Appeal No: SC/106/2011, SC/107/2011,
SC/108/2011 & SC/109/2011
Hearing Dates: 12th & 13th October 2011
Date of Judgment: 27th October 2011.

SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
MR PERKINS
MR WARREN-GASH

S1, T1, U1 and V1

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

For the Appellant: Mr Laurie Fransman QC and Mr Duran Seddon

For the Respondent: Mr Robin Tam QC and Mr Rupert Jones

Special Advocates: Mr Zubair Ahmad

JUDGMENT

MR JUSTICE MITTING :

Background

1. S1 was born on 22nd January 1963 in Newcastle-upon-Tyne. T1, U1 and V1 are three of his sons, born in London on 14th December 1987, 29th November 1989 and 3rd January 1991 respectively. Until deprived of their citizenship status by order of the Secretary of State on 2nd April 2011, each was a British citizen by birth. Each appeals against the decision to deprive them of citizenship status made by the Secretary of State on 31st March 2011. On 25th May 2011, SIAC directed that there be a preliminary hearing to determine the question whether the Secretary of State's decision breached section 40(4) of the British Nationality Act 1981, which prohibits the making of an order if she is satisfied that the order would make a person stateless.

2. It is common ground that S1's parents, both now deceased, were Pakistani nationals. His father was born on 26th November 1927 in Srinagar in what is now on the southern, Indian, side of the line of control in Kashmir. His mother was born on 5th October 1933 in Jhallander, Punjab, in India. By the time of partition in 1947, they were living in what is now known as Faisalabad, in West Pakistan. It is common ground that on 13th April 1951, the date on which the *Pakistan Citizenship Act 1951* came into force, they were deemed to be citizens of Pakistan under either or both of sub-sections 3(b) and (d) of that Act, because they were both born in territories included in India on 31st March 1937 and had their domicile in Pakistan on 13th April 1951 (3(b)) or because before that date they migrated to Pakistan from any territory in the Indo-Pakistan subcontinent with the intention of residing permanently in Pakistan (3(d)). S1's father came to the United Kingdom in 1958. His mother and their four children (not including S1, who was born later) joined him in 1960. There is no evidence that either registered as citizens of the United Kingdom and Commonwealth. S1 maintains that they "renounced" their Pakistani citizenship, but accepts that he has no evidence that they did so in the manner prescribed by section 14A of the *Pakistan Citizenship Act 1951*. Accordingly, it is not now contended that they lost their Pakistani citizenship at any time by renunciation.

3. S1 married his wife, U, in 1984. She was born on 18th August 1966 in Jhang Saddar in Pakistan. She came to the United Kingdom after the marriage. She was naturalised as a British citizen on 5th October 1993. In addition to the three sons who are appellants, S1 and U have two further children, a son and daughter, both British citizens.

The law

4. Section 40(2) of the British Nationality Act 1981 permits the Secretary of State to deprive a person of British citizenship if satisfied that deprivation is conducive to the public good. Section 40(4) provides that the Secretary of State may not make an order under sub-section (2) "*if he is satisfied that the order would make a person stateless*". For the reasons given in paragraph 5 of SIAC's decision in *Abu Hamza* SC/23/2003, 5th November 2010, we are satisfied that the reference in section 40(4) is to *de jure* statelessness, not *de*

facto statelessness and that the definition of *de jure* statelessness is to be found in Article 1.1 of the Convention relating to the Status of Stateless Persons done at New York on 28th September 1954:

> "*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.*"

For present purposes, Mr. Fransman QC accepts that we will decide the issue on that premise, but reserves the right to argue otherwise elsewhere. On the same basis, he also accepts that the burden of proving that the Secretary of State's order would make the appellants stateless lies on them and must be discharged on the balance of probabilities. It is not contentious that each state is entitled to frame its nationality laws and to make executive decisions lawful under those laws as they see fit, subject only to the prohibitions contained in Articles 7, 8 and 9 of the Convention on the Reduction of Statelessness done at New York on 30th August 1961, in respect of states parties which have ratified that Convention. None of them are material.

The facts

5. S1 and his family have made frequent trips to Pakistan. One such trip was on 15th November 2007. S1, his wife U and two youngest children were stopped and examined by police at Heathrow Airport on their way to Lahore. They produced UK passports, but were also in possession of Pakistani passports and identity cards. Three of the Pakistani passports were issued on 5th August 2005 (those of S1, U and their youngest son). One, his daughter's, was issued on 6th August 2005. U's details, including her place of birth (Jhang, Pakistan) were correctly stated on her passport. All of the details on the three other passports were correct, apart from place of birth. S1's was stated to be Faisalabad, Pakistan. The two childrens' was stated to be Sheikhpura, Pakistan.

6. The final trip made by S1 and members of his family to Pakistan was on 28th October 2009. S1 travelled from Manchester to Lahore with his wife U and two of his sons, U1 and V1. They were travelling on British passports. S1 said that they were intending to attend the wedding of U1. He said that T1 was intending to travel from Cairo, Egypt to attend the event. As far as is known, none of them have since returned to the United Kingdom or attempted to do so. The address given by all four appellants in the witness statements made for the purpose of these proceedings is in Sheikhpura District, Pakistan. It is not suggested, and there is no evidence, that they have lived elsewhere since October 2009.

7. S1 has made three statements for the purpose of this appeal. His sons have each made one. Their statements, and S1's first statement, set out uncontroversial background details, but are laconic as to the preliminary issue. S1 simply stated that, in all his contacts with the Pakistani authorities over the years, he had been treated as a foreigner who required a visa to enter Pakistan. All four stated that they believed that the Secretary of State's decision to deprive them of British citizenship would leave them stateless. S1 made no

mention of the possession by him of the Pakistani passport and identity card examined on 15th November 2007. It was only when the Secretary of State made reference to it in the open statement that S1 dealt with it.

8. He did so in an unsigned and undated statement served under cover of his solicitor's letter of 9th September 2011. In that statement he described the efforts which he said he had made to obtain, legitimately, a Pakistani passport for himself. He says that his attempts were prompted by the introduction in 1985/6 of visa requirements for foreign nationals, including the payment of fees. Because he made frequent trips to Pakistan he wished to avoid the trouble and expense of doing so. His brother-in-law had previously obtained Pakistani passports for S1's mother and wife from an official in the Pakistani High Commission in London. The same official also endorsed T1's name on his wife's passport. When U1 was born, the same official endorsed his name on her passport, again at the request of S1's brother-in-law. However, when S1 went to see the same official in 1989, he was told that he was not entitled to a Pakistani passport. After the birth of V1, he went to the High Commission to attempt to get his name endorsed on his wife's passport. He met a different official, who accused him of having added the names of T1 and U1 to his wife's passport himself. He deleted the names by drawing parallel lines through them and writing "Deleted as the father is British national by birth". Neither the original endorsements nor the deletion are validated by stamp or official signature or initials. He was again told that he was not a Pakistani citizen. He said that he was rebuffed again by officials at the High Commission in January or February 2002. In a third statement signed and dated 10th October 2011, S1 gave further details of these attempts and identified the documents which he took with him to support his application, which included his mother's passport (which we take to be a reference to the Pakistani passport obtained for her by his brother-in-law).

9. He also says that he attempted to obtain a Pakistani passport in Pakistan in 1996 and 2002. On each occasion, he was told by an official that although his family were well known in Jhang Saddar and Faisalabad, he was not entitled to claim Pakistani citizenship because he could not produce documents demonstrating his father's Pakistani citizenship. A final attempt in 2004 met with the same answer.

10. His solution was to circumvent the problem by informal means, at which he hinted in paragraph 18 of his second statement:

> "I accept that when my family went to Pakistan in November 2007, some members of the family were in possession of documents that appeared to be valid, a Pakistani passport and Pakistani ID cards. These documents had been obtained through agents in Pakistan."

He claims that it was not safe to use the documents, so he left them in Pakistan in 2007. He undoubtedly obtained a visa to travel to Pakistan in October 2009. It was a single entry three month visa, valid from 20th October 2009 to 19th April 2010. It had clearly expired long before notice of the Secretary of State's decision to deprive him of British citizenship was given to him. S1 has

not explained how he has obtained permission to remain in Pakistan or, if he has not, how he had intended on departure to avoid the financial penalties which had been imposed upon his family on an earlier occasion when they had overstayed their visas.

11. Mr. Tam QC submitted that S1's evidence should be treated with scepticism. We agree. We have little doubt that we would not have been told by S1 that he had a genuine Pakistani passport (albeit containing a false place of birth) if the Secretary of State had not produced the port stop report for 15th November 2007. Although he has gone into significant detail in describing his unsuccessful attempts to obtain a Pakistani passport, he has said next to nothing about how he succeeded in obtaining one. Nor has he explained his current circumstances. We also share Mr. Tam's reservations about the purported deletion of the names of T1 and U1 from S1's wife's passport. Nevertheless, we do accept, on balance of probabilities, that S1 did make one or more unsuccessful attempts to obtain a Pakistani passport by legitimate means. We also accept that when they failed he thought it in his interests to obtain a passport for himself and his two youngest children by misstating his own and their place of birth. He would not have had to do so if he had not been rebuffed in his attempts to obtain a passport by legitimate means.

12. The Secretary of State no longer relies on the Pakistani passport held by S1 as evidence of his Pakistani nationality. It is common ground that the preliminary issue must be determined by reference to the true facts and the conclusions which would be drawn under Pakistani law from them. There is, however, an element of unreality in the exercise which we must perform. S1 and his family are, as far as we can tell, securely resident in Pakistan. The informal means of demonstrating to the Pakistani authorities that they are Pakistani nationals appears to have worked. If the Secretary of State's decision has made the appellant stateless, it would have little or no practical effect on their ability to enjoy the benefits of Pakistani citizenship.

Pakistani law

S1

13. Pakistani citizenship law is statutory. Sections 3 – 6 and 8 – 11 of the *Pakistan Citizenship Act 1951* identify seven categories of Pakistani citizen: those who were citizens at the date of commencement of the Act (13th April 1951) (section 3); (with two exceptions) anyone born in Pakistan after commencement of the Act (section 4); by descent (section 5); by migration (section 6); by registration (sections 8 and 11); by naturalisation (section 9); by marriage in the case of a woman (section 10). The Secretary of State's case is that the appellants are citizens by descent. Section 5, as originally enacted, provides,

> "*Citizenship by descent*
>
> *Subject to the provisions of section 3 a person born after the commencement of this Act shall be a citizen of Pakistan by*

> *descent if his father is a citizen of Pakistan at the time of his birth.*
>
> *Provided that if the father of such person is a citizen of Pakistan by descent only, that person shall not be a citizen of Pakistan by virtue of this section unless –*
>
> *a) that person's birth having occurred in a country outside Pakistan the birth is registered at a Pakistan Consulate or Mission in that country…*".

By the *Pakistan Citizenship (Amendment) Ordinance 2000 (Ordinance XIII of 2000)*, issued and gazetted on 18th April 2000, President Musharraf amended section 5, by substituting "*parent*" for "*father*", so that a person born after 13th April 1951 "*shall be a citizen of Pakistan by descent if his parent is a citizen of Pakistan at the time of his birth*". The continuing effectiveness of this Ordinance is in issue.

14. On the undisputed facts, it is common ground that, by virtue of the opening sentence of paragraph 5, S1 has always been and is a Pakistani citizen by descent from his father. Mr. Fransman concedes that he is an "*ex lege*" citizen of Pakistan. He submits, however, that that is not enough to establish that, in the language of Article 1.1 of the 1954 Convention, he is a person "*considered as a national*" by Pakistan "*under the operation of its law*". This submission is founded on rules made under section 23, which provides,

> "*(1) The Federal Government may frame rules for carrying into effect the provisions of this Act*".

Pursuant to section 23 the Federal Government framed and gazetted the *Pakistan Citizenship Rules 1952* on 5th February 1952. Rules 7 – 17 set out the requirements which must be followed by "*any person claiming citizenship*" under sections 3 – 11 of the 1951 Act. Each requires a form to be submitted in duplicate or triplicate, accompanied by certain documents. Those claiming citizenship by birth, descent or migration "*shall apply in form B*". Sub-rule 9(2) requires the form to be accompanied by

> "*(a) A certificate of citizenship of Pakistan granted to his father and*
>
> *(b) Evidence establishing his relationship with his father*".

There is a proviso when the certificate of citizenship indicates that the father is a citizen by descent only which is not relevant in the case of S1. We were not shown any amended rule which, in conformity with the amendment to section 5, substituted "*parent*" for "*father*" in rule 9.

15. The appellants and the Secretary of State have each relied on expert evidence to assist us to determine the legal effect of rule 9 – Dr. Wasti, for the appellants and Ms. Piracha, for the Secretary of State. Dr. Wasti is a solicitor

admitted in England and Wales, a Pakistani advocate and a senior lecturer in law at the Islamic College, London. Ms. Piracha is a practising Pakistani

16. lawyer. Neither claim to be specialist practitioners in Pakistani nationality law. On some aspects of current law and practice Ms. Piracha was, in our view, better informed than Dr. Wasti; but both conscientiously discharged their duty to the Commission to give honest expression to their independent opinion. We have been assisted by their evidence.

17. Dr. Wasti was and remained of the opinion that S1 could only establish his right to citizenship by descent from his father by producing a certificate of citizenship of Pakistan granted to his father. As he could not do this, he could not establish his right to Pakistani citizenship. We understood him to accept that, as a matter of Pakistani law, rules made under the enabling section (section 23) could not cut down rights granted by the primary legislation, including S1's right to citizenship under section 5. Ms. Piracha was certainly of that view. We are satisfied that it is correct. It follows that the Pakistani state could not, ultimately, lawfully refuse to recognise S1's citizenship merely because he could not or cannot produce a certificate of citizenship granted to his father. Further, the evidence of Ms. Piracha satisfies us that he could establish that his father was a Pakistani citizen, otherwise than by descent, by other means. She says that the Pakistani authorities are well aware of the difficulties, particularly for overseas Pakistanis, of securing the relevant citizenship certificate. Regulation 9 of National Database and Registration Authority Ordinance 2000 requires all Pakistani citizens "*in or out of Pakistan*" over eighteen to be registered in accordance with the provisions of the Ordinance. A recently published policy applies to overseas Pakistanis: the registration policy for national identity cards for overseas Pakistanis ("NICOP"). The information required is either, "*Valid Pakistani passport or foreign passport and computerised national identity card/manual national identity card number of any of the blood relatives*" or "*Manual national identity card/B – form*" or "*Citizenship Certificate*". Thus, an overseas Pakistani citizen, such as S1, could establish his entitlement to be recognised as a Pakistani citizen by producing his valid UK passport and the identity card number of a blood relative. In his second statement, S1 referred to the fact that his brother-in-law had managed by the late 1980s, to obtain a passport for his brother and sister, both of whom had been born in Pakistan. Annexed to his third statement was a copy of a page of his brother's passport which noted that he was a dual national Pakistani. There cannot be any doubt that his brother either has or could easily obtain a national identity card. Accordingly, under the registration policy for NICOP, the Pakistani authorities should register S1 as a Pakistani citizen.

18. If, at official level, the Pakistani authorities refuse to do so, Ms. Piracha's evidence is that he could challenge that decision in the Pakistani High Court. If an attempt was made to remove him as an overstayer, he would be allowed to prove his Pakistani nationality to the Court. In her opinion, he would require "good substantial proof" of his entitlement, the burden of proof being on him. On our analysis of the evidence available to him, set out above (including the acceptance by officials in Pakistan that his family are well

known in Jhang and Faisalabad) we are satisfied that he would have no difficulty in discharging that burden. Mr Fransman submitted that even if S1 could establish his entitlement to Pakistani citizenship by litigation in the Pakistani Courts, he would still not be considered as a national by Pakistan under the operation of its law unless his entitlement was recognised, without litigation, by the competent Pakistani executive authorities. We do not accept that proposition. We prefer, and follow, the approach and reasoning of a panel of the Commission presided over by Keith J in *Al-Jedda* SC/66/2008 26th November 2010, in which it held it was what Iraqi Courts would decide, whatever view the executive authorities had, that was determinative. (See paragraph 74 of its decision). Mr. Fransman relies on paragraph 19 of a summary of the conclusions of a gathering of experts on statelessness in Prato on 27th-28th May 2010 under the auspices of the United Nations High Commissioner for refugees:

> "*There is no requirement for an individual to exhaust domestic remedies in relation to a refusal to grant nationality…before he or she can be considered as falling within Article 1(1)*".

The sentence is ambiguous. All that can safely be read into it is that, unlike the case of someone applying to the Strasbourg Court, there is no obligation to exhaust every legal remedy before an application can be admitted. We do not understand the experts to have agreed that, in a country in which the courts play an effective role in resolving disputes about nationality, such as Pakistan, a person must be treated as stateless, as a result of an adverse decision by officials, even if he could mount an effective challenge to the decision in his country's courts. If, contrary to our view, that was the opinion of the experts, we do not accept that it is what Parliament would have envisaged when enacting section 40 of the 1981 Act.

19. For the reasons given, we are satisfied, at least on balance of probabilities, that S1 is a Pakistani national, by descent from his father, and that, under the law of Pakistan, as it would be applied by Pakistani courts, he is considered to be a Pakistani national, by descent from his father.

20. There is an alternative route by which S1 is entitled to Pakistani nationality – by descent from his mother – if section 5 of the 1952 Act in its amended form is effective and applies to him.

21. As already noted, the substitution of "*parent*" for "*father*" in section 5 of the 1951 Act was effected by Presidential Ordinance. Under Article 89 of the *Constitution of the Islamic Republic of Pakistan 1973* Presidential Ordinances lapsed after four months unless enacted by statute. However, when the Ordinance was issued, the Constitution of Pakistan was suspended. That was achieved by Order No. 1 of 1999 issued on 14th October 1999. Paragraph 5A(1) of that Ordinance, inserted by Order No. 9 of 1999 issued on 14th November 1999, provided that an Ordinance promulgated by the President "*shall not be subject to the limitation as to its duration prescribed in the Constitution*". By a further executive order the *Legal Framework Order 2002*, the Constitution was amended by the insertion of Article of 270AA, the relevant part of which provides:

> "*The proclamation of emergency of the 14th day of October 1999, all President's Orders, Ordinance(s)…are hereby affirmed, adopted and declared notwithstanding any judgment of any court to have been validly made by competent authority and notwithstanding anything contained within Constitution shall not be called in question in any court on any ground whatsoever*".

An identically worded article was inserted into the Constitution by the *Constitution (17th Amendment) Act III of 2003.* (By this stage, the National Assembly had resumed sitting and it was not suggested that this enactment was not valid under the Constitution). Political change brought a further amendment. A new section 270AA was inserted by the *Constitution (18th Amendment) Act 2010*, which provided that:

> *"The proclamation of emergency of the 14th day of October 1999, the provisional Constitution Order No. 1 of 1999 (and certain other named orders)…are hereby declared as having been made without lawful authority and of no legal effect"*.

However, sub-paragraph (2) contained a saving provision:

> "*Except as provided in clause (1) and subject to the provisions of the Constitution (18th Amendment) Act 2010, all laws including President's Orders, Acts, Ordinances…made between the 12th day of October 1999 and the 31st day of December 2003(both days inclusive) and still in force shall continue to be in force until altered repealed or amended by the competent authority "*.

22. Ms. Piracha is of the opinion that, as a result of these changes to the Constitution, the 2000 Ordinance has throughout been, and remains, effective to amend section 5 of the 1951 Act. Dr. Wasti in his report did not consider these provisions at all. When asked about them in evidence, he expressed the opinion that, because the 18th Amendment struck down the Provisional Constitution Order No. 1 of 1999, which, as amended, removed the limitation on the duration of Ordinances promulgated by the President, the effect of the 2000 Ordinance must be taken to have lapsed four months after it was issued. We unhesitatingly prefer Ms. Piracha's opinion. Dr. Wasti's view would, it seems to us, render the saving provision in Article 270AA(2) of no effect. No Presidential Ordinance could have been enacted by the National Assembly because it was suspended. The provision in Article 89 of the Constitution limiting the effect of an Ordinance to four months, would, accordingly, mean that no Presidential Ordinance would have been preserved by Article 270AA(2). The National Assembly cannot possibly have intended that outcome. The clear intent of the new Article 270AA was to preserve Presidential Ordinances etc., other than those named in paragraph (1). The omission of the 2000 Ordinance from paragraph (1) accordingly means that it was preserved.

23. Mr Fransman did not press Dr. Wasti's view about the amendment to the Constitution. Nevertheless, he did rely on Dr. Wasti's further opinion that, because the change to section 5 of the 1951 Act was retrospective, it could have no effect in relation to those born before it came into force. He expressed that opinion in relation to the position of T1, U1 and V1, but his view is equally applicable in S1's case. It was that, if the President intended that the change should be retrospective, his order would have contained words to that effect. Ms. Piracha says that the plain meaning of the amended section is clear: anyone born after the commencement of the 1951 Act shall be a citizen of Pakistan by descent if one of his parents is a citizen of Pakistan at the time of his birth. Mr. Tam submitted that the changed wording was not truly retrospective: all that it achieved was to deem – after 18th April 2000 - that anyone born after 13th April 1951 of a Pakistani citizen otherwise than by descent would be a citizen of Pakistan. We accept the opinion of Ms. Piracha and the submission of Mr Tam, which accord with a natural reading of the amended section. We accept Ms. Piracha's opinion that, if the President had intended that the change should not apply to those born before 18th April 2000, words would have been required to achieve that limitation. It is readily understandable that they were not included. As Ms. Piracha explained, the change was effected in response to representations from NGOs and modernising opinion in Pakistan. To have distinguished those born before, from those born after, 18th April 2000 would have discriminated arbitrarily between children of the same parents – an odd effect of a measure apparently designed to reduce discrimination.

24. On the agreed facts, S1 is, accordingly, entitled to Pakistani citizenship by descent from his mother. On his own account of his dealings with the Pakistani High Commission, he would have no difficulty in satisfying the Pakistani authorities that his mother was a citizen of Pakistan otherwise than by descent, because he was able to produce to the High Commission the copy of the Pakistani passport which his brother-in-law had obtained for her. To do that, if the strict requirements of rule 9 of the 1952 rules had been fulfilled, he must have had a certificate of citizenship of Pakistan for her. Even if it could not now be found, on Ms. Piracha's view of what is required to prove entitlement to Pakistani citizenship, which, for reasons already given, we accept, production of her passport alone should suffice. Accordingly, we are satisfied at least on balance of probabilities that S1 is a citizen of Pakistan by descent from his mother and that he would be considered by Pakistan to be a national under the operation of its law.

T1, U1 and V1

25. The same analysis of Pakistani law applies in their cases. On the facts, they are clearly entitled to Pakistani citizenship by descent from their mother. Further, they could not possibly have any difficulty in proving it. The passport and identity card produced at the port stop on 15th November 2007 in her name are genuine documents, issued on the basis of true facts. She was born on 18th August 1966 in Jhang. The Pakistani authorities recognise her as a citizen of Pakistan by birth under section 4 of the 1951 Act. They can prove descent from her by the UK birth certificates annexed to their statements. No

Pakistani official could sensibly refuse to recognise them as citizens of Pakistan. If one were to do so, they would have no difficulty in persuading a court to set the matter right.

26. That conclusion makes it unnecessary to address Mr. Tam's alternative and more difficult submission that they obtained Pakistani citizenship by descent from S1.

Conclusion

27. For the reasons given, we are satisfied, at least on balance of probabilities, that the Secretary of State's decision to deprive the appellants of British citizenship did not make them stateless.