Neutral Citation Number: [2018] EWCA Civ 2483

Case No: C5/2016/3001

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Gleeson
DC/00015/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2018

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LEGGATT
and
LORD JUSTICE HADDON-CAVE

- -

Between:

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

- -

Hugh Southey QC and Amarjit Seehra (instructed by **Barnes Harrild & Dyer Solicitors**) for the **Appellant**
Gwion Lewis (instructed by the **Government Legal Department**) for the **Respondent**

Hearing date: 25 October 2018

- -

Judgment Approved

Lord Justice Leggatt:

1. When the Secretary of State makes an order under section 40(3) of the British Nationality Act 1981 to deprive a person of British citizenship on the ground that their naturalisation was obtained by fraud, the effect of the order may be to make the person stateless. This appeal raises questions about (1) the significance of this consequence and of the person's ability to become a national of another country for the exercise of the power and (2) who has the burden of proving the relevant facts.

Factual history

2. The appellant was born in 1973 in Sri Lanka. In June 1994 he arrived in the United Kingdom from Sri Lanka and claimed asylum on arrival. In June 1996 his asylum claim was refused. He appealed against that decision and in November 1997 his appeal was allowed. In July 1998 the appellant was convicted of conspiracy to defraud and sentenced to 2½ years' imprisonment. Nonetheless, on the basis of his successful asylum appeal he was on 12 June 1999 recognised as a refugee and granted indefinite leave to remain in the UK. In March 2007 the appellant applied for British citizenship and his application was granted on 11 December 2007.

3. What the appellant did not disclose when he applied for British citizenship was that he had previously applied, first for indefinite leave to remain in the UK and then for British citizenship, using the name and date of birth of another individual of Sri Lankan origin. The first application, for indefinite leave to remain, was granted on 16 October 1999 and the second, for British citizenship, on 16 December 2003.

4. The Home Office subsequently discovered those facts and on 27 May 2015 sent two letters to the appellant. The first letter informed him that the grant of British citizenship made on 16 December 2003 was considered to be a nullity. That view is consistent with the law as confirmed by the Supreme Court in *R (Hysaj) v Secretary of State for the Home Department* [2017] UKSC 82; [2018] 1 WLR 221, para 16, and has not been challenged by the appellant. The second letter gave notice under section 40(5) of the British Nationality Act 1981 of the Secretary of State's decision to make an order to deprive the appellant of his British citizenship granted on 11 December 2007 on the ground that, in his application, the appellant had deliberately concealed the fact that he had already obtained a grant of British citizenship using false details. The letter said that, had this information been known, his application would have been refused. The letter further stated that, once a deprivation order was made, the appellant would be granted discretionary leave to remain in the UK for 30 months.

The legal basis for deprivation of British citizenship

5. Section 40 of the British Nationality Act 1981 provides in relevant part as follows:

> "(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.
>
> …"

The references in these provisions to "citizenship status" include a person's status as a British citizen: see subsection (1)(a). Section 40(5) requires the Secretary of State before making an order under section 40 to give the person concerned notice of (a) the decision, (b) the reasons for the order and (c) the person's right of appeal.

6. Pursuant to section 40A(1), a person who is given such a notice may appeal against the decision to the First-tier Tribunal. The task of the tribunal on such an appeal has been considered by the Upper Tribunal (Immigration and Asylum Chamber) in a number of cases including *Deliallisi (British Citizen: deprivation appeal; Scope)* [2013] UKUT 439 (IAC) and, more recently, *BA (deprivation of citizenship: Appeals)* [2018] UKUT 85 (IAC). I would endorse the following principles which are articulated in those decisions and which I did not understand to be in dispute on this appeal:

(1) Like an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002, an appeal under section 40A of the 1981 Act is not a review of the Secretary of State's decision but a full reconsideration of the decision whether to deprive the appellant of British citizenship.

(2) It is thus for the tribunal to find the relevant facts on the basis of the evidence adduced to the tribunal, whether or not that evidence was before the Secretary of State when deciding to make a deprivation order.

(3) The tribunal must first establish whether the relevant condition precedent specified in section 40(2) or (3) exists for the exercise of the discretion whether to deprive the appellant of British citizenship. In a section 40(3) case, this requires the tribunal to establish whether citizenship was obtained by one or more of the means specified in that subsection.

(4) If the condition precedent is established, the tribunal has then to ask whether the Secretary of State's discretion to deprive the appellant of British citizenship should be exercised differently. For this purpose, the tribunal must first determine the reasonably foreseeable consequences of deprivation.

(5) If the rights of the appellant or any other relevant person under article 8 of the European Convention on Human Rights are engaged, the tribunal will have to decide whether depriving the appellant of British citizenship would constitute

a disproportionate interference with those rights. But even if article 8 is not engaged, the tribunal must still consider whether the discretion should be exercised differently.

(6) As it is the Secretary of State who has been charged by Parliament with responsibility for making decisions concerning deprivation of citizenship, insofar as the Secretary of State has considered the relevant facts, the Secretary of State's view and any published policy regarding how the discretion should be exercised should normally be accorded considerable weight (in which regard see *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799).

The First-tier Tribunal decision

7. On his appeal to the First-tier Tribunal (Immigration and Asylum Chamber) in the present case, the appellant raised four main arguments. These were: (1) that he had assumed a false identity "under duress" at a time when he faced being returned to Sri Lanka and in these circumstances the fact that he had previously applied for citizenship using this false identity should not be regarded as material; (2) that depriving him of his British citizenship would violate his right to respect for private life under article 8, in particular because it would result in the loss of his employment which required him to travel abroad; (3) that depriving the appellant of his citizenship would be inconsistent with the best interests of his children, a factor to which the Secretary of State was required to have regard by section 55 of the Borders, Immigration and Asylum Act 2009; and (4) that deprivation of British citizenship would have a disproportionate impact on the appellant and his family because it would make him stateless.

8. In support of the contention that he would be made stateless, the appellant relied on the text of the Ceylon Citizenship Act No. 18 of 1948, downloaded from an entry on that Act on Wikipedia. In particular, the appellant's solicitors in their written submissions drew attention to the provision in section 20(5) of that Act that: "A person who is a citizen of Ceylon by descent shall cease to be a citizen of Ceylon if he voluntarily becomes a citizen of any other country". Anticipating an argument that the appellant could apply to re-acquire Sri Lankan nationality, it was submitted that he cannot do so because he is a refugee who has been found to have a well-founded fear of persecution if he returns to Sri Lanka. Reliance was also placed on a witness statement made by a partner in the law firm representing the appellant. He gave evidence of a conversation with an official at the Sri Lankan Embassy in London who had confirmed that on becoming a British citizen the appellant will have lost his Sri Lankan nationality and would have to make an application if he wished to resume it.

9. On 16 September 2015 the First-tier Tribunal dismissed the appellant's appeal. In short, the tribunal found that the appellant had obtained naturalisation as a British citizen by means of fraud, false representation and/or concealment of a material fact; that in circumstances where the Secretary of State had said that the appellant would be granted discretionary leave to remain in the UK for 30 months, depriving him of citizenship would not interfere with his article 8 right to respect for his private life; and that proper account had been taken of the interests of the appellant's children, who would not be deprived of their own British citizenship. However, despite recording the submission that the appellant would be stateless if he was deprived of

his British citizenship, the First-tier Tribunal did not address this point anywhere in its decision.

The Upper Tribunal decision

10. The appellant was given permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber). His main ground of appeal (and the only one that remains relevant) was that the First-tier Tribunal had failed to consider the contention that removal of his British citizenship would make him stateless and that it was necessary to reopen the decision to deal with this question.

11. The Upper Tribunal dismissed the appeal. In her decision promulgated on 9 March 2016 Upper Tribunal Judge Gleeson accepted that the First-tier Tribunal erred in law in failing to consider whether the appellant would be made stateless. But she concluded that the error was immaterial as the burden of proving statelessness lay on the appellant and he had not discharged that burden.

This appeal

12. Permission to appeal to the Court of Appeal was granted by McCombe LJ following an oral hearing. The appellant's case on this appeal, as advanced on his behalf by Mr Hugh Southey QC and Ms Amarjit Seehra, can be summarised as follows:

    (1) The Upper Tribunal was wrong to hold that the burden lay on the appellant to prove that he would be stateless if deprived of British citizenship.

    (2) Alternatively and in any event, there was evidence before the tribunal which proved not only that the appellant would be stateless but that he cannot re-acquire Sri Lankan citizenship.

    (3) Alternatively, the appellant should, if necessary, be permitted to rely on additional evidence which was not before the First-tier Tribunal or the Upper Tribunal to prove those facts.

    (4) In these circumstances the Upper Tribunal was wrong to conclude that the failure of the First-tier Tribunal to consider the issue of statelessness was immaterial.

Proportionality

13. Before addressing these grounds of appeal, it is relevant to consider a general submission made by Mr Southey that, in deciding whether a person should be deprived of citizenship, it is necessary to consider the proportionality of that decision. Mr Southey emphasised that the right to nationality is an important and weighty right and is properly described as the right to have other rights, such as the right to reside in the country of residence and to consular protection: *Pham v Secretary of State for the Home Department* [2018] EWCA Civ 2064, para 49. He argued that in these circumstances a test of proportionality must be applied to determine whether interference with this right is justified.

14. In support of this argument Mr Southey relied on *dicta* of the Supreme Court in *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591,

in particular of Lord Mance at para 98, to the effect that, given the fundamental importance of citizenship, the "tool of proportionality" would be available on a review of a decision to remove British citizenship. Lord Carnwath (paras 59-60) and Lord Sumption (paras 104-109) expressed similar views. All three Justices referred to observations of Lord Mance in *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] AC 455, para 51, that: "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle … The nature of judicial review in every case depends on the context."

15. The context in which these remarks were made was an argument that, because loss of British citizenship would entail loss of citizenship of the European Union and the Court of Justice of the European Union has held that the EU law principle of proportionality applies to the withdrawal of EU citizenship, a person may only be deprived of British citizenship in accordance with this principle. The Supreme Court had difficulty with this argument for the reason that EU citizenship is parasitic on national citizenship, not an independently acquired status, so that treating the question whether British citizenship should be withdrawn as determined by principles applicable to the withdrawal of EU citizenship would (in my phrase, not theirs) be allowing the tail to wag the dog. However, the Supreme Court found it unnecessary on the facts of the case to decide this question, and also expressed views to the effect that it was improbable that the nature, strictness or outcome of a review of deprivation of citizenship would differ according to whether it was conducted under domestic principles or whether it was also required to be conducted by reference to a principle of proportionality derived from EU law.

16. In so far as the members of the Supreme Court in *Pham* were indicating that the consideration under UK domestic law of a decision to deprive a person of citizenship is not limited to applying a test of irrationality, this seems to me to follow from the nature of an appeal under section 40A of the 1981 Act which, as noted earlier, is not a review of the Secretary of State's decision but an extension of the administrative decision-making process. In making a decision whether to order deprivation of citizenship in the exercise of a discretionary power under section 40, the decision-maker (whether that be the Secretary of State or the tribunal on an appeal) has to form a view, not just as to whether it would be rational to make such an order, but whether it is right to do so. This necessarily involves an evaluation of the relative weight to be accorded to the public interest in depriving the person concerned of citizenship and any competing interests and considerations, including the impact of deprivation on the legal status of the individual concerned.

17. It is a further question whether the exercise of the discretion should be approached on the basis that deprivation of citizenship involves interference with a right and that any such interference should be no greater than is necessary to achieve the legitimate aim of the interference. It is well established that such a test of proportionality is applicable where there is interference with a right protected by the European Convention on Human Rights, such as the right to respect for a person's private and family life guaranteed by article 8. However, although deprivation of citizenship may result in interference with article 8 rights, the right to a nationality is not itself a right protected by the Human Rights Convention.

18. Although a right not to be made stateless is recognised under other international treaties, no such right applies in a case where a person's nationality has been obtained by fraud. In particular, article 8(1) of the 1961 Convention on the Reduction of Statelessness (which the UK has ratified) prohibits deprivation of nationality which would render a person stateless; but article 8(2)(b) provides an exception where the nationality has been obtained by misrepresentation or fraud. Likewise, article 7(1) and (3) of the 1997 European Convention on Nationality (which the UK has not in fact ratified) does not prohibit a state party from depriving a person of his nationality, even if he thereby becomes stateless, when that nationality was acquired by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant. More broadly, article 15 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1951, declares that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality. But as the CJEU recognised in *Rottmann v Friestadt Bayern* (Case C-135/08) [2010] QB 761, para 53, when a state deprives a person of his nationality because of acts of deception, legally established, that deprivation cannot be considered to be an arbitrary act.

19. Where, as in the present case, it is established not only that deception was used but that, without it, an application for naturalisation as a citizen would not have been granted, it seems to me that it will be an unusual case in which the applicant can legitimately complain of the withdrawal of the rights that he acquired as a result of naturalisation. That is because the withdrawal of those rights does no more than place the person concerned in the same position as if he had not been fraudulent and had acted honestly in making the application. The position may be different, however, in a case where, as a result of naturalisation, the individual has lost other rights previously enjoyed which will not or may not be restored if he is now deprived of his citizenship. In such a case depriving the person of citizenship will not simply return him to the *status quo ante* but will place him in a worse position than if he had not been granted citizenship in the first place.

20. That may occur where a person who was a national of another state has lost that nationality as a result of becoming a British citizen and would not be entitled to resume his former nationality if deprived of his British citizenship. In such a case the decision-maker (whether it be the Secretary of State or the tribunal on an appeal) will need to consider whether deprivation of citizenship is justified having regard to that consequence. Relevant factors in making that determination are likely to include both the nature and circumstances of the deception by means of which naturalisation was obtained but also, on the other side of the scales, the likelihood (if any) that the individual would be able to re-acquire his former citizenship and the extent to which the inability to do so will have practical detrimental consequences for the individual or others. Although it does not seem to me necessary that the assessment should have to be conducted using the formal four stage test of proportionality adopted in cases such as *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 74, it will necessarily involve a balancing exercise and a judgment as to whether in all the circumstances deprivation of citizenship is proportionate.

The burden of proving statelessness

21. Against this background, I turn to the first issue raised by the appellant, being whether the Upper Tribunal was correct to hold that the burden lay on the appellant to prove that, if deprived of his British citizenship, he would be made stateless.

22. For the appellant, Mr Southey QC relied on the following statement of the law in *G3 v Secretary of State for the Home Department* SC/140/2017, a decision of the Special Immigration Appeals Commission, at para 15:

> "Given that it is the respondent who is seeking to deprive a person of British citizenship, the burden lies on the respondent to show, on the balance of probabilities, that, on the facts of the particular case, that person will not be stateless, if deprived of British citizenship."

23. In the *G3* case, however, the respondent's decision was made under section 40(2) of the 1981 Act on the ground that deprivation of citizenship was conducive to the public good. In a section 40(2) case, the Secretary of State is prohibited by section 40(4) from making a deprivation order "if he is satisfied that the order would make a person stateless". In *Al-Jedda v Secretary of State for the Home Department* [2013] UKSC 62; [2014] AC 253 the Supreme Court interpreted section 40(4) as requiring the Secretary of State, before making an order under section 40(2), to identify whether or not the order would make the person concerned stateless, which in turn requires the Secretary of State to identify whether the person has another nationality at the date of the order: see paras 30 and 32. The effect therefore is that, in a section 40(2) case, establishing that the person would not be made stateless is a condition precedent to the making of a deprivation order.

24. There is no similar requirement to establish that the person concerned would not be made stateless before making a deprivation order under section 40(3) of the 1981 Act on the ground that naturalisation was obtained by fraud. Accordingly, the reasoning in the *G3* case does not apply to such a decision.

25. Mr Southey recognised that there is no statutory prohibition on making an order under section 40(3) which makes a person stateless. But he submitted that, because a test of proportionality is applicable, the burden is on the state to establish that the interference with the right is proportionate: see *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 44.

26. As Lord Wilson in fact made clear in the passage cited by Mr Southey from the *Quila* case, the burden to which he was referring was a burden of persuasion or justification rather than the burden of proving relevant facts. Lord Wilson was simply pointing out that, in a case where article 8 is engaged, it is for the Secretary of State to establish that the interference with the claimants' rights is justified under article 8(2). I have accepted that, in deciding whether a person should be deprived of British citizenship even where article 8 is not engaged, a form of proportionality assessment is required. But it does not follow that, before taking the decision, the Secretary of State has a duty to make inquiries to find out what, if any, further adverse consequences not already known (or reasonably foreseeable from facts already known) to the Secretary of State over and above the deprivation of citizenship itself would result from such

deprivation. As Mr Southey accepted, if there are facts not already known to the Secretary of State on which the person affected wishes to rely to argue that the withdrawal of citizenship would interfere with his rights under article 8, it is for that person to establish the facts relied on. Likewise, I see no reason why, before depriving a person of citizenship on the ground that his naturalisation as a citizen was obtained by fraud, the Secretary of State should be required to investigate whether that person has, or previously had, another nationality. If a person who has been shown to have obtained citizenship by fraud wishes to argue that he should nevertheless not be deprived of his citizenship because this would have further particular adverse consequences in his case over and above the loss of citizenship itself, then it seems to me that the burden must lie on him to identify and prove the further consequences on which he seeks to rely. That includes any assertion that the person will be made stateless.

27. I therefore consider that the Upper Tribunal was right to hold that the burden of proving statelessness in this context lay on the appellant.

The meaning of statelessness

28. Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons defines a "stateless person" as "a person who is not considered as a national by any state under the operation of its law." It is clear that the term has the same meaning in section 40(4) of the 1981 Act: see the *Pham* case, para 20. In considering, albeit not as a condition precedent to making an order, whether depriving a person of citizenship under section 40(3) would make the person stateless, the term is reasonably understood in the same sense. This does not mean that whether the person would be made stateless is the only relevant consideration. It may also be relevant to the exercise of discretion to take account of any ability which the person concerned may have to acquire (or re-acquire) another nationality.

29. Although proving statelessness involves proving a negative, in order to show that a person would be made stateless it is plainly not necessary to adduce evidence of the law concerning nationality of every country in the world. A court or tribunal can take notice of the fact that nationality is normally based on descent from nationals of a state, birth within the state's territory or naturalisation as a citizen – which in turn usually requires prolonged residence in the territory of the state or other substantial residential and/or social ties. Thus, it is only where the person concerned has a connection with a state of one of these kinds that evidence will be needed to show that he or she is not considered as a national under that state's law.

30. In the present case it is apparent from his immigration history that the only other country apart from the United Kingdom with which the appellant has a relevant connection is Sri Lanka. In practice, therefore, to show that the withdrawal of his British citizenship would make him stateless, he had to prove that he had ceased to be a national of Sri Lanka and would not automatically re-acquire Sri Lankan nationality if deprived of his British citizenship. This required evidence of Sri Lankan law.

Proof of foreign law

31. In English proceedings, matters of foreign law are treated as matters of fact which must be proved to the satisfaction of the court or tribunal. Traditionally, the general

rule in court proceedings has been that this cannot be done simply by putting the text of a foreign enactment before the court or by citing foreign decisions or books of authority, but can only be done by adducing evidence from an expert witness. The reason generally given for this requirement is that, without the assistance of an expert witness, the court is not competent to interpret such materials: see e.g. *Phipson on Evidence* (18th Edn, 2013) para 33-75; *Dicey Morris & Collins on The Conflict of Laws* (15th Edn, 2012) vol 1, para 9-014. Sometimes this is undoubtedly true. When, for example, the foreign law in question derives from a system which does not share a common heritage with our own and is contained in sources written in a foreign language whose meaning and/or relationship to each other is not easy to understand, it would plainly be unsafe for an English judge to reach conclusions about the effect of the foreign law without expert assistance. But equally plainly, this is not always true. An English judge does not generally need expert assistance in order to understand and interpret an enactment or decision of a court of another English-speaking country whose law forms part of the common law. Decisions of such courts are frequently cited in the English courts and treated as persuasive authority on questions of English law with no suggestion that the court needs the aid of an expert witness in order to interpret such materials. There is no reason why the court should be any less competent to interpret such materials when they are relied on to prove the content of the foreign law concerned.

32. I therefore agree with Judge Posner when he remarked in *Bodum USA Inc v La Cafetière Inc*, 621 F 3d 624 (2010), a decision of the US Seventh Circuit Court of Appeals which itself needs no expert assistance to comprehend:

> "I cannot fathom why in dealing with the meaning of laws of English-speaking countries that share our legal origins judges should prefer paid affidavits and testimony to published materials."

33. A second reason sometimes given for requiring expert evidence in order to prove foreign law is that, without it, the parties or the court are not competent to research the relevant foreign law and ensure that they have identified the most relevant and up-to-date materials. Thus, it is said in *Dicey Morris & Collins on The Conflict of Laws* at para 9-015 that, if an expert witness cites a section from a foreign code or a passage from a foreign decision, the court will not look at other sections of the code or at other parts of the decision without the aid of the witness, since they may have been abrogated by subsequent legislation.

34. No doubt this may sometimes be a wise approach to adopt. But in law as in so many other areas of life, technological advance and the expansion of the internet have in recent years revolutionised the ability to gain access to information. No longer is it generally necessary to consult books in a library in order to conduct legal research. A vast amount of legislation and case law in many jurisdictions is readily available online. Where, for example, the answer to a question of foreign law is to be found in a provision of an enactment which is published in its current version in English on an official government website, I can see no reason why a court should not look at the provision without the aid of an expert witness. In such a situation there is no material risk that the provision has been abrogated by subsequent legislation.

35. In making these observations, I am not encouraging the use of sources such as Wikipedia (which was relied on by the appellant's lawyers in the First-tier Tribunal in this case) as evidence of foreign law. But it should, in my view, be a matter for the judgment of the court or tribunal to decide what material to accept in any particular case as evidence of foreign law. In deciding whether expert evidence is needed, it is relevant to consider not only the nature of the question of foreign law raised, the nature of the foreign legal system and the nature of the materials relied on, but also the importance of dealing with cases at proportionate cost. With this as with other matters of evidence, a more informal approach may be justified in tribunal proceedings than in court proceedings. This is reflected in the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), rule 15(2)(a), which provides that the Upper Tribunal may admit evidence whether or not the evidence would be admissible in a civil trial. A similar rule applies in the First-tier Tribunal: see the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604), rule 14(2).

36. In the present case it might have been viewed as a cause for concern that the legal text relied on by the appellant in the First-tier Tribunal was taken from a Wikipedia article on the "Ceylon Citizenship Act" and referred throughout to citizenship of "Ceylon". Given that the name of the country was changed from Ceylon to Sri Lanka in 1972, this suggested that the tribunal had not been provided with an up-to-date version of the applicable legislation. It appears from para 24 of the Upper Tribunal decision, however, that at the hearing in the Upper Tribunal counsel for the respondent produced a copy of the relevant legislation as amended (most recently in 2003). Although the Upper Tribunal judge pointed out (in para 42 of the decision) that there was no expert evidence before the tribunal dealing with the question of whether the appellant was now stateless, she did not treat that fact as fatal and had regard to the evidence of the 1948 Sri Lankan Citizenship Act which was adduced by the appellant. In my view, that was an entirely proper approach.

The relevant Sri Lankan law

37. The effect of the 1948 Sri Lanka Citizenship Act ("the Citizenship Act"), so far as relevant for present purposes, is clear from its terms. Pursuant to section 2(2):

> "A person shall be or become entitled to the status of a citizen of Sri Lanka in one of the following ways only:
>
> (a) by right of descent as provided by this Act;
>
> (b) by virtue of registration…"

Section 20(5) provides that:

> "A person who is a citizen of Sri Lanka by descent shall cease to be a citizen of Sri Lanka if he voluntarily becomes a citizen of any other country."

(There is a corresponding provision in section 21(1) applicable to a citizen by registration.)

38. On the reasonable inference, therefore, that the appellant was a citizen of Sri Lanka (by descent) until he was granted British citizenship on 11 December 2007, the effect of his voluntarily becoming a British citizen was that he ceased to be a citizen of Sri Lanka at that time.

39. Section 8 of the Citizenship Act provides (in relevant part) as follows:

> "(1) Any person who ceases under section 19 or section 20 to be a citizen of Sri Lanka by descent may at any time thereafter make application to the Minister for a declaration that such person has resumed the status of a citizen of Sri Lanka by descent; and the Minister may make the declaration for which the application is made
>
> (a) if that person renounces citizenship of any other country of which he is a citizen, in accordance with the law in force in that behalf in that other country; and
>
> (b) if that person is, and intends to continue to be, ordinarily resident in Sri Lanka.
>
> (2) Where a declaration is made in relation to any person under subsection (1), that person shall, with effect from such date as may be specified in the declaration, again have the status of a citizen of Sri Lanka by descent.
>
> …
>
> (4) The Minister may refuse to make a declaration under subsection (1) in relation to any person on grounds of public policy; and such refusal shall be final and shall not be contested in any court, but without prejudice to the power of the Minister subsequently to make such a declaration in relation to that person.
>
> (5) The Minister may in his discretion exempt any person from the requirements of paragraph (a) of subsection (1) of this section, and make a declaration under that subsection notwithstanding that such person does not comply with the said requirements."

40. These provisions indicate that the appellant would be able to resume Sri Lankan citizenship after being deprived of his British citizenship only if: (1) he makes an application to the Minister under section 8(1) of the Citizenship Act; (2) at the time of making the application he is, and intends to continue to be, ordinarily resident in Sri Lanka; and (3) the Minister decides in the exercise of his discretion to make the declaration (and does not refuse to do so on grounds of public policy).

The reasoning of the Upper Tribunal

41. The crux of the Upper Tribunal's reasoning is contained in the following three paragraphs of the decision:

> "44. The appellant, upon whom rests the burden of proof of citizenship, must show which category [of person who is 'of' or 'has' a nationality within the meaning of article 1A(2) of the Refugee Convention] applies to him. There is no evidence before me which assists in that exercise. In particular, there is no evidence that the appellant has renounced his Sri Lankan citizenship or that he has lost it by operation of law: the appellant is Sri Lankan by birth. The 1948 Ceylon Citizenship Act, on which the appellant relies, does not as [his counsel] asserts provide for automatic deprivation of citizenship for those who are Sri Lankan citizens by birth: instead, at section 19, it provides that they may, if they choose, make a formal declaration of renunciation of Sri Lankan citizenship, and the statute also provides a process for resumption of citizenship where such a declaration of renunciation has been made.
>
> 45. At sections 20 and 21, the statute deals with those whose Sri Lankan citizenship is acquired by registration or by descent. In that case, there is automatic loss of such citizenship on the acquisition of another nationality, again subject to provisions for resumption. The appellant has made no attempt to discover what the position is by applying to the Sri Lankan Embassy in London to clarify his status and if appropriate, resume his Sri Lankan citizenship.
>
> 46. I am satisfied that, although the First-tier Tribunal erred in law in failing to make an express finding as to whether this appellant is now stateless, such error is immaterial, since there was no evidence before the First-tier Tribunal and is none before me on which such a finding could rationally be made. The burden of proving statelessness is on the party asserting it, the appellant, and he has not discharged that burden."

42. It appears from para 44 that the Upper Tribunal judge was under the impression that Sri Lankan citizenship can be acquired by being born in Sri Lanka and that the appellant fell within this category of citizen as he was born in Sri Lanka. The judge reasoned that, as the Citizenship Act does not provide for automatic deprivation of citizenship for those who are Sri Lankan citizens by birth on acquisition of another nationality, the only way in which a person who is a citizen by birth can cease to be a Sri Lankan citizen is by making a formal declaration of renunciation under section 19 of the Citizenship Act. She concluded that, as there was no evidence to suggest that the appellant has renounced Sri Lankan citizenship, he is currently a Sri Lankan citizen and will remain so if he loses his British citizenship.

43. This reasoning was based on a palpable misreading of the Citizenship Act. As already mentioned, section 2(2) of that Act makes it clear that there are only two ways

in which a person can be entitled to Sri Lankan citizenship, which are by descent and by registration. There is no right to become a Sri Lankan citizen as a result of being born in Sri Lanka and therefore no category of persons who are Sri Lankan citizens by birth. Accordingly, the appellant did not become Sri Lankan by birth. No doubt he became a Sri Lankan citizen when he was born, but he did so by right of descent and not by reason of the fact that he was born in Sri Lanka. The Upper Tribunal judge was therefore wrong to conclude that the appellant was a Sri Lankan citizen on the basis that there was no evidence that he had renounced his Sri Lankan citizenship.

44. The Upper Tribunal judge did go on to consider (at para 45 of the decision, quoted above) the position of those whose Sri Lankan citizenship is acquired by descent. She referred to section 20 of the Citizenship Act and stated – correctly – that there is automatic loss of such citizenship on the acquisition of another nationality. The judge went on, however, to observe that the appellant "has made no attempt to discover what the position is by applying to the Sri Lankan Embassy in London to clarify his status and if appropriate, resume his Sri Lankan citizenship."

45. There was in fact evidence before the tribunal (mentioned at paragraph 8 above) that the appellant had made enquiries through his legal representatives of the Sri Lankan Embassy in London and had been told that he had lost his Sri Lankan nationality on becoming a British citizen and would need to apply if he wished to attempt to resume Sri Lankan citizenship. This confirmed what was in any case apparent from the Citizenship Act – that the appellant had automatically ceased to be a Sri Lankan citizen on acquiring British citizenship and would not automatically re-acquire his status as a Sri Lankan citizen if he ceased to be a British citizen.

46. In concluding that the appellant had failed to prove statelessness and that there was no evidence on which such a finding could rationally be made, the Upper Tribunal therefore made an error. In fact, the provisions of the Citizenship Act in evidence before the tribunal unequivocally showed that, if deprived of British citizenship, the appellant will not be considered as a national of Sri Lanka under the operation of its law. As there is no other state with which the appellant has a relevant connection, it follows that he would indeed be made stateless.

47. On behalf of the Secretary of State, Mr Gwion Lewis submitted that, on a fair reading of the Upper Tribunal decision, when the judge referred to "statelessness" she was using the term, not in the sense in which the term is used in section 40(4) of the 1981 Act, but to refer to a situation in which an individual not only has no nationality but is not entitled to acquire (or re-acquire) a nationality. Thus, one basis at least for the Upper Tribunal's conclusion was that the appellant had failed to prove that he did not have the right to resume his Sri Lankan citizenship. On that basis the error made by the First-tier Tribunal in failing to consider statelessness was immaterial, because a person who is entitled to acquire another nationality is not materially disadvantaged by the fact that he does not currently hold another nationality.

48. It does indeed appear that the Upper Tribunal may have been using the term "stateless" in this broader sense. That is suggested by the reference in para 43 of the decision to the case of *KK (Korea) CG* [2011] UKUT 92 (IAC) which discussed the distinction between cases where a person does or does not have a nationality within the meaning of article 1A(2) of the Refugee Convention. In that context a person who, although not already of a particular nationality, is entitled as of right to acquire

that nationality is considered to "have" or be "of" the nationality in question. By contrast, a person who, although not of that nationality or entitled to it, may be able to acquire it is not considered to "have" or be "of" that nationality. It is not clear why the *KK (Korea) CG* case was referred to, as the question whether a person has or is of a nationality for the purposes of the Refugee Convention is not relevant to deprivation of British citizenship. Nevertheless, this might not have mattered if the Upper Tribunal judge had been justified in finding that the appellant had failed to prove that he is not entitled to resume his Sri Lankan citizenship.

49. However, that finding was not justified. As I have already indicated, section 8(1) of the Citizenship Act makes it clear that, in order to resume Sri Lankan citizenship, it is necessary to apply for and obtain a declaration from the Minister. It is also clear from section 8(1)(b) that one of the conditions which must be satisfied before a declaration may be made is that the applicant "is, and intends to continue to be, ordinarily resident in Sri Lanka". Plainly, the appellant is not ordinarily resident in Sri Lanka. He has been resident in the United Kingdom since he claimed asylum here in 1994. It follows that he has no current right to resume Sri Lankan citizenship. More than that, it is in fact difficult to see how he could realistically become able to do so. For that purpose, he would need first of all to take up residence in Sri Lanka. If the appellant's British citizenship (and hence his passport) is withdrawn, he will not be able to leave this country. More fundamentally, assuming that a travel document would be issued to him, the appellant cannot on the face of it reasonably be expected to return to Sri Lanka, let alone live there, in circumstances where he successfully claimed asylum on the ground that he had a well-founded fear of being persecuted if he were to return.

50. As a last ditch, Mr Lewis submitted that there is in English law and might well be in Sri Lankan law an overarching discretion on the part of the Minister to waive the statutory requirements and allow a person to resume Sri Lankan nationality even though he does not meet the conditions specified in section 8 of the Citizenship Act. Mr Lewis argued that, given this possibility, the appellant has failed to prove that he could not re-acquire Sri Lankan nationality.

51. The principle of English law to which I take Mr Lewis to have been referring is that, where a Minister has a discretionary power (for example, to grant applications for citizenship) and chooses to exercise that power in accordance with published rules or policies, the Minister nevertheless retains a residual discretion to consider an application made outside the rules by someone who does not qualify under them. This principle which precludes the fettering of a discretion only applies, however, where the Minister has a discretion to exercise. It has no application where the statute which is the source of the relevant power does not give the Minister a discretion. I see no reason to suppose that the position is different under Sri Lankan law. It would be startling if, in a situation where the statute does not permit the Minister to grant an application for citizenship, he was nevertheless legally entitled to do so.

52. As already mentioned, section 8(1) of the Citizenship Act gives the Minister a discretion to allow a person to resume citizenship by descent only where two conditions are met. Subsection (5) gives the Minister a further discretion to exempt any person from the first of these conditions (the requirement to renounce citizenship of any other country) but not from the second condition (the requirement to be, and intend to continue to be, ordinarily resident in Sri Lanka). It follows that, unless the

residency condition is satisfied, the Minister has no power to permit an applicant to resume citizenship. (Likewise, the Minister has no power to accept an application for registration as a citizen under section 11 of the Citizenship Act unless the applicant is, and intends to continue to be, ordinarily resident in Sri Lanka.)

53. Furthermore, even if the Minister had the power to waive the requirement of ordinary residence in Sri Lanka – which on the plain wording of the statute he does not – there is no apparent reason why he should or would be willing to waive the requirement in the case of the appellant.

54. I conclude that the Upper Tribunal was wrong to treat the failure of the First-tier Tribunal to address the question of statelessness as immaterial. The Upper Tribunal should have found that depriving the appellant of his British citizenship would make him stateless and that, on the evidence before the tribunal, he had no right to resume and no realistic prospect of being able to resume Sri Lankan citizenship. It was therefore necessary for the tribunal to address the question of whether, given those consequences, a deprivation order should nevertheless be made.

The appellant's application to adduce new evidence

55. In the light of this conclusion I can deal shortly with the appellant's application to adduce new evidence on this appeal. This evidence takes two forms. First, there is a witness statement dated 16 January 2018 from Mr Paul Turner, a partner in the law firm representing the appellant, evidencing further enquiries made of the Sri Lankan Embassy in London after the Upper Tribunal dismissed his appeal and the responses to those enquiries. Secondly, there is an expert report from a Sri Lankan lawyer. An informal application was made to admit Mr Turner's witness statement at the hearing on 17 January 2018 at which McCombe LJ granted permission to appeal. McCombe LJ did not grant the application and indicated that the appellant would be well advised to obtain evidence from an expert in Sri Lankan law. The order granting permission to appeal directed that any application to admit fresh evidence be made by way of formal application, supported by a witness statement and skeleton argument, within 28 days.

56. No application was made within this time limit either to admit Mr Turner's witness statement or to seek to rely on any expert report. It was not until 27 September 2018 that an application was made to admit a report from a Sri Lankan lawyer. The report sets out the relevant provisions of the Citizenship Act and also states that an application for resumption of Sri Lankan citizenship cannot be made through the Sri Lankan High Commission in London and can only be made in Colombo.

57. The report is dated 21 February 2018 but was not released to the appellant's solicitors until 20 September 2018 because the full fee for the report was not paid until then. Mr Turner in a further witness statement made in support of the application for permission to rely on the report has explained that the appellant was unable to raise the necessary funds to pay the Sri Lankan lawyer and ultimately Mr Turner's firm decided to fund the cost themselves.

58. As the appellant did not comply with the order of McCombe LJ, he requires relief from sanctions in order to make the application. But it is convenient to consider whether, if such relief were granted, the further evidence is admissible. The criteria

which must be satisfied before fresh evidence will be admitted on an appeal are those specified in *Ladd v Marshall* [1954] 1 WLR 1489, 1491, being (1) that the evidence could not have been obtained with reasonable diligence for use in the proceedings at first instance, (2) that the evidence, if admitted, would probably have an important influence on the result of the case, though it need not be decisive, and (3) that the evidence is apparently credible. In public law cases these principles remain the starting-point, though there is a discretion to depart from them in exceptional circumstances if the wider interests of justice so require: *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044, paras 79-82.

59. In the present case, the new evidence is apparently credible but the appellant has failed to show that it could not with reasonable diligence have been obtained for use in the tribunal proceedings. The witness statement made in support of the application to adduce the new evidence only addresses the delay between February and September 2018 and makes no attempt to explain why the evidence, if important, was not obtained for the purpose of the tribunal proceedings. Its author, Mr Turner, does not assert that the evidence could not with reasonable diligence have been obtained for use in the tribunal proceedings.

60. In any event, it follows from my earlier conclusion that the new evidence, if admitted, would not in my view have an important – or indeed any – influence on the result of the appeal. In particular, the witness statement of Mr Tuner dated 18 January 2018 seems to me to add nothing material to his earlier statement which was before the tribunals of enquiries made of the Sri Lankan Embassy. The report of the Sri Lankan lawyer confirms that the text of the Citizenship Act which was relied on before the Upper Tribunal was accurate and up-to-date in all material respects. But otherwise it adds nothing of importance to the evidence already available.

61. Nevertheless, although the appellant's application to admit fresh evidence was made out of time and does not satisfy the *Ladd v Marshall* principles, I consider that it is in the wider interests of justice that the court should take account of the Sri Lankan lawyer's report (and grant relief from sanctions) in so far as the report confirms that the relevant provisions of Sri Lankan law have been accurately represented to the tribunals and to this court – but only for that purpose. Had this evidence shown that any of the relevant provisions of the Citizenship Act had in fact been repealed or materially amended, the court would certainly have wished and expected to be informed of that fact. The information that there has been no such change is equally, in my view, a matter of which the court ought properly to take notice.

62. In these circumstances, I would admit the expert's report solely as evidence of the current wording of the Sri Lankan Citizenship Act and would otherwise refuse the appellant's application to adduce new evidence.

Disposal

63. I would allow the appeal and remit the case to the Upper Tribunal to determine whether the discretion of the Secretary of State under section 40(3) of the British Nationality Act 1981 to deprive the appellant of his British citizenship should be exercised differently in the light of the evidence that a deprivation order would make him stateless and that he is not in a position to re-acquire Sri Lankan citizenship. I would also indicate, for the avoidance of any doubt, that when the matter is reheard it

will be open to the appellant to rely on any new evidence, including the evidence which he has unsuccessfully sought to adduce on this appeal, that is relevant to the issue which the tribunal has to decide.

Lord Justice Haddon-Cave:

64. I agree.

Sir Geoffrey Vos, Chancellor of the High Court:

65. I also agree.