leave to remain in this country. In 1995 they acquired British citizenship. The only document which B2 has evidencing his connection with Vietnam is his birth certificate. It appears that B2 and his parents have never held Vietnamese passports. Nor have they ever taken any steps to renounce their Vietnamese nationality.

10. B2 was aged 12 when he acquired British nationality. He was educated in this country and went on to attend a college of design and communications in Kent. At the age of 21 B2 converted to Islam. It is alleged that thereafter he became an Islamist extremist. In December 2010 B2 travelled to Yemen, where he remained until 25th July 2011. It is the assessment of the Security Service that while in Yemen

B2 received terrorist training from Al Qaida in the Arabian Peninsula. It is also the assessment of the Security Service that B2, if at liberty, would pose an active threat to the safety and security of the United Kingdom and its inhabitants.

11. On the 20th December 2011 the Secretary of State decided to make an order pursuant to section 40 (2) of the 1981 Act depriving B2 of his British citizenship, because she was satisfied that this would be conducive to the public good. The reason for her decision was that the Security Service assessed that B2 was involved in terrorism related activities and had links to a number of Islamist extremists.

12. On the 22nd December 2011 the Secretary of State served notice of that decision on B2 pursuant to section 40 (5) of the 1981 Act. In that notice the Secretary of State stated that she was satisfied that her intended order would not make B2 stateless.

13. The Secretary of State further certified, pursuant to section 40 A (2) of the 1981 Act, that her decision had been taken in part in reliance on information which, in her opinion, should not be made public because its disclosure would be contrary to the public interest. The effect of this certificate was that any appeal against the Secretary of State's decision would be an appeal to SIAC, not to the First-tier Tribunal.

14. Later on 22nd December 2011 the Secretary of State made an order under section 40 (2) of the 1981 Act, depriving B2 of British nationality on the grounds set out in her earlier notice. On the same day that order was served on B2 together with a notice of the Secretary of State's intention to order B2's deportation to Vietnam.

15. As soon as these documents had been served on B2, he was detained.

16. The deportation decision has subsequently been overtaken by events. This is because the United States of America have asked for B2 to be extradited to stand trial in the USA. The extradition hearing has not yet taken place. In the circumstances, although B2 has given notice of appeal against the deportation decision, this matter is not currently a live issue.

17. On the other hand, the question of B2's nationality remains very much a live issue. In order to challenge the Secretary of State's deprivation decision, B2 commenced the present proceedings.

Part 3. The present proceedings

18. By a notice of appeal dated 13th January 2012 B2 appealed to SIAC against the Secretary of State's decision to deprive him of British nationality.

19. One of the grounds upon which B2 challenges the Secretary of State's deprivation decision is that this decision, if upheld on appeal, would leave him stateless.

20. SIAC held a preliminary hearing to determine the statelessness issue in June 2012. The panel comprised Mr Justice Mitting, Upper Tribunal Judge Allen and Mr P. Nelson. Most of the evidence relevant to the statelessness issue was open. Accordingly, most of the hearing before SIAC was held in public. There was, however, one short private session to deal with certain closed documents.

21. Two Vietnamese lawyers were called to give expert evidence about Vietnamese law. Ambassador Nguyen Quy Binh gave evidence on behalf of B2. Dr Nguyen Thi Lang gave evidence on behalf of the Secretary of State. I shall refer to relevant parts of their expert evidence, as necessary, in Parts 5 and 6 below.

22. On 29th June 2012 the panel handed down its decision. The panel allowed B2's appeal on the basis that the effect of the Secretary of State's decision would be to render him stateless. Accordingly the panel held that the Secretary of State was not permitted to deprive B2 of British nationality. SIAC supplemented its open decision with a separate short closed decision. At the request of the Secretary of State the court has also read the closed judgment. There is nothing in the closed judgment which affects my conclusions in this case. I therefore put the closed decision out of my mind. The parties can rest assured that my conclusions are based solely on the open evidence and the open decision.

23. The Secretary of State was aggrieved by SIAC's decision. Accordingly she appeals to the Court of Appeal. The Secretary of State's principal ground of appeal is that her decision has made B2 *de facto* stateless, but not *de jure* stateless. Therefore her decision cannot make B2 stateless within the meaning of section 40 (4) of the 1981 Act. In the alternative, the Secretary of State contends that, even if B2 became *de jure* stateless, this could not have happened until some time after the relevant date, namely 22nd December 2011. Accordingly the Secretary of State asks this court to reverse SIAC's decision on one or other of those two grounds.

24. Before tackling the issues in this appeal, I must first say something about the concept of statelessness.

Part 4. Statelessness

25. In 1930 the Hague Convention on Certain Questions Relating To The Conflict of Nationality Laws established the principle that it was for each state to determine under its own laws who are its nationals. See articles 1 and 2.

26. In 1946, following the displacement of many ethnic groups during the Second World War, work was put in hand to define and provide for both refugees and stateless persons. In 1946 the Inter-Governmental Committee on Refugees published a Memorandum entitled "Statelessness and some of its Causes" ("the 1946 Memorandum"). The 1946 Memorandum defined two categories of stateless persons. First, there were *de jure* stateless persons. This meant people who did not have a nationality under the law of any state. Secondly, there were *de facto* stateless persons. This meant people who had nationality under the law of a state, but were denied the protection of the Government of that state.

27. Much further work was undertaken thereafter under the auspices of the United Nations. The result was the Refugee Convention of 1951 and the Convention relating to the Status of Stateless Persons of 1954 ("the 1954 Convention").

28. Article 1 of the 1954 Convention provides:

> "For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by any State under the operation of its law."

This definition embraces *de jure* stateless persons, but not *de facto* stateless persons, as described in the 1946 Memorandum. At the time it was widely, though erroneously, assumed that most *de facto* stateless persons were refugees. The substantive provisions of the 1954 Convention set out the obligations of Contracting States to stateless persons within their territories and related matters.

29. Throughout the 1950s international negotiations continued with the objective of reducing the incidence of statelessness. The outcome of these negotiations was the Convention on the Reduction of Statelessness of 1961 ("the 1961 Convention").

30. The 1961 Convention requires Contracting States to grant nationality to persons who would otherwise be stateless in a number of specified situations. The 1961 Convention also imposes restrictions on the circumstances in which nationality can be lost. Article 8.1 of the 1961 Convention provides (subject to certain specified exceptions):

> "A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless."

Section 40 (4) of the 1981 Act (set out in Part 1 above) is intended to give effect to this provision in our domestic law.

31. Article 11 of the 1961 Convention provides:

> "The Contracting States shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession, of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority."

Pursuant to article 11 the United Nations General Assembly designated the Office of the UNHCR as the body to which individuals who claim the benefit of the Convention may apply for assistance.

32. Mr Paul Weis, Legal Advisor to the Office of the UNHCR, published articles criticising the terms *de jure* and *de facto* statelessness. He pointed out that that statelessness is a purely legal concept. It would be more accurate to refer to *de jure* and *de facto* unprotected persons. See e.g. P. Weis, "The Convention Relating to the Status of Stateless Persons" (1961) 10 ICLQ 255-261. I agree with this criticism of the terminology, but the terminology is found in the 1946 Memorandum and it is now well established. I therefore proceed on the basis that *de jure* stateless persons means

persons who are *de jure* unprotected by any state. In other words they fall within article 1.1 of the 1954 Convention. *De facto* stateless persons means persons who possess a nationality, but are not protected by any state. It appears that attempts were made to expand the definition of stateless persons in the 1954 Convention so as to include *de facto* stateless persons, but these attempts were unsuccessful.

33. *De jure* statelessness may result from oversights by law-makers, mismatch between the nationality laws of different states, political upheavals or through a variety of other mechanisms: see Weisbrodt and Collins, "The Human Rights of Stateless Persons" (2006) HRQ 254-263. *De facto* statelessness may also arise in a wide variety of ways.

34. Hugh Massey, Senior Legal Advisor at the UNHCR, discusses *de facto* statelessness in his report "UNHCR and *de facto* statelessness", published by the UNHCR in 2010 ("the Massey Report"). Massey maintains that some categories of persons who are described in the literature as *de facto* stateless have been wrongly classified. They are in fact *de jure* stateless. See the reasoning in Part II of his report at pages 27 to 60. He sets out his conclusions in paragraph 9 on page 60 as follows:

> "Conclusions of Part II
>
> Part II has analyzed three categories of persons who have been claimed in the literature to be *de facto* stateless:
>
> - Persons who do not enjoy the rights attached to their nationality;
>
> - Persons who are unable to establish their nationality, or who are of undetermined nationality;
>
> - Persons who, in the context of State succession, are attributed the nationality of a State other than the State of their habitual residence.
>
> The conclusion from the analysis above is that each of these categories is invalid, since in some cases the persons concerned are actually *de jure* stateless, in other cases they fit the traditional concept of *de facto* statelessness, and in yet other cases they should not be considered *de facto* stateless at all."

35. In Part II of his report Massey argues that as a general rule non-enjoyment of rights attached to nationality does not constitute *de facto* statelessness. He goes on to explain that there is a link between persons not able to establish their nationality and persons not enjoying the rights attached to their nationality. See page 40. Massey then identifies six categories of persons who have difficulty proving their nationality. I shall refer to these as "Massey Categories".

36. Massey category (d) reads as follows:

> "Countries may be unable or unwilling to cooperate in identifying persons who are their nationals. For example, Country A may not respond to a request from Country B to confirm whether Mr. Y is its national, e.g. because it lacks the institutional capacity to carry out the necessary investigations, or simply because it is unwilling to cooperate. Mr. Y may even be detained by Country B and himself have received no response from Country A to a request for consular assistance."

37. Massey category (e) reads as follows:

> "Nationality legislation may be unclear or be misinterpreted or misapplied by the Executive. This type of problem frequently may impact upon a particular group in society, for example in the context of post-colonialism or of State succession. Its resolution may require a ruling by the Courts, confirming that persons belonging to the group are indeed nationals. Up until such time as the ruling is made, which may take several years or even several decades, the group may not be considered as nationals by the Executive, or may not even consider themselves to be nationals, even though they in fact fulfil the requirements for nationality. In other cases, ambiguity may be resolved only by a change in Government policy or by the adoption of new nationality legislation with retroactive effect."

38. In 2010 the UNHCR decided to convene a series of expert meetings on statelessness to mark the fiftieth anniversary of the 1961 Convention. The Massey report was prepared as background material for these meetings. The first of the expert meetings was held at Prato in Tuscany in May 2010. I shall refer to the report which was prepared at the end of this meeting as "the Prato Report". The Prato Report contains much helpful discussion about the interpretation of article 1.1 of the 1954 Convention. The two passages to which counsel have drawn particular attention during argument are paragraphs 3 and 18.

39. Paragraph 3 of the Prato Report states:

> "The issue under Article 1(1) is not whether or not the individual has a nationality that is effective, but whether or not the individual has a nationality at all. Although there may sometimes be a fine line between being recognized as a national but not being treated as such, and not being recognized as a national at all, the two problems are nevertheless conceptually distinct: the former problem is connected with the rights attached to nationality, whereas the latter problem is connected with the right to nationality itself."

40. Paragraph 18 of the Prato Report states (so far as material):

> "The ordinary meaning of Article 1(1) requires that a "stateless person" is a person who is not considered a national by a State regardless of the background to this situation. Thus, where a deprivation of nationality may be contrary to rules of international law, this illegality is not relevant in determining whether the person is a national for purposes of Article 1(1) – rather, it is the position under domestic law that is relevant. The alternative approach would lead to outcomes contrary to the ordinary meaning of the terms of Article 1(1) interpreted in light of the Convention's object and purpose."

41. Although the writings of jurists on statelessness are extensive, I believe that the above survey provides sufficient background for the purpose of considering the issues in the present case. I must now turn, therefore, from the general to the particular and outline the nationality laws of Vietnam.

Part 5. The Nationality Laws of Vietnam

42. Vietnam was a French protectorate during the nineteenth and early twentieth centuries. In 1945 the Democratic Republic of Vietnam was established in the northern part of Vietnam with its capital at Hanoi.

43. On 20th October 1945 the Chairman of the Provisional Government of the Democratic Republic of Vietnam issued Order 53. This provided that the children of Vietnamese citizens and persons who were born in Vietnam were Vietnamese citizens. Order 53 permitted dual nationality in one situation only. Under article 4 Vietnamese people who had been granted French nationality were deemed to be Vietnamese citizens, but they were required to renounce their French nationality. Article 7 provided that in any other situation a Vietnamese citizen who was granted foreign nationality would lose his Vietnamese nationality.

44. In 1975, following the end of the Vietnam War, North and South Vietnam were re-united. Saigon, the former capital of South Vietnam, was re-named Ho Chi Minh City.

45. The 1988 Nationality Law ("the 1988 Law") was enacted some thirteen years after the re-unification of Vietnam. Article 1 provided:

> "The Socialist Republic of Vietnam is a unified State of all nationals living on Vietnamese territory. All members of all ethnic groups hold Vietnamese nationality…."

46. Article 3 of the 1988 Law provided:

> "Recognition of a single nationality for Vietnamese citizens.

> The State of the Socialist Republic of Vietnam recognizes Vietnamese citizens as having only one nationality being Vietnamese."

47. Article 8 of the 1988 Law provided that a citizen may lose Vietnamese nationality in four situations. These were: being permitted to relinquish Vietnamese nationality, being deprived of that nationality, losing that nationality as a result of international treaties or in other cases provided by law.

48. Articles 9, 10, 12 and 14 of the 1988 Law supplemented article 8 by providing further details of the four situations in which a citizen may lose Vietnamese nationality. Article 9 made it plain that express permission was required to relinquish Vietnamese nationality and the grant of such permission was subject to restrictions.

49. Article 15 of the 1988 Law provided:

> "1. The Council of Ministers shall determine in all cases the granting, relinquishing, restoration, depriving and revoking of decisions to grant Vietnamese nationality.
>
> 2. Procedures for deciding all questions of nationality shall be determined by the Council of Ministers."

50. On the 5th February 1990 the Council of Ministers of the Socialist Republic of Vietnam issued Decree No. 37/HDBT ("the 1990 Decree"). Article 2 of the 1990 Decree provided:

> "Vietnamese citizens who concurrently hold another nationality (because they has naturalised another nationality without relinquishing their Vietnamese nationality or because of the conflict of laws between the laws of Vietnam and foreign countries) shall be protected by the Vietnamese Government in accordance with the international law and customs when being abroad, and shall be treated like other Vietnamese citizens when being in Vietnam.
>
> In order to be permitted to renounce Vietnamese nationality, these Vietnamese citizens have to follow the procedures as provided in this Decree."

51. The subsequent provisions of the 1990 Decree set out the grounds on which Vietnamese citizens living abroad might be permitted to renounce Vietnamese nationality.

52. Ambassador Binh, who played a part in drafting the 1988 Law, has explained the policy which underlay this legislation. Although there were two views within the

Government, many supported the principle of dual nationality. By the late 1980s about 3 million people had fled Vietnam as a result of wars and political upheavals. Vietnam was seeking to enter the global market. It therefore wished to draw upon the capital and the knowledge of the Vietnamese diaspora.

53. It is clear that the effect of article 3 of the 1990 Decree is to reinforce the 1988 Law. A Vietnamese national could not unilaterally relinquish his nationality by becoming a citizen of another country. In order to renounce his original nationality, he had to follow the procedures laid down by Vietnamese statutes and secure the consent of the Vietnamese Government. This is the effect of the Vietnamese legislation. It is also SIAC's conclusion after hearing conflicting evidence from the expert witnesses on Vietnamese law: see paragraph 17 of SIAC's decision.

54. Dr Lang's understanding of the position is to that effect. She explains that an individual acquired foreign nationality under the laws of a foreign state, but retained Vietnamese nationality under Vietnamese law. The effect of article 3 of the 1988 Law was that Vietnam did not recognise the foreign nationality.

55. Although some of the Vietnamese Government statements are inconsistent, the effect of the 1988 Law and the 1990 Decree appears to have been as follows. Many members of the Vietnamese diaspora effectively acquired dual nationality, even though Vietnamese law recognised only their single nationality, namely Vietnamese.

56. In 1992 a new constitution of the Socialist Republic of Vietnam was established. Under the provisions of the new constitution the Xth National Assembly of the Socialist Republic of Vietnam passed the 1998 Nationality Law ("the 1998 Law"), which came into force on 1st January 1999.

57. The 1998 Law (like the 1988 Law) provided that Vietnamese citizens had only one nationality, namely Vietnamese nationality. The 1998 Law introduced the concept of "Vietnamese living abroad". They might be Vietnamese persons or persons of Vietnamese origin. Articles 6 and 7 provided that the state should adopt policies to encourage links between such people and their homeland and to promote the restoration of Vietnamese nationality to persons who had lost it. The 1998 Law contained provisions for loss, relinquishment and deprivation of Vietnamese nationality which were broadly similar to the previous law. Articles 31 to 36 of the 1998 Law identified which parts of the state could determine nationality questions. Article 32 provided that the State President alone had power to permit restoration or relinquishment of Vietnamese nationality and to order deprivation of Vietnamese nationality.

58. On 13th November 2008 the XIIth National Assembly of the Socialist Republic of Vietnam passed the 2008 Nationality Law ("the 2008 Law"), which came into force on 1st July 2009. This is the law which was in force in December 2011, when the Secretary of State took her decision in respect of B2. The 2008 Law is still in force in Vietnam.

59. Article 4 of the 2008 Law provides:

> "The State of the Socialist Republic of Vietnam recognizes that Vietnamese citizens have a single nationality. Vietnamese nationality, unless it is otherwise provided for by this law."

60. Article 7 of the 2008 Law provides:

> "Policies toward persons of Vietnamese origin residing abroad
>
> 1. The State of the Socialist Republic of Vietnam adopts policies to encourage and create favorable conditions for persons of Vietnamese origin residing abroad to maintain close relations with their families and homeland and contribute to the building of their homeland and country.
>
> 2. The State adopts policies to create favorable conditions for persons who have lost their Vietnamese nationality to restore Vietnamese nationality."

61. Article 13 of the 2008 Law provides:

> "1. Persons having Vietnamese nationality include those who have Vietnamese nationality by the effective date of this Law and those who acquire Vietnamese nationality under this Law.
>
> 2. Overseas Vietnamese who have not yet lost Vietnamese nationality as prescribed by Vietnamese law before the effective date of this Law may retain their Vietnamese nationality and within 5 years after the effective date of this Law, shall make registration with overseas Vietnamese representative missions to retain Vietnamese nationality."

62. Articles 19 to 21 of the 2008 Law set out the circumstances in which foreign nationals and stateless persons living in Vietnam may acquire Vietnamese nationality. Articles 23 to 25 set out the circumstances in which restoration of Vietnamese nationality is permitted. The details of these provisions are not material for present purposes. I should, however, refer to article 23.

63. Article 23.1 of the 2008 Law provides for restoration of Vietnamese nationality in a number of situations. That described in paragraph (f) is:

> "Having renounced Vietnamese nationality for acquisition of a foreign nationality but failing to obtain permission to acquire the foreign nationality."

64. This provision is supplemented by article 23.5 which provides:

> "Persons permitted to restore Vietnamese nationality shall renounce their foreign nationality, except for the following persons in special cases, if so permitted by the President, who:
>
> a/ Are spouses, natural parents or natural offsprings of Vietnamese citizens;
>
> b/ Have made meritorious contributions to Vietnam's national construction and defense;
>
> c/ Are helpful to the State of the Socialist Republic of Vietnam."

65. Articles 27 to 29 of the 2008 Law set out the circumstances in which persons may be permitted to renounce Vietnamese nationality. There are some quite tight restrictions upon such renunciation. For example, no-one owing tax to the State or having a property obligation to anyone in Vietnam may renounce Vietnamese nationality.

66. Articles 31 and 32 of the 2008 Law deal with deprivation of Vietnamese nationality. Article 31.1 provides:

> "Vietnamese citizens residing abroad may be deprived of Vietnamese nationality if they commit acts that cause serious harms to the national independence, national construction and defense or the prestige of the Socialist Republic of Vietnam."

67. Article 32 sets out the procedure for such deprivation. The provincial level People's Committee or overseas Vietnamese representative investigates and compiles a dossier. Courts which have found that the person committed relevant acts shall compile a dossier. The dossier is sent to the Ministry of Justice, which liaises with other relevant ministries and prepares a report for the Prime Minister. The Prime Minister submits the report to the President for decision.

68. Articles 38 to 41 of the 2008 Law set out the responsibilities of different state agencies for dealing with nationality issues. All relevant tasks are assigned to the executive, not the courts. The critical provision for present purposes is article 38. This provides, so far as material:

> "Tasks and powers of the President for nationality
>
> 1. To decide on the grant, restoration, renunciation and deprivation of Vietnamese nationality and annulment of decisions on the grant of Vietnamese nationality."

69. Finally I should say something about the nature of the Vietnamese State and the relationship between the courts and the executive. Vietnam is a communist state, in which the executive controls the courts and not vice versa.

70. There was a conflict between the expert witnesses on this issue. Dr Lang maintained that if the President or Council of Ministers acted contrary to the law, their decisions could be effectively challenged in the courts. Ambassador Binh disputed this. He maintained that the President and the Council of Ministers acted as they wished; it was the function of the courts to uphold the actions and decisions of the executive. On this issue SIAC accepted the evidence of Ambassador Binh and rejected Dr Lang's views as naïve. There is no challenge to SIAC's assessment of the expert evidence in this regard.

71. Having set out the relevant aspects of Vietnamese law, I must now consider how these impacted on B2 at each stage of his life.

Part 6. The status of B2 under Vietnamese Nationality Laws

72. In 1983, when B2 was born, Order 53 was still in force. Under article 1 of Order 53 B2 acquired Vietnamese nationality at birth.

73. When B2 and his family travelled first to Hong Kong and then to the UK B2 retained his original nationality. Nothing occurred during the 1980s which would have deprived B2 of his Vietnamese nationality either under Order 53 or under the 1988 Nationality Law.

74. In 1995 B2 (then aged 12) became naturalised in this country and acquired British citizenship. B2 did not, however, lose his Vietnamese nationality through any of the mechanisms set out in articles 8 to 14 of the 1988 Law. In particular B2 did not apply for or secure permission to relinquish Vietnamese nationality in accordance with article 9 of the 1988 Law.

75. Thus in 1995 B2 became one of the persons to whom article 2 of the 1990 Decree applied. B2 was now a person of dual nationality. Although he was a British citizen and resided in the UK, he remained a Vietnamese national and was entitled to the protection of the Vietnamese Government.

76. On 1st January 1999 the 1998 Law came into force. None of the provisions of the 1998 Law changed B2's status. B2 neither sought nor obtained permission to relinquish Vietnamese nationality under articles 23 and 24 of the 1998 Law.

77. On 1st July 2009 the 2008 Law came into force. B2's status under Vietnamese law remained as it had been before.

78. The next and critical date is 22nd December 2011. Up until then the Vietnamese Government had not been aware of B2's existence and had not taken any steps in relation to him. On 22nd December 2011 the Secretary of State made an order purportedly depriving B2 of British citizenship.

79. Following the events of 22nd December 2011 the British Government informed the Vietnamese Government of the position. The Vietnamese Government declined to accept that B2 was a Vietnamese citizen. SIAC held that this omission was deliberate

and there is no challenge to that finding of fact. The Vietnamese Government has not taken any steps since the critical date to deprive B2 of Vietnamese nationality. On the contrary the Vietnamese Government now adopts the stance that B2 is not a Vietnamese national and was not such on 22nd December 2011: see paragraph 19 of SIAC's judgment.

80. This brings me to the critical question: does the Secretary of State's decision of 22nd December 2011 render B2 *de jure* stateless or *de facto* stateless?

81. Mr Robin Tam QC for the Secretary of State submits that the answer is *de facto* stateless. He relies in particular upon the evidence of Ambassador Binh. Ambassador Binh accepted in answer to questions from Mr Justice Mitting that the 1988 Law was ambiguous. This enabled the Government to pick and choose which persons of Vietnamese origin it would accept back into the country. The crucial question and answer upon which Mr Tam relies reads as follows:

> "Q. Can I ask my question again? Was the effect of the 1988 law that the Council of Ministers, the Government, that the Government could pick and choose which people of Vietnamese origin it would accept back into Vietnam?
>
> A. Openly and legally, no, but in practice, yes."

82. Mr Tam submits that this answer is applicable to the position under the 2008 Law as well as the 1988 Law. It is a classic description of the Vietnamese Government rendering certain citizens *de facto* stateless. He contends that this is what has happened in the case of B2.

83. Mr Tam also draws attention to article 38.1 of the 2008 Nationality Law. This entrusts the final decision in all individual cases to the President. On the other hand it does not give the President unlimited powers. The President is only empowered to take nationality decisions in accordance with articles 19 to 32 of the 2008 Law.

84. Mr Hugh Southey QC on behalf of B2 contends otherwise. He draws attention to the words "under the operation of its law" in article 1.1 of the 1954 Convention. He submits that in Vietnam the various nationality laws operate in such manner as the executive decides. Therefore B2 has lost Vietnamese nationality under Vietnamese law. Accordingly the Secretary of State's decision has made B2 *de jure* stateless.

85. Mr Southey draws attention to the discussion of statelessness in the Massey Report. He submits that the present case falls neatly into Massey category (d) or category (e).

86. Mr Southey also places reliance on the Prato Report, in particular paragraphs 3 and 18, which I have set out in Part 4 above.

87. The arguments of counsel on both sides are powerful ones. Ultimately, however, I have come to the conclusion that Mr Tam's contentions are correct.

88. The position under Vietnamese nationality law is tolerably clear. B2 retained his Vietnamese nationality through all the events of the 1980s and the 1990s. The 2008

Law did not change B2's legal status. The fact that in practice the Vietnamese Government may ride roughshod over its own laws does not, in my view, constitute "the operation of its law" within the meaning of article 1.1 of the 1954 Convention. I accept that the executive controls the courts and that the courts will not strike down unlawful acts of the executive. This does not mean, however, that those acts become lawful.

89. Massey category (d) is not directly in point. The UK Government does not need the co-operation of Vietnam in establishing the relevant facts. The relevant facts as set out in Part 2 above are clear. These establish that as at 22nd December 2011 B2 retained Vietnamese nationality.

90. As to Massey category (e), whatever may have been the private thoughts of the lawmakers, the text of the various Vietnamese nationality laws is reasonably clear. The effect of the express words of those enactments is that B2 retained his Vietnamese nationality up to 22nd December 2011. SIAC accepted this part of Dr Lang's evidence: see paragraph 17 of SIAC's judgment.

91. The Vietnamese Government has now, apparently, decided to treat B2 as having lost his Vietnamese nationality. They have reached this decision without going through any of the procedures for renunciation, deprivation or annulment of Vietnamese nationality as set out in the 2008 Law and its predecessors. I do not accept that this can be characterised as the "position under domestic law" as that phrase is used in paragraph 18 of the Prato Report.

92. If the relevant facts are known and on the basis of those facts and the expert evidence it is clear that under the law of a foreign state an individual is a national of that state, then he is not *de jure* stateless. If the Government of the foreign state chooses to act contrary to its own law, it may render the individual *de facto* stateless. Our own courts, however, must respect the rule of law and cannot characterise the individual as *de jure* stateless. If this outcome is regarded as unsatisfactory, the remedy is to expand the definition of stateless persons in the 1954 Convention or in the 1981 Act, as some have urged. The remedy is not to subvert the rule of law. The rule of law is now a universal concept. It is the essence of the judicial function to uphold it.

93. Let me now draw the threads together. For the reasons set out above I conclude that the combined effect of the Secretary of State's order of 22nd December 2011 and the subsequent responses of the Vietnam Government is to render B2 *de facto* stateless, but not *de jure* stateless.

Part 7. Decision

94. Section 40 (4) of the 1981 Act provides that the Secretary of State cannot make an order depriving a person of citizenship status, if he is satisfied that the order would make that person stateless.

95. The word stateless in section 40 (4) means *de jure* stateless, not *de facto* stateless in the sense discussed above: see Fransman's British Nationality Law, third edition, paragraph 25.4 and *Abu Hamza v The Secretary of State for the Home Department* (SIAC, 5th November 2010).

96. The words "if he is satisfied that" in section 40 (4) of the 1981 Act do not mean that the Secretary of State's opinion is the yardstick. These words must be construed in a manner which is consistent with article 8.1 of the 1961 Convention. In the result therefore the Secretary of State cannot make an order depriving a person of British citizenship if the consequence will be to render that person *de jure* stateless.

97. For the reasons set out in Part 6 above, I have come to the conclusion that the effect of the Secretary of State's order on 22nd December 2011 is not to render B2 *de jure* stateless. Accordingly, in my view the Secretary of State's appeal succeeds on the first ground. The second ground therefore does not arise.

98. If my Lords agree, this appeal will be allowed and B2's underlying appeal will be remitted to SIAC for further consideration.

Lord Justice Lloyd Jones:

99. I agree.

Lord Justice Floyd:

100. I also agree.