England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2017] EWHC 1365 (Admin)
Case No: CO/4812/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
14/06/2017

B e f o r e :

MR C M G OCKELTON, VICE PRESIDENT OF THE UPPER TRIBUNAL
(SITTING AS A DEPUTY HIGH COURT JUDGE)

Between:

The Queen on the application of MK (a child by her litigation friend CAE)	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

Mr A Burrett (instructed by Charles Simmons Immigration Solicitors) for the Claimant
Mr E Brown (instructed by Government Legal Department) for the Defendant

Hearing date: 28 February 2017

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C. M. G. Ockelton :

The Issue and the procedural history

1. Paragraph 3 of Schedule 2 to the British Nationality Act 1981 is as follows:

> "3. (1) A person born in the United Kingdom or a British overseas territory after commencement shall be entitled, on an application for his registration under this paragraph, to be so registered if the following requirements are satisfied in his case, namely
>
> (a) that he is and always has been stateless; and
>
> (b) that on the date of the application he was under the age of twenty-two; and
>
> (c) that he was in the united Kingdom or a British overseas territory (no matter which) at the beginning of the period of five years ending with that date and that (subject to paragraph 6) the number of days on which he was absent from both the United Kingdom and the British overseas territories in that period does not exceed 450.
>
> (2) A person entitled to registration under this paragraph –
>
> (a) shall be registered under it as a British citizen if, in the period of five years mentioned in sub-paragraph (1), the number of days wholly or partly spent by him in the United Kingdom exceeds the number of days wholly or partly spent by him in the British overseas territories;
>
> (b) in any other case, shall be registered under it as a British overseas territories citizen."

2. The claimant ("C") was born in the United Kingdom on 14 November 2010. Her father ("F") and her mother ("M") are both nationals of India. On 8 March 2016 she submitted an application for registration as a British Citizen under the provisions I have just set out. On 18 May 2016 the Secretary of State refused the application. The present proceedings were begun on 17 August 2016, the last day of the succeeding three months, in the Upper Tribunal, the wrong forum. They were transferred to this Court on 14 September 2016. Sitting as a Deputy Judge, Amanda Yip QC ordered the application for permission into court for an oral hearing with consideration of the substantive claim to follow immediately if permission be granted.

3. In making her Order, the Deputy Judge noted that this case appears to be one of a number of similar cases and directed that the others be stayed awaiting the outcome of this claim. She also directed the parties' solicitors (by which I take it she meant the solicitors for this and the other claimants) to identify issues likely to be common to the claims. That must I think be the origin of a document before me entitled 'agreed statement of facts', which refers throughout to claimants in the plural but does not name or give file numbers for anybody except C, and is not signed as agreed by anybody. In any event, the generic issues are adequately illustrated by the present case. So far as concerns the merits, the only observation favouring the claimants that she made was that a claimant might have difficulty in meeting procedural requirements for registration adopted by the Secretary of State, requiring an applicant to prove a negative (that she had not already been registered as a national of any, or the relevant, State). This procedural issue is relevant only if it might prevent the registration of a person who would be otherwise entitled under the statute to be registered, which in turn is a question of the interpretation of the statute and its application to the facts as found by the court on the basis of the evidence.

4. The issue, in short, is whether C, for the purposes of paragraph 3 of Schedule 2 to the 1981 Act, 'is and always has been stateless'. That will (or may) depend on the meaning of 'stateless' in the Act, which is a matter of law. It will in addition almost certainly turn on the question whether C is (or ever has been) a national of India. That will depend wholly or largely on Indian law, which in this court is a matter of fact and needs to be proved by evidence.

Indian law

5. The need to prove Indian law by evidence appeared to take Mr Burrett rather by surprise. He put what he said were the relevant and up-to-date provisions of the Citizenship Act 1955 (India) before me as an authority, photocopied from some unidentified compendium of statutes (the copy incorporates some amendments to the Act and a few comments). He asked me to read, interpret, and assess the impact of the Indian legislation as though it were English legislation.

6. I cannot do that. The court is deemed to know the whole of English law and the relevant principles of interpretation, but it knows nothing of Indian law save as may be revealed by evidence. That is obvious if the situation were to be reversed. An Indian judge who had before him three sections of an English statute, apparently updated at some unknown stage, unaccompanied by any subordinate legislation, any decided cases, any contextual information or any material showing how the provisions impacted in practice could not be expected to form an accurate view of the relevant part of the English legal order. That is why it is normally necessary to have not merely evidence, but expert evidence, to prove foreign law.

7. There is no evidence in this case from anybody being put forward as an expert in Indian nationality law. What I do have is witness statements submitted by the defendant, setting out the experience of certain of her officers and the result of enquiries they have made. I understood Mr Burrett to suggest that I should not take very much notice of them – presumably either because they are not expert evidence, or because it is not for a non-lawyer to give evidence on the meaning or operation of the law, or because the meaning or operation of a statute, even an Indian statute, is not a matter for evidence. But the crucial features of the statements are not the subject of any contrary evidence. It seems to me that I am entitled to take them into account, not as a comprehensive statement of the relevant Indian law, but as evidence of its operation as observed by the makers of the statements.

8. So far as the Indian legislation is concerned, there is in fact agreement between the parties about its present form, and about what (if I may use the broad term) it says. The claimant seeks to leave the matter there and to draw conclusions from what it says. The defendant seeks to show that what it says is not the whole story. Although the state of the evidence on Indian law is clearly not what it might be, it is in my judgment appropriate to make findings of facts on the basis of it, and to proceed to determine this claim on the basis of those findings, for the following reasons. First, there is no dispute between the parties about the legal text to be applied: this is not, for example, a case where there is any doubt about whether there are statutory amendments that may or may not be in force and may or may not be reflected in the text before the court. Secondly, although there is no expert evidence there is evidence about the operation of the relevant provisions, which is not the subject of any counter-evidence and is not itself of a nature of which the court ought to be suspicious. It presents, as it were, what might be the 'bottom line' of an expert account, without showing the working: but where there is no proper basis for doubting the working, it is sufficient to support findings. Thirdly, given the nature of the present claim as a lead case, it may be assumed that the parties have done all they can to assemble material going to establish what the Indian law is, and it may therefore be further assumed that nothing very much better is going to be available in any other case.

9. Proceeding then on the basis of the material before me I find the following facts in relation to the relevant Indian law. Indian citizenship is acquired by descent, and a child born outside India after 1992 is a citizen of India by descent if either of the child's parents was at the time of his birth a citizen of India other than by descent. If, however, the birth was outside India on or after 3

December 2004 (the date of commencement of the Citizenship (Amendment) Act 2003 (India)) the child is not a citizen unless the birth is registered at an Indian consulate 'in such form and in such manner as may be prescribed'. If the registration is after the child's first birthday it needs 'the permission of the Central Government'. In either case the parents have to declare, also 'in such form and in such manner as may be prescribed', that the child does not hold the passport of any other country. There is no suggestion that citizenship is granted from the date of registration: it is obtained by the birth, provided that the birth is registered.

10. Guidance issued by the Indian Government provides for the use of a form for the process of registration, and an 'undertaking in writing by the parents' that the child does not hold the passport of another country. The claimants have adduced evidence that the Indian consulates in the United Kingdom will require the production of documentation that F and M do not have, for example F's passport and their marriage certificate. But there has been no investigation or any elucidation of what is actually required in an individual case. Given that citizenship can pass from the child's mother it seems highly unlikely that registration is impossible without these two particular documents although it is said that the production of the parents' marriage certificate is 'mandatory' despite there being no requirement that the parents are married. Production of an Indian passport is required only for an Indian passport holder: F claims not to be one, because his passport has expired. There does not seem to be any good reason why he should not renew it if he needs to. So far as a marriage certificate is concerned the position as I understand it is that M and F were married in a Sikh ceremony in the United Kingdom. What counts as a certificate of a Sikh marriage according to Indian law is itself an area of some complexity and is not something on which I can make any finding of fact. Suffice it to say that C has not established that M and F would not be able to produce what is required; and there is no proper basis upon which I could find that the Indian government erect such barriers to the registration of a child's birth in accordance with the statute.

11. Much more to the point is the question what is meant by needing the permission of the Central Government for registration. The evidence of the defendant's witnesses Katie-Ann Baker (from her own experience) and Jane Whitehead (from enquiries of an Indian minister and two consular officials) indicates that in practice there is no difference between registration before the child's first birthday and registration after that date. The Indian officials said that there is 'no restriction' on later registration. This is important: it means that the statutory provision requiring the permission of the Central Government does not in practice imply the exercise of a discretion: permission is given routinely. Mrs Baker also says that if an application is made without the correct documentation it will be (or perhaps may be) refused; but this is not a refusal of registration, merely an indication that the documentation is not in order and that the application will need to be resubmitted.

12. There are other provisions of the law, to which I was referred, but on which I do not need to make any specific finding. There are possibilities for applying for registration as a citizen where a person born outside India comes to live in India while still a minor, and there are provisions for the backdating (if necessary) of the Central government permission. There is no evidence before me of any actual difficulty in registering a child whom the parents wanted to register.

13. The Indian law and practice as revealed from the evidence is that a child born to an Indian parent outside India has a right to Indian citizenship, which, if the child was born on or after 3 December 2004 is obtained by registration at the Indian consulate after fulfilling appropriate administrative procedures directed to identification of the child and the parents and their nationality. The child's age has no impact on the process.

English law: statelessness

14. It is agreed between the parties that the underlying purpose of the statutory provisions under consideration is to reduce statelessness and that they are motivated by the 1961 UN Convention on the Reduction of Statelessness. It is further agreed between the parties that the meaning of 'stateless' and 'statelessness' for these purposes is that given by the definition in art 1(1) of the United Nations

Convention relating to the Status of Stateless Persons. That is explicit in Part 14 of the Statement of Changes in Immigration Rules, HC 395, which applies to those who remain stateless, because they are not entitled to register as citizens; but on behalf of the defendant Mr Brown says in paragraph 8 of his written skeleton that the same applies generally in English law, and so to Schedule 2 of the 1981 Act, where it is not express. That is an important concession, for reasons I shall give in due course.

15. The definition in art 1(1) of the 1954 Convention is as follows:

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

16. There is a considerable amount of authority on the question whether a person is to be regarded as stateless, particularly but not exclusively for the rather different purposes of the 1951 United Nations Convention relating to the status of Refugees, where status is determined by reference to a person's nationality or nationalities and only in the case of a person 'not having a nationality' by reference to his country of former habitual residence. A primary question in refugee status determination is whether a person is at risk of persecution in the country, or all the countries, of nationality. One such case was KK v SSHD [2011] UKUT 92 (IAC), where, giving the decision of the Upper Tribunal, and after reviewing a number of decisions from the UK and other countries, I said this at [82]-[83]:

> "82. In summary, for the purposes of the Refugee Convention, where a person already has a nationality (even if he has no documents to that effect) that is the end of the matter: he is a national of the country concerned. If he is entitled to nationality, subject only to his making an application for it, he is also to be regarded as a national of the country concerned. But if he is not a national and may be refused nationality, he is not to be treated as being a national of the country concerned. Subject to questions as to the "effectiveness" of nationality, the same principle applies to entitlement to a second nationality as to entitlement to a first.

83. We should say that we regard that summary as consistent with authority, including Bradshaw [1994] Imm AR 359, and MA. In both of those cases there is more than a suggestion (in Bradshaw it is stated as a rule) that in order to establish a claim not to have a particular nationality, a person ought to apply, using his or her best endeavours, to obtain nationality of a country with which he or she is associated. But it seems to us that that must be a matter of evidence rather than of legal principle. For example, if the evidence is that nationality will be acquired on application, a decision maker ought to be entitled without more to treat the person as a national of the country in question, for the purposes of the Refugee Convention. If, on the other hand, there is evidence that the grant of nationality is a matter of discretion, it is not easy to see why a refugee claimant should be regarded, to his disadvantage, as having a nationality that he does not possess and may never possess. There may be borderline cases, and we would with respect strongly endorse what was said by Stanley Burnton LJ in MA at [83], as set out above."

17. The final words are a reference to the following observation of Stanley Burnton LJ:

> "Refugee status is not a matter of choice. A person cannot be entitled to refugee status solely because he or she refuses to make an application to her Embassy, or refuses or fails to take reasonable steps to obtain recognition and evidence of her nationality."

18. These authorities are not precisely on the issue raised in this claim, but on an apparently identical issue in proceedings with similarly international implications. Direct reference to the 1954 Statelessness Convention is found in R v SSHD ex parte Bradshaw [1994] Imm AR 359, a decision of Lord MacLean in the Outer House. At 366-7 he said this:

> "[I]t seems to me that before a person can be said to be stateless in terms of the

> definition in the [1954] Convention, he or she would have had to apply to those states which might consider her to be and might accept her as a national. … I was left with the suspicion … that the petitioner did not wish to attempt to obtain the nationality of either [Russia or Ukraine] lest that diminished her chances of remaining within the United Kingdom. … [M]y view, looking at the definition in the Convention, [is] that before a person can be regarded as stateless she must have made application to those countries with which she has closest connection. In the result, I am not prepared on such meagre information as I was provided with, to find that the petitioner is a stateless person."

19. All the authorities on this line of argument to which I was specifically referred are to the same effect, and I was indeed told that the parties agreed that it was appropriate to apply the principles set out in KK. Mr Brown's position was that the application of those principles showed that C was not stateless as she has and had always been able in practice to acquire Indian nationality; Mr Burrett argued that the need for registration, or the need for the permission of the Central Government, or the specific documentary requirements for registration, or some combination of one or more of those factors, took the case into the third KK category and that accordingly C should be treated as not having Indian nationality.

20. Applying those principles to Indian law as I have found it to be would lead to the dismissal of this claim. There is no doubt that registration of a child under one year old is a purely administrative matter, and Indian citizenship is a matter of entitlement. The child would therefore fall to be considered an Indian national at that stage. Whatever might be said about the requirement for permission after the child's first birthday, that would prevent the child from being able to meet the requirements of paragraph 3(1)(a) that 'he … always has been stateless'. As I have found, however, the requirement for permission does not in practice mean that registration after the child's first birthday is discretionary, so an older child would not be able to show that 'he is … stateless' as required by the same subparagraph.

21. That, however, is not the end of the matter. The authorities to which I have so far referred are all of the Upper Tribunal or of this Court or its equivalent, although some of them apply dicta of the Court of Appeal in refugee cases. But I am also referred to two decisions of the Supreme Court that in my judgment have clear bearing on this issue, Al-Jeddah v SSHD [2013] UKSC 62 and Pham v SSHD [2015] UKSC 19.

22. Both appeals were concerned with the meaning and operation of s 40(4) of the British Nationality Act 1981. By s 40(2) the Secretary of State may deprive a person of 'citizenship status' if she is satisfied that deprivation is conducive to the public good; but by s 40(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."

23. Al-Jeddah was of Iraqi origin and had Iraqi nationality by descent. He later acquired British citizenship, and so lost his Iraqi nationality. The Secretary of State made her order depriving him of British citizenship on 14 December 2007. He claimed that the order was invalidated by s 40(4). At the invitation of the Secretary of State the Court of Appeal and the Supreme Court (the latter with considerable hesitation) determined the issue on the factual premise that on the date of the order Al-Jeddah had a right to immediate restoration of his Iraqi nationality on application to the Iraqi authorities. (The reason for the Supreme Court's hesitation was that that does not appear to have been the actual effect of the relevant Iraqi law.) The Secretary of State's position was that in these circumstances the order did not 'make' Al-Jeddah stateless: what made (or might make) him stateless was his failure to apply for the restoration of his Iraqi nationality

24. That argument found no favour with the Court of Appeal [2012] EWCA Civ 358. In his judgment, Richards LJ said this:

> "120. I am prepared to assume that if an application were made for the restoration of the appellant's Iraqi nationality it would be bound to succeed, though the point is by no means free from doubt. ….
>
> 121. I would reject the Secretary of State's argument for the straightforward reason that section 40(4) requires the Secretary of State (and, on appeal, the court) to consider the effect of the *order* made under section 40(2): would the *order* make the person stateless? If Iraqi nationality was not restored to the appellant automatically under the Iraqi legislation considered above, he was not an Iraqi national at the time of the order: his only nationality at that time was British nationality. The effect of the order would therefore be to make him stateless. That would be the effect of the order irrespective of whether he could previously have acquired another nationality had he chosen to do so, or whether he could do so in the future."

25. Stanley Burnton LJ and Gross LJ agreed with Richards LJ's analysis and the result. All three members of the Court noted, apparently with regret, that this was the effect of s 40(4) and that the provisions of that subsection went further than was required by the United Kingdom's obligations under the 1961 Convention. That, though, was because in circumstances such as the present the Convention would have permitted an order that made its subject stateless, not because of some notion of potential nationality to be found in the Convention. (Their Lordships' particular concern has been addressed by the insertion of s 40(4A) by s 66 of the Immigration Act 2014.)

26. The Secretary of State appealed to the Supreme Court. In his judgment, with which the other members of the Court agreed, Lord Wilson JSC reviewed the developing international concept of statelessness and the United Kingdom's reaction to it by legislation at [12]-[22] and went on to consider whether it was appropriate to apply the factual premise set out above. At [30] he rejected the Secretary of State's submission that anything depended on the need for the Secretary of State to be 'satisfied' that the order would make a person stateless. The primary question was the fact of statelessness. He then considered the Secretary of State's argument that a purposive interpretation of the statute required analysis of the 'active' or 'real' cause of any statelessness.

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

27. At [33] he pointed out that s 12 of the Act (renunciation of citizenship) does indeed contain a notion that a person may 'have or acquire some citizenship or nationality other than British citizenship' and that if Parliament had intended to make a similar addition to s 40(4) it could readily have done so. The final paragraph of the judgment is the following:

> "34. On 20 February 2012 the United Nations High Commissioner for Refugees issued "Guidelines on Statelessness No 1", HCR/GS/12/01, in which he addressed some of the effects of the authoritative definition of a

> stateless person in article 1(1) of the 1954 Convention. Para 43 of his guidelines, entitled "Temporal Issues", has been incorporated, word for word, into the Home Office guidance on "Applications for leave to remain as a stateless person" dated 1 May 2013, referred to at para 13 above. The guidance provides:
>
>> "3.4 ... An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures have not been completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention. Similarly, where requirements or procedures for loss, deprivation or renunciation of nationality have not been completed, the individual is still a national for the purposes of the stateless person definition."
>
> The Secretary of State's own guidance eloquently exposes the fallacy behind her appeal."

28. In Pham the same legislation was under consideration. It was argued (amongst other things) on the appellant's behalf that although, at the date of the order in his case, he might have been entitled by Vietnamese law to be regarded as a national of Vietnam, there was evidence to suggest that the Vietnamese authorities might, as a matter of practice or perhaps even of disregard of the rule of law, not be prepared to recognise the appellant's status as a national. The evidence, however, was of later date, even if it was to be seen as reflecting what the authorities' position would have been at the date of the order.

29. The position in relation to s 40(4) was put in this way by Lord Sumption JSC, with whom, of a seven-member Court, Lord Neuberger, Lady Hale and Lord Wilson expressly agreed:

> "101. I agree that this appeal should be dismissed. I am not convinced that practice can stand for law in article 1(1) of the 1954 Convention, nor that any relevant practice was proved in this case. But I think that the answer to this appeal is simpler than that. Under section 40(4) of the British Nationality Act the Home Secretary was precluded from withdrawing Mr Pham's British nationality only if he would thereby have been rendered stateless. That depends on whether he had Vietnamese nationality on 22 December 2011 when his British nationality was withdrawn. Since Mr Pham unquestionably had Vietnamese citizenship at the time of his birth in Vietnam, he must still have had it on 22 December 2011 unless something had happened to take it away. The government of Vietnam was entitled to withdraw his nationality, but no one suggests that they had done so, at any rate by the relevant date. In those circumstances, Mr Pham's case on appeal depends upon the proposition that the statements of Vietnamese officials to British diplomats after 22 December 2011 (when the British government was hoping to deport him to Vietnam) were tantamount to a legally definitive declaration about his status on that date, with substantially the same effect as if it had been a declaration pronounced by a court of law. There is, however, a world of difference between saying that no court of law was in a position to control the Vietnamese government's statements or acts, and saying that the Vietnamese government was a court of law or was

> like one. There is some evidence for the former proposition but not for the latter. The statements did not purport to do anything other than state the Vietnamese government's position. They amounted to a refusal to treat Mr Pham as a Vietnamese citizen. Even if one were to assume that these statements conclusively determined Mr Pham's nationality at the time that they were made, there is no basis on which they could relate back to an earlier date when the Vietnamese government knew nothing about Mr Pham and had no position one way or the other about his status. The judge may well have been right to say that they are good evidence of what the Vietnamese government's position would have been on 22 December 2011 if they had been asked on that date. But if they were not a court of law or like a court of law, and it is clear that they were not, that is irrelevant. It follows that if anyone has rendered Mr Pham stateless, it is not the Home Secretary on 22 December 2011 but the Vietnamese government thereafter."

30. Thus, although the facts took the court to the converse answer, the question was the same simple one as that posed in Al-Jeddah: did the subject of the order have, on the date of the order, nationality of another State?

31. As I have made clear, these decisions are not specifically on statelessness as it applies in paragraph 3 of Schedule 2 to the 1981 Act. They are on statelessness as it applies in s 40(4) of the same Act. Before me, Mr Brown's clear argument was that the Supreme Court's decision in Al-Jeddah was not applicable to the present case because the guidance to which Lord Wilson refers at [34], and which he evidently regarded as the coup de grace to the Secretary of State's argument in that case, is applicable only to "persons who have no other right to remain in the UK but who cannot be removed because they would not be admitted to another country for purposes of residence to be allowed to stay" and so cannot apply to the claimant because she would be admitted with her parents to India.

32. I am afraid that will not do. The guidance, in 'Asylum Policy Instruction: Statelessness and applications for leave to remain' (the current edition is 18 February 2016) indeed is not specifically on point, as it is concerned with the application of Part 14 (paragraphs 401 and following) of the Immigration Rules and not of either of the statutory provisions I am looking at. But, as I have already noted, paragraph 401 expressly incorporates the 1954 Convention's definition into the Rules, and this guidance is on how to apply the Rules. It is necessarily implicit that this guidance is guidance on the meaning of 'statelessness' within the Rules, and furthermore, because of paragraph 401, is the Secretary of State's understanding of the meaning of statelessness under art 1(1) of the 1954 Convention.

33. The point being made by Lord Wilson is that it is the UNHCR's guidance on the meaning of statelessness for the purposes of art 1(1) of the 1954 Convention that has been adopted into the Secretary of State's own guidance. The date of the guidance excluded it from consideration in relation to the decision-making in Al-Jeddah itself. But the Court makes its own decision on the meaning of statelessness at that time within the context of s 40(4) and does so as a matter of statutory interpretation against the background of the Conventions. It then notes that the UNHCR Guidance produces the same result, and has been adopted by the Secretary of State.

34. Now it is clearly open to the Secretary of State and indeed anybody else to say that the notion of having no nationality for the purposes of the Refugee Convention is different from that of statelessness for the purposes of the Statelessness Conventions and any associated national legislation. The terms are different, and the context is different: in the Refugee Convention the essential context is the threat of expulsion and issues of destination are crucial, whereas the statelessness issue is in essence static. It would also have been open to the Secretary of State to say in the course of either the Al-Jeddah litigation or this case that for the purposes of the legislation

respectively under consideration the meaning of statelessness within art 1(1) was neither determinative nor directly relevant. Our law is a dualist system, and neither the 1954 nor the 1961 Convention has as such been incorporated, so the Conventions are not part of the law, and the UNHCR guidance is not a source of English (or United Kingdom) law.

35. What the Secretary of State is not entitled in my judgment to do is to say that in both s 40(4) of, and paragraph 3 of Schedule 2 to, the 1981 Act, and in Part 14 of the Immigration Rules, the notion of statelessness is to be determined in accordance with its meaning in art 1(1) of the 1954 Convention, but that it has different meanings in those different provisions. But that is what she seeks to do. In Al-Jeddah there is no sign, so far as I can see, that the Secretary of State argued that 'stateless' in s 40(4) should not have the same meaning as in the 1954 Convention: the crux of the argument was on surrounding issues, that is to say the procedure of determining the issue and the cause of the statelessness. The Secretary of State's guidance on Part 14 of the Rules, which needs to follow the meaning of the term in the 1954 Convention, makes it clear that she applies the UNHCR guidance on the meaning of 'stateless'. In the present case, as noted above, it is specifically conceded that the meaning of statelessness is to be determined in the same way. There is no room for applying a different meaning. 'Stateless' means, in the provisions with which I am concerned, the same as it means in the provisions with which the Supreme Court was concerned in Al-Jeddah. What it means in those provisions is determined by the Supreme Court in Al-Jeddah, which is obviously binding on me. The Secretary of State has made the matter even plainer by her adoption of the UNHCR guidance in relation to decisions made in under the Rules. The same meaning must apply to all the cases in which the matter is to be determined in accordance with the meaning in the Convention.

Conclusion on the meaning and effect of paragraph 3 of Schedule 2 to the 1981 Act.

36. The conclusions from what is set out above are as follows. For the purposes of the statutory provisions in issue, a person is stateless if he has no nationality. Ability to acquire a nationality is irrelevant for these purposes. A child born on or after 3 December 2004, outside India, of parents at least one of whom is an Indian national, and who has not been to India, is not an Indian national unless registration of the birth has taken place in accordance with the provisions of the Citizenship Act 1955 (India) as amended. If the child has no other nationality, the child is stateless for the purposes of paragraph 3 of Schedule 2 to the British Nationality Act 1981 and, if the other requirements of that paragraph are met, is entitled to be registered as a British citizen. If, therefore, C's birth had on the date of the decision under challenge not been registered, she is entitled to British Citizenship

37. I recognise of course that this conclusion opens an obvious route to abuse. Indeed, the facts of the present case might be said to be an example of abuse. M and F are both overstayers. Both have sought, and been refused, further leave. They have preferred to allow C to be stateless all her life to date rather than to register her birth and obtain Indian nationality for her. Yet C's right to British nationality (and the consequence that she will not be or become a national of India) will now immeasurably improve M and F's prospects of being allowed to stay in the United Kingdom. But the Secretary of State's position in this case on the one hand, and the authorities on the other, necessarily lead to this result.

The Secretary of State's procedure.

38. Given the importance of actual nationality rather than the ability to acquire it, a claimant's ability to show that he or she meets the statutory requirement of not having or having had any nationality becomes an individual issue. If the question depended on the possibility of the acquisition of nationality it could be answered, or largely answered, by an examination of the relevant foreign law; but if it depends on actual acquisition, the foreign law is merely the background against which the individual's actual acts and their effect are to be seen.

39. In the present case, the Secretary of State has made it clear in correspondence before the decision, the decision itself, and a supplementary letter of 12 October 2016, that in order to consider an

application for registration as a British citizen in circumstances such as C's, she requires 'confirmation from the Indian authorities (in one version it is 'the authorities in India') that C's birth has not been registered in accordance with Indian law and that she is not a national of India'. There is copious evidence before me of the difficulty, perhaps the impossibility, of providing such evidence. I accept that the difficulties may have been exaggerated. Although there are a number of places in the United Kingdom where registration takes place, it appears that they each have exclusive jurisdiction over such matters in a part of the United Kingdom, so that if C has only ever been resident in the Midlands, a statement from the Consulate in Birmingham would provide part of the evidence; but it would not of itself show that registration had not been effected elsewhere. Further, registration of this sort is not the only way in which Indian nationality may be obtained by a person in C's situation, and there appears to be no central register of who is a citizen of India

40. The Secretary of State is clearly entitled to require that an applicant for British citizenship proves his or her entitlement, and in my judgment is entitled to require evidence tending to establish the issue at the level of certainty appropriate for such an important and far-reaching act of the State. But she is not entitled to impose requirements that make it impossible for an individual to obtain a benefit that is his by statute. It is sometimes difficult, though not usually impossible, to prove a negative. But it may be simply impossible in an individual case to obtain documents of a category specified as generally obligatory. There may well be rules or guidance about what needs to be provided, but there will have to be flexibility to cover cases where it will be exceptionally difficult or impossible to obtain the documents sought. In such cases the Secretary of State has to be willing to consider proof by some other means. Her unwillingness to do so, despite the evidence of difficulty, appears to me to be unreasonable.

41. It is not for me to specify what evidence the Secretary of State ought to consider adequate. But, despite the suggestion that it would be 'self-serving' it appears to me that a clear unambiguous sworn statement by each of the parents ought to be regarded as having some value. From the evidence before me it appears that a statement from the relevant Consulate might in many cases be of great assistance. If citizenship is obtained by fraud, false representation or concealment of a material fact it may be revoked under s 40(3) of the 1981 Act – to which s 40(4) does not apply. So the Secretary of State has a remedy if her flexibility is abused. For the present it is sufficient for me to say that the imposition of an inflexible procedural requirement of confirmation from the Indian authorities that C's birth has not been registered in accordance with Indian law and that she is not a national of India was unlawful in the context of the Secretary of State's knowledge of the extreme difficulty or impossibility of fully satisfying that precise requirement.

Article 8 and the best interests of the child.

42. Mr Burrett's original grounds, and some brief submissions at the hearing, were directed to a suggestion that the Secretary of State's refusal of a grant of citizenship was contrary to C's rights under article 8 of the ECHR, or failed to take account of her best interests, or both. These submissions are of no weight.

43. First, whatever view I had taken of the other grounds of claim, the submissions have to be seen as a claim that the Secretary of State should have granted citizenship to C despite not being entitled under the statute and such lawful procedural rules and guidance as might govern its implementation. This is therefore a claim that in the circumstances of this case nothing other than an exercise of the prerogative power to grant citizenship would have net the needs of the case. Secondly, any claim of this sort has to be made on the basis of the evidence of the individual circumstances of the claimant: but it is here made in purely general terms. Thirdly, as the defendant points out, it is not suggested that the present decision entails the claimant's removal from the United Kingdom.

44. Even if that were suggested, there is no general basis upon which these submissions could succeed. It is obviously not in general contrary to a child's best interest to be exposed to life in various countries. The court cannot take the view that other civilised countries are places that it is contrary

to a child's best interests to live in. In particular, it is extremely difficult to see that for C, living in India, which is the country of origin of her parents, and where (so far as I know) all her other relatives are, would be other than in accordance with her best interests.

45. There is no evidence that C has any particular contacts in the United Kingdom. There is no evidence even that she does not speak the language of origin of her parents. She might, I suppose, be assumed to have made some friends in the United Kingdom (though there is no evidence of any) but for a child a move from Wednesbury to Bombay is probably no more destructive of friendships than a move from Wednesbury to Birmingham.

46. Besides, there is no material before me suggesting that in the present case what is needed is a discretionary grant of citizenship rather than a discretionary grant of leave. Nothing has been identified that shows that at the date of the decision under challenge C (on the premise that she was not entitled to citizenship) suffers some particular disadvantage by her lack of citizenship as distinct from her lack of any status at all.

47. It follows that if the claim had depended on these points it would have failed; and it does not appear to me that they are capable of adding anything even if the claim did not wholly depend on them.

Decision.

48. For the reasons given earlier in this judgment, C is entitled to registration as a British citizen on proof that she meets the requirements of paragraph 3 of Schedule 2 to the British Nationality Act 1981. For these purposes she was or is 'stateless' at any time when she did or does not in fact have Indian nationality. The Secretary of State is entitled to require her to prove the relevant facts, but is not entitled to impose requirements that cannot, or practically cannot, be met.

49. I grant permission and allow the claim; there will be an Order quashing the decision under challenge.

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