Case No: T1/2009/0898
Neutral Citation Number: [2010] EWCA Civ 212

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Special Immigration Appeals Commission

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2010

Before:

LORD JUSTICE MUMMERY
LORD JUSTICE MAURICE KAY
and
LORD JUSTICE HOOPER

- - - - - - - - - - - -

Between:

HILAL ABDUL RAZZAQ ALI AL-JEDDA	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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(Transcript of the Handed Down Judgment of
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Richard Hermer QC and Tom Hickman (instructed by Public Interest Lawyers) for the Appellant
Jonathan Swift and Andrew O'Connor (instructed by Treasury Solicitors) for the Respondent

Hearing date: 3/03/2010

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Judgment

LORD JUSTICE HOOPER:

1. On 14 December 2007 the Secretary of State for the Home Department ("SSHD") made an order depriving the appellant of his British citizenship.

2. By virtue of section 40(4) of the British Nationality Act 1981 the SSHD was not entitled to deprive him of his British citizenship if he thereby, on that date, became stateless. Sub-section (4) provides:

> The Secretary of State may not make an order under subsection (2) [depriving a person of his British citizenship] if he is satisfied that the order would make a person stateless.

3. It is agreed that it is for the Appellant to demonstrate that the order would make him stateless. In so far as the issue turns upon questions of fact, it is agreed that the burden of proof is on the appellant on the balance of probabilities.

4. This appeal is concerned with a preliminary ruling of the Special Immigration Appeals Commission ("SIAC") dated 23 May 2008. SIAC, chaired by Mitting J, ruled on that date that the appellant was not on 14 December 2007 stateless. The hearing before SIAC had taken place on 19 and 20 May 2008.

5. Following a further hearing SIAC held in a second decision that the SSHD was justified in depriving the appellant of his citizenship. There is now no appeal from that conclusion. The preliminary ruling could not be appealed until after the second decision (see the appellant's unsuccessful application for leave to appeal the preliminary ruling, [2008] EWCA Civ 1041).

6. The appellant was born an Iraqi citizen. He had been granted British citizenship on 12 June 2000.

7. It is now no longer in dispute that, by virtue of Article 11(1) of the Iraqi Nationality Law of 1963, he automatically lost his Iraqi citizenship on acquiring British citizenship. That issue, disputed by the respondent at the hearing of the preliminary ruling, was resolved by SIAC in favour of the appellant.

8. SIAC concluded that the appellant regained his Iraqi citizenship by virtue of Article 11(C) of the Law of Administration for the State of Iraq for the Transitional Period (the "TAL"), which was adopted by the Iraqi Governing Council on 8 March 2004, a year after the invasion of Iraq by coalition forces. The Iraqi Governing Council was created by the Coalition Provisional Authority ("CPA"), itself created in April 2003.

9. Article 3(A) provided:

> This law is the Supreme Law of the land and shall be binding in all parts of Iraq without exception. No amendment to this law may be made except by a three fourths majority of the members of the National Assembly and the unanimous approval of the Presidency Council. Likewise, no amendment may be made that could abridge in any way the rights of the Iraqi people cited in Chapter Two…

10. TAL was "annulled" on 20 May 2006.

11. On 7 March 2006 the Iraqi Nationality Law came into force. SIAC had formed the tentative view that, by virtue of the 2006 Law, the appellant was, in any event, an Iraqi national at the date of the decision to revoke his British citizenship (see paragraph 27 of the judgment). However, both experts had given the opinion that under the Nationality Law of 2006 an Iraqi who had lost his citizenship had to satisfy certain conditions and make the appropriate application. Thus the 2006 Nationality Law did not automatically make him an Iraqi national (if not one already). See appellant's bundle, pages 382-383, for Judge Raid Juhi Al-Saedi's report to that effect with which the respondent's expert was to agree when giving evidence orally.

12. Article 11 of TAL provided:

> (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 naturalised 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/*is considered to be 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/*is considered to be Iraqi*.
>
> (F) The National Assembly must issue laws pertaining to citizenship and consistent with the provisions of this Law.
>
> (G) The Courts shall determine all disputes arising from the application of the provisions relating to citizenship. (Italics added)

13. The respondent's expert, Mr Ian Edge, a barrister and academic, preferred the italicised words to the words "shall be deemed an Iraqi".

14. SIAC decided that Article 11 had immediate effect and that the appellant, by virtue of (C) automatically regained his Iraqi nationality/citizenship at the latest on 28 June 2004 (the date of the handover by the CPA to the Iraqi Governing Council) and had not relinquished it in writing under Article 10.1 of the Nationality Law of 2006.

15. It is the appellant's case that the Iraqi Governing Council was not competent to enact Article 11 (C) and that, if it was, Article 11 (C) means that an Iraqi whose citizenship was withdrawn because he acquired another citizenship is entitled to Iraqi citizenship upon application. It cannot mean, so it is submitted, that Iraqi citizenship is automatically "foisted" upon some 1.5 million persons who had lost their Iraqi nationality because they had obtained citizenship in another country.

The appellant's submissions in outline

16. The appellant's grounds of appeal are:

> 1. SIAC erred in law in concluding that the Iraqi Governing Council/the Coalition Provisional Authority had sufficient competence and authority to promulgate Article 11 (C) of the Transitional Administration Law for Iraq (the 'TAL') which sought to alter Iraqi nationality law during a time of armed conflict.
>
> 2. SIAC erred in law in interpreting Article 11 (C) of the TAL in such a way as to automatically and immediately re-instate the Appellant's Iraqi citizenship.
>
> 3. The Commission erred in law and/or exercised its discretion in an irrational manner by refusing the Appellant's request of 9 May 2008 for an adjournment in order to have sufficient time to present its expert evidence

17. In so far as ground 1 is concerned, it is submitted on behalf of the appellant that Article 11 (C) was beyond the competence of:

> the ... CPA ... because as an occupying power it is not sovereign and cannot change fundamental aspects of the Constitution or laws (such as citizenship),
>
> the Governing Council appointed by the CPA, because the Governing Council was not itself able to exercise sovereign legislative authority, but was rather an advisory political counsel to the occupying powers.

18. In respect of this ground the appellant relies on international law. International law is said to be relevant because it is assumed by the parties and was assumed by SIAC that an Iraqi court called on to decide whether the appellant had regained his Iraqi citizenship automatically by virtue of Article 11 (C) of TAL would examine international law to decide whether the Iraqi Governing Council was competent in international law to enact Article 11 (C).

19. Even if by virtue of international law the Iraqi Governing Council was competent to enact Article 11 (C), an Iraqi court applying Iraqi domestic constitutional law as at 14 December 2007 might not accept that the Iraqi Governing Council had the necessary legislative authority to enact Article 11 (C). SIAC addressed this issue in paragraph 21 of the judgment and its conclusion, based at least in part on the oral evidence of Mr

Edge, is challenged by the appellant. Mr Edge had not dealt with this issue in his written report.

20. In so far as ground 2 is concerned, it is submitted in the alternative that:

> If, however, Article 11 of the TAL was effectively enacted into Iraqi law, then, correctly interpreted, it did not operate automatically and immediately to reinstate Mr Al-Jedda's citizenship. The Commission misinterpreted Iraqi law, and failed to give sufficient weight to legal context and continuity, and to the constitutional and legislative provisions adopted subsequently by Iraqi democratic institutions.

21. The appellant seeks permission to introduce additional expert evidence of Iraqi law.

22. In so far as ground 3 is concerned, it is submitted that SIAC erred in law and/or exercised its discretion in an irrational manner by refusing the Appellant's request of 9 May 2008 for an adjournment in order to obtain further expert evidence. During the course of oral argument Mr Hermer QC submitted that the appellant had not had the benefit of a fair hearing. He sought the remission of the whole issue of statelessness to SIAC.

23. We decided at the outset of the hearing before us to ask for submissions only on ground 3 and having heard those submissions adjourned the case for judgment on ground 3.

Expert evidence at the hearing of 19 and 20 May 2008

24. At the hearing of the preliminary issue on 19 and 20 May, SIAC received expert evidence in the form of written reports from Judge Al Saedi for the appellant and a written report supplemented by oral evidence from Mr Edge for the Secretary of State.

25. Judge Raid Juhi Al Saedi is a member of the Iraqi judiciary and was on sabbatical leave at the time in the USA. We were told that his knowledge of English at this time was limited. SIAC said this about him in their preliminary ruling (paragraph 5):

> It is said, and we accept, that the government of Iraq have lawfully required of him that, although he may give advice about Iraqi law, he may not appear in any court to be questioned about it. Such a requirement is understandable: the Iraqi government is entitled to be concerned about, and to discourage the questioning of its Judges in the courts of other countries. Judge Al Saedi's unwillingness to be questioned upon his report does not persuade us that he lacks the independence, let alone integrity, required of an expert witness. We admit his reports. The fact that he cannot be questioned about his opinions does, however, detract from their force and utility. In one critical aspect (the meaning and effect of Article 11 of the Law of Administration for the State of Iraq for the Transitional Period of 8th March 2004 ("TAL")) his reports are laconic and contain only one sentence of assertion as to their

> effect: that the TAL "had no direct effect on the procedure of the nationality status of Iraqis who formerly held Iraqi citizenship". Questioning might have elucidated Judge Al Saedi's reasoning and so permitted a conclusion to be formed about the validity of his assertion. The lack of that opportunity greatly reduces the utility of his opinion and the reliance which we can place upon it.

26. As to both experts SIAC said:

> Neither Judge Al Saedi nor Mr Edge claim any particular expertise, whether acquired by study or by practice, in Iraqi nationality law. Judge Al Saedi has practised in the criminal and family jurisdictions of Iraq; and Mr Edge has acquired a broad knowledge of Middle Eastern legal systems, with particular emphasis on Sharia Law.

27. SIAC went on to say:

> 6. The result of these shortcomings in the expert evidence is that we cannot decide the critical questions of Iraqi law by reference only to the expert evidence which we have received. Mr Hermer submits that, in those circumstances, we should reach our own conclusions about the meaning and effect of Iraqi law, applying English canons of construction to it. The task is made more difficult by the fact that the texts which we have to consider are in translation from the Arabic: and, as Mr Edge explained, Arabic words are often capable of bearing more than one meaning. The approach which we have adopted is to attempt, with the aid of Mr Edge and Judge Al Saedi, to discern the meaning and effect of Iraqi laws by applying a familiar domestic technique: to analyse the words used against the historical and statutory background in such a way as to give effect to the apparent intention of the legislators; and, in so doing, to attempt to resolve anomalies and absurdities in a way that does least violence to the language and apparent purpose of the laws.

28. In its ruling, SIAC did not accept a significant part of the evidence of Mr Edge. Mr Edge had given expert evidence that the Appellant did not lose his Iraqi nationality when he was granted British citizenship on 12 June 2000. That evidence was rejected, SIAC saying:

> 17. ... Accordingly, in our view, the fundamental premise of Mr Edge's conclusion is wrong. We prefer the opinion of Judge Al Saedi on this question, which follows the straightforward wording of Article 11.1 [of the 1963 Nationality Law]. Judge Al Saedi's view accords with the conclusion which we would have reached upon the straightforward approach to interpretation stated in paragraph 6 above.

29. As to the proper interpretation of Article 11 of TAL, SIAC did not rely on the expert evidence of Mr Edge in so far as it concerned that Article albeit that the conclusion of SIAC mirrored that of Mr Edge. He, in his written opinion, had said:

> If I am wrong ... and Mr Al-Jedda did lose his Iraqi nationality in 2000 on acquiring British citizenship, then he reacquired it by virtue of Article 11 (C) of the TAL and nothing in the constitution of 2006 or the Nationality Law of 2006 has changed that position". (Appellant's bundle, page 403)

30. In reaching the conclusion that, by virtue of Article 11 (C) the appellant automatically regained his Iraqi nationality/citizenship at the latest on 28 June 2004, SIAC rejected the opinion of Judge Al Saedi, describing it as "laconic" and saying that the lack of the opportunity to question him "greatly reduces the utility of his opinion and the reliance which we can place upon it".

31. Judge Al-Saedi had written (Appellant's bundle, pages 381-382):

> Question three:
>
> Did the introduction of the Law of Administration for the State of Iraq for the Transitional Period (TAL) give Mr Al-Jedda back his citizenship?
>
> The answer:
>
> According to the Transitional Law of 2004, Section (A) Article (11), each individual who holds Iraqi nationality is considered an Iraqi citizen. Also according to Article 11(C) of the Transitional Law each Iraqi shall have the right to carry more than one nationality. Any Iraqi whose nationality was withdrawn because he acquired another nationality shall be deemed an Iraqi. Article (11)(F) anticipated that the National Assembly would adopt new laws on nationality, but none were legislated until after the adoption of the 2005 Iraqi Constitution was legislated. Section VI, Article (18) of the Iraqi Constitution confirms that an Iraqi who has lost his Iraqi nationality may reclaim it if he follows the legal procedures and fulfils the required conditions under Iraqi law. The Transitional Law of 2004 therefore had no direct effect on the procedure of the nationality status of Iraqis who formally held Iraqi citizenship. An individual wishing to reclaim his Iraqi nationality must follow the procedures set out in Article 10(III) of the 2006 Iraqi Nationality Law.

32. As Mr Hermer submitted for the appellant, it seems that SIAC, in reaching its conclusion as to the meaning of Article 11 (C), interpreted it without relying on the expert evidence, but reaching its own conclusion applying, in effect, English law.

33. The fresh evidence upon which the appellant wishes now to rely, namely a report from Dr Abdul Mohsin, an immigration lawyer and academic, casts doubt upon

SIAC's conclusion that Article 11 (C) automatically conferred Iraqi nationality on persons like the appellant.

Procedural history of the case up to 9 May

34. By letter dated 12 November 2008 the SSHD sent a letter to the solicitors for the appellant to the effect that the SSHD had in mind depriving the appellant of his British citizenship and inviting representations. No representations were made before the letter of 14 December 2007 depriving the appellant of his citizenship.

35. The appellant's solicitors responded to the 12 November letter on 11 January 2008. In the letter it was submitted that the appellant had lost his Iraqi nationality by virtue of the law in force when he became a British citizen and would therefore be stateless should he be deprived of his British citizenship.

36. In her reply the SSHD wrote on 18 February 2008 that the appellant had not lost his citizenship because "he remains an Iraqi national" (page 373 of the appellant's bundle).

37. It seems clear to me that the SSHD at this stage thought that the 1963 Nationality Law had not operated to deprive the appellant of his Iraqi citizenship when he became a British citizen.

38. As I have already said, SIAC was later not to accept this view of the law of Iraq, albeit supported by the opinion of Mr Edge.

39. In the meantime the appellant's solicitors on 11 January 2008 issued a notice of appeal. Ground 1 (the ground relevant to this appeal) stated:

> The decision of the Secretary of State for the Home Department is void because it is based upon a mistaken assumption that Mr Al-Jedda is a joint citizen of Iraq and UK. Accordingly her decision was unlawful because its effect was to render him stateless in contravention of section 40(4) of the British Nationality Act (as amended by section 4 of the Nationality, Immigration and Asylum Act 2002), section 56 of the Immigration, Asylum and Nationality Act 2006 and Article 8 of the Convention of the Reduction of Statelessness 1961. It is averred that Mr Al Jedda lost his Iraqi citizenship upon naturalisation as a British citizen in 2000, by virtue of the operation of Article 11 of the Iraqi Law of Nationality (Law No. 46 of 1963). In accordance with the applicable international law regarding military occupation, the ordinary laws of the land remain in force.

40. By letter dated 23 January 2008, the Chairman of SIAC, Mitting J, on his own motion requested the parties to consider whether the first ground of appeal should be determined as a preliminary issue. The parties agreed and on 8 February 2008 Mitting J ordered that the "the issue set out at paragraph 1 of the Grounds of Appeal shall be determined as the preliminary issue".

41. Mr Hermer submitted to us that the preliminary issue was limited by its terms to the issue of the 1963 Nationality Law. Mr Swift disputes that, submitting that it was intended to cover the whole issue of statelessness.

42. In February the date of the hearing of the preliminary issue was set for 19 May.

43. Mitting J also ordered the simultaneous exchange of experts' reports on the preliminary issue by 4.00 pm on 24 April. That did not happen.

44. Neither side had obtained a report by then. The SSHD had instructed Mr Edge on 13 March 2008. Mr Edge sent his report to the SSHD on 2 May. The SSHD subsequently declined to disclose it otherwise than in accordance with the direction calling for simultaneous exchange.

45. On 9 April the appellant's solicitors wrote to the Treasury Solicitors a letter stating that in the view of the appellant's counsel expert evidence was not necessary and that neither side should rely on an expert. The reply expressed surprise at this suggestion and, in effect, declined it.

46. The explanation for the letter of 9 April is clear. Those advising the appellant thought that the only issue which was to be resolved at the preliminary hearing was the issue relating to Article 11 of the Nationality Act of 1963. In the view of those advising the appellant the words of the Article were so clear that no expert evidence was required.

47. In any event the appellant's solicitors were having considerable difficulty in obtaining an expert. Mr Philip Shiner's witness statement dated 15 May sets out the difficulties. Mr Shiner is a solicitor in the firm Public Interest Lawyers who were representing the appellant. The statement was made in part because of Mr Shiner's understanding that at a directions hearing on 9 May (to which I return shortly) "serious accusations were made by the Treasury Solicitors as to the integrity of Public Interest Lawyers in its approach to that hearing". Mr Shiner wrote:

> I would dispute that at any stage Public Interest Lawyers have acted improperly in this case. However, I repeat the apologies made to Mr Justice Mitting at the Special Immigration Appeals Commission (SIAC) at the hearing through our counsel, Richard Hermer. In particular, I apologise for the failure of Public Interest Lawyers to (i) bring to the attention of SIAC the difficulties encountered in locating an expert willing to give evidence and (ii) to make the position of obtaining Iraqi law evidence as clear as it should have been in our correspondence with the Treasury Solicitors.

48. The statement continues:

> 5. At the time of this Directions Hearing Rosalind Campion, a solicitor of over four years PQE, was responsible for the day-to-day conduct of Mr Al-Jedda's case, under my overall supervision.

6. Following the Directions Hearing on 8 February 2008, Rosalind Campion and our counsel made strenuous attempts to locate an Iraqi expert. On 19 February 2008, upon the recommendation of our counsel Guy Goodwin-Gill, a barrister at Blackstone Chambers and senior research fellow at All Souls College, at Oxford University, Mr Raid Juhi Hamadi Al Saedi was proposed as an expert. Efforts were also made at this time to locate other potential experts.

7. In light of a change of circumstances relating to Mr Al-Jedda, it was necessary to liaise with the Legal Services Commission to obtain their approval for further work on the case. Accordingly, Rosalind Campion was not able to instruct an expert until approval had been obtained from the Legal Services Commission. In light of these funding issues, Rosalind Campion was only able to write to Mr Raid Juhi Hamadi Al Saedi on 19 March 2008, with a view to instructing him as an Iraqi law expert.

8. Rosalind Campion spoke to Mr Raid Juhi Hamadi Al Saedi on 20 March 2008 to clarify the type of expert which Public Interest Lawyers was seeking. At this time, Mr Raid Juhi Hamadi Al Saedi confirmed that he would not be able to assist as a formal adviser because of the terms on which he was permitted to take sabbatical leave from his judicial work in Iraq. I understand that Mr Raid Juhi Hamadi Al Saedi indicated that he would assist Public Interest Lawyers in locating a suitable expert.

9. Rosalind Campion left Public Interest Lawyers on 20 March 2008. At this time, Lisa Richardson became responsible for the day-to-day care and conduct of the case, under my overall supervision. Further efforts were made at this time to locate an expert. For example, Guy Goodwin-Gill continued to try to locate potential experts. Some of these contacts were travelling during this period and therefore there was some delay in reaching these individuals.

10. Lisa Richardson wrote to Mr Raid Juhi Hamadi Al Saedi on 4 April 2008 to enquire whether he had been able to locate a suitable Iraqi law expert. Despite contacting many of the Iraqi lawyers in Iraq, Mr Raid Juhi Hamadi Al Saedi wrote to Lisa Richardson on 4 April 2008 confirming that he was unable to find any lawyers that had a suitable command of the English language. Further, Mr Raid Juhi Hamadi Al Saedi indicated that the majority of the good Iraqi constitutional lawyers had left Iraq and that it was difficult to contact these lawyers. Moreover, Mr Raid Juhi Hamadi Al Saedi indicated that any good Iraqi lawyers still in Iraq were employed with the Iraqi government and therefore would be unable to act as an expert witness before the UK courts.

11. Further efforts were made to locate an expert. On 7 April 2008, Lisa Richardson contacted the clerk to Mark Mueller QC at Garden Court to enquire whether he was aware of anyone that could assist.

12. Lisa Richardson left Public Interest Lawyers on 10 April 2008, at which time I took on responsibility for the day to day running of the case. Further efforts were made to locate an Iraqi law expert. Upon the recommendation of Mark Mueller QC, Public Interest Lawyers contacted Ms Sarb K. Hassan, a partner at Nuri Yaba Law Office on 14 April 2008 and again on 17 April 2008. A number of other potential experts were also contacted during this period. However I understand that none of these individuals were able to assist.

13. Finally I took part in a case conference with Counsel, Guy Goodwin-Gill and Richard Hermer, on 2 May 2008. We concluded that it seemed to be impossible for us to find a suitable expert. Accordingly it was agreed I would contact Treasury Solicitors to ascertain whether the Defendant was relying on an expert and, if so, whether he would be prepared to disclose his report at this stage. I contacted Nicky Smith at Treasury Solicitors the same day to inform her that we had been unable to locate an Iraqi expert. At this time, I also confirmed that Rosalind Campion had been mistaken when she indicated that an Iraqi law expert had been instructed. During this conversation, I enquired whether Treasury Solicitors would be prepared to disclose their expert report unilaterally in order for me to ascertain whether it was imperative for the Appellant to submit Iraqi law evidence. Nicky Smith confirmed that she would seek instructions from her client. I telephoned Nicky Smith later that day to check progress, but she informed me that she was awaiting her client's instructions.

14. On Saturday 3 May 2008, Guy Goodwin-Gill, through one of his contacts, spoke again with Mr Raid Juhi Hamadi Al Saedi. I understand that Mr Raid Juhi Hamadi Al Saedi had initially misunderstood the earlier discussion between himself and Rosalind Campion; it seems that Mr Raid Juhi Hamadi Al Saedi had understood that he needed to be "certified" as an expert before Public Interest Lawyers could instruct him. He said that he would be able to provide an affidavit by way of expert evidence. This seemed to me that weekend to be the breakthrough we had been waiting for.

15. Immediately after the bank holiday weekend, on 6 May 2008, I contacted Mr Raid Juhi Hamadi Al Saedi. I spoke to him by telephone in New York. At this stage, Mr Raid Juhi Hamadi Al Saedi indicated that he would be able to assist in providing expert evidence, and I instructed him accordingly. On 7 May I spoke with Nigel Barnes informing him of the

position and wrote a lengthy letter of the same date explaining the difficulties to date and a proposed way forward.

49. On 8 May an application was made on behalf of the appellant to adjourn the hearing scheduled to start on 19 May.

50. The application was heard on 9 May, was opposed by the respondent and was refused by the judge.

Refusal on 9 May 2008 of the appellant's application for an adjournment

51. In the application for the adjournment made to Mitting J on Friday 9 May 2008 it was submitted that the appellant had encountered real difficulties in obtaining an expert: "Iraq is an extraordinarily difficult country to try and find experts." "It is one thing to be able to locate an expert but it is another thing to be able to persuade that expert to give evidence in a case such as this.". SIAC was told that "after many months of trying we have now located an expert" [in the USA] but that "ten days to properly instruct this expert and receive a report" is insufficient (Appellant's bundle, pages 54-58).

52. In his ruling on 9 May refusing an adjournment, Mitting J said (Appellant's bundle, pages 58-59):

> On the 8th February 2008 directions were set with the consent of the parties for the determination of a very important preliminary issue in this claimant's case, namely would the effect of the deprivation of his citizenship by the Secretary of State be to make the claimant stateless. If it had that effect then the deprivation could not stand. If it did not then the Commission would at a later date go on to hear other issues which would be determinative of the appeal.
>
> It has from the start been foremost amongst the claimant's grounds of appeal that he would be made stateless by virtue of the operation of Iraqi law.
>
> It has always been obvious that the Commission would have to consider the effect of Iraqi law upon his status, and to that end it was always very highly likely that expert evidence would be required.
>
> On the 9th February 2008 directions were given for the orderly deployment of expert evidence. Unhappily in the claimant's case it is asserted that he has been unable to locate an expert. Various assertions have been made in the course of preparing for the hearing. First, apparently erroneously, in February 2008 that an expert had been instructed. Secondly, on the 9th April 2008, that no expert evidence was required. And finally on the 7th May that the Secretary of State disclose the expert evidence which she had obtained to see if on the claimant's side it would be necessary to obtain expert evidence in rebuttal.

> These steps have all been left hopelessly late. The claimant has now identified an expert. There are ten days in which a report for evidence in some form can be obtained. This hearing has been fixed now for three months. It is important that it is determined rapidly because Mr Al-Jedda needs to know what his status is. It is disruptive of the business of the Commission to have last minute applications for an adjournment such as this.
>
> I am entirely unpersuaded that on the facts that I have recited given the probability that if everybody puts their shoulders to the wheel the claimant can deploy expert evidence at the hearing, that it is at all sensible or just to adjourn the hearing. Accordingly I reject the application for an adjournment and will now proceed to see what can be done to ensure that it takes place in as orderly and as fair a manner as possible.

Procedural history of the case from 9 May to start of hearing on 19 May

53. On 9 May the judge gave further directions. In particular he ordered the respondent to serve any expert evidence on which it proposed to rely by 5.00 pm that evening. Mr Edge's report dated 2 May was served in accordance with the order.

54. On receipt of Mr Edge's report the appellant's legal team was made aware by the respondent for the first time that the SSHD would be submitting not only that the appellant had not lost his Iraqi citizenship on becoming a British citizen but that, if that was wrong (as it in fact turned out to be) he had automatically regained his Iraqi citizenship by virtue of Article 11 (C) of Tal. Mr Edge based his opinion on the meaning of Article 11 (C) by reading it in a way that an English lawyer would read it. I compare that with the quite different way that it is construed by Dr Mohsin in his report.

55. Mr Edge's written evidence about the Nationality Law of 2006 is not entirely easy to follow. That is not now of importance because he was to agree when he gave oral evidence that it did not automatically confer Iraqi citizenship on someone who was not an Iraqi citizen by virtue of Article 11 of the 1963 Law if that person had not automatically regained his Iraqi citizenship by virtue of Article 11 (C) of TAL.

56. On 9 May the judge also ordered the appellant to serve his expert evidence and skeleton argument on 15 May and that the respondent serve her skeleton argument on 19 May, the morning of the hearing. Those directions were complied with.

57. The difficulties for the appellant were not at an end. Mr Shiner sets them out in his statement dated 15 May which was also in response to what turned out to be an unsuccessful application by the respondent that Judge Al-Saedi should not be permitted to give evidence at all because he could not be cross-examined. The respondent submitted that if the Judge could not be cross-examined: "the Commission is obviously prejudiced in its ability to resolve the disputes that exist on the expert evidence", a proposition on which Mr Hermer placed reliance during the course of oral argument before us.

58. Mr Shiner wrote:

> 16. Over the following weekend (Saturday 10 May 2008), Mr Raid Juhi Hamadi Al Saedi contacted Public Interest Lawyers and Mr Raid Juhi Hamadi Al Saedi informed Public Interest Lawyers on 14 May that he will only be available to listen to the evidence of Mr Edge on Monday 19 May between 2PM and 4PM GMT, due to prior conflicting engagements which he is unable to rearrange. My colleague Fouzia Javaid informed the Commission and Treasury Solicitors of this fact immediately. I would respectfully request that the Commission accommodates the difficulties we face due to the restrictions on the availability of our expert by adopting a flexible practice between the parties.
>
> 17. In view of these difficulties faced by Mr Raid Juhi Hamadi Al Saedi, we would respectfully request that, if the Commission proceeds with the preliminary issue on Monday 19 May, his expert evidence be accepted in written form. Mr Raid Juhi Hamadi Al Saedi has confirmed during my discussions with him that in his opinion Mr Al-Jedda is not an Iraqi citizen under Iraqi law.

59. In accordance with the order the appellant served a skeleton argument. I need to refer to only one part of it. Having learnt on 9 May that the respondent was going to rely on Article 11 (C) of TAL, counsel for the appellant was able to prepare written argument to the effect that (i) the TAL was drafted and promulgated by the occupying powers (the Authority), not by the Governing Council and that (ii) under settled principals of international law the Authority had no power to promulgate law which altered Iraqi nationality law.

60. SIAC, in its ruling on the preliminary issue, was to accept the second proposition (see paragraph 19 of the judgment) but not the first.

61. We are assured by Mr Hermer that it was for the first time on the day of the hearing when the respondent's skeleton argument was served, that it was realised that the respondent was going to argue that the Governing Council had been recognised by the Security Council as representing the sovereignty of Iraq and thus empowered in international law to adopt the TAL, an argument which SIAC accepted in paragraph 20 of the judgment. It was also submitted in the skeleton argument that domestic Iraqi law recognised the validity of the TAL, an argument which SIAC accepted in part at least on the oral evidence of Mr Edge (see paragraph 21).

62. For the purposes of this appeal the appellant has obtained a lengthy report from Professor Vera Gowlland-Debbas, the arguments in which support ground 1.

Discussion

63. The procedural history demonstrates the difficulties encountered by the appellant in finding an expert witness and expert help on the issue of statelessness. The appellant's legal team (and not for want of trying) only located an expert on Iraqi law on 3 May

and he later turned out to be an expert who could not be cross-examined and who, in the view of SIAC, dealt only summarily with the issue of the interpretation of Article 11 (C). This Article, as it turned out, became all important when SIAC rejected the respondent's argument that the appellant had not lost Iraqi citizenship when he became a British citizen- being the argument on which the SSHD appears to have relied to reach the conclusion in December 2007 that depriving the appellant of British citizenship would not make him stateless.

64. There cannot be any doubt, in my view, that the issue of whether the appellant was stateless when the SSHD revoked his British citizenship was one fraught with difficulty. Amongst other things resolution of the issue involved ascertaining and interpreting the law of Iraq during the period of occupation by the Coalition. That involved examining the status of the Governing Council during this period and seeing whether, as the respondent submitted and SIAC was to hold (in paragraph 20):

> The TAL is a law promulgated by a competent sovereign authority and has the force of law in Iraq under international law.

65. Whereas it is true to say that the contents of international law is a matter of law and not of fact, nonetheless the status in international law of the TAL is not a matter upon which counsel for the appellant was likely to be able to make adequate submissions at such short notice and without considerable help from an expert in international law with particular knowledge of the legal consequences of the invasion of Iraq from a domestic and international view point. That knowledge would have to include a detailed knowledge of the relevant United Nations Security Council resolutions as they affected the governance of Iraq post invasion. Professor Gowlland-Debbas appears to have that knowledge.

66. Another potentially complicated issue of both domestic Iraqi law and international law concerns the right of a state to impose nationality on a person without the consent of that person as was done, so SIAC held, by Article 11 (C). The imposition of nationality by state A upon a person who is the national of another state B may have consequences such as liability to conscription and tax in state A and may imperil that person's status in state B and may mean that state B will have no responsibility for the person when he is in state A.

67. Mr Swift argues that the reasons why on 9 May the appellant argued for an adjournment were very narrow- more time was needed to prepare the expert report anticipated to be forthcoming from Judge Al-Saedi. That is right. But it is vitally important to bear in mind that it was not until 5.00 pm that evening that the respondent made the appellant aware for the first time of the Article 11 (C) argument.

68. Mr Swift submits that the appellant should have made further applications for an adjournment on receipt of the report of Mr Edge on 9 May and the respondent's skeleton argument on 19 May, the day of the hearing.

Conclusion

69. It is highly unusual allow an appeal on the ground that the court below – in this case SIAC – ought not to have refused an adjournment. Such a ground rarely has merit

and we also have to keep in mind the narrow appellate jurisdiction on appeals from SIAC. By section 7 of the Special Immigration Appeals Commission Act 1997, an appeal to this Court only lies "on any question of law" material to the final determination of SIAC. For this purpose, the "final determination" must embrace the determination of the preliminary issue because, in accordance with the earlier decision of this Court in the present case [2008] EWCA Civ 1041, there can be no appeal at all until after SIAC has finally completed its task. Mr Swift accepts, indeed advances, this analysis.

70. With all this in mind, I have to consider (1) whether SIAC took into account matters which should have been taken into account and left out of account irrelevant matters and (2) whether the refusal of an adjournment was so plainly wrong that it fell outside the generous ambit of the discretion entrusted to the Commission: *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, at paragraph 33, per Lawrence Collins LJ.

71. This is a case the context of which always put it in the "anxious scrutiny" category. At the time of the hearing in SIAC, the appellant remained in Iraq, where he had been released from detention some four months earlier. His nationality or statelessness were of vital importance to him. I can well understand that a late application to vacate an important hearing date will inevitably cause concern. However, the witness statements of Mr Shiner demonstrate that the lateness was not at all attributable to the appellant personally and that any culpability attaching to his legal representatives went no further than that for which they tendered appropriate apologies. In truth, they had been striving assiduously to be ready for the hearing but had encountered difficulties in relation to expert evidence of a kind which are unsurprising, given the context.

72. I imply no criticism of the Secretary of State or his advisers. What is clear, however, is that by 9 May, and as became even more obvious on 19 May, the interests of the appellant were undoubtedly in an adjournment to enable expert evidence to be presented adequately on his behalf. I accept that, ideally, a further adjournment application ought to have been made on the 19th but, as a matter of justice, I do not think that the omission to make one should now be seen as fatal to this appeal. In any event, it seems to me that SIAC was plainly wrong on 9 May to consider that a rapid determination was called for "because Mr Al-Jedda needs to know what his status is". SIAC coupled that "need" with disruption of the business of the Commission as being clinching factors in the exercise of discretion. In my judgment, that was wrong then and the error became yet more manifest when the case for the Secretary of State developed new features on 19 May.

73. Whether one looks at the adjournment refusal with blinkered vision, concentrating only on the position and decision on 9 May, or stands back and looks at the matter up to the conclusion of the hearing on 20 May, it seems to me that the appellant was significantly prejudiced by the adjournment refusal. In the end, he had to attempt to defeat a new case with impaired expert evidence on a few hours' notice. I conclude that on 9 May the adjournment refusal was wrong in law and productive of procedural unfairness.

74. In my view the appeal should therefore be allowed and the case remitted for a fresh hearing on the whole issue of statelessness. There would be no point in remitting the

case on the statelessness issue if the outcome was inevitably going to be the same. Having read the reports of Dr Mohsin and Professor Gowlland-Debbas it seems to me impossible to say that the outcome is inevitably going to be the same. Mr Swift submitted that they added little to the debate. I do not accept that submission.

Maurice Kay LJ:

75. I agree

Mummery LJ:

76. I also agree