SPECIAL IMMIGRATION APPEALS COMMISSION

APPEAL NUMBERS: SC/138/2017 & SC/146/2017

DATE OF HEARING: 11th & 12th October 2018

DATE OF JUDGMENT: 15th November 2018

BEFORE:

THE HONOURABLE MR JUSTICE JAY

UPPER TRIBUNAL JUDGE GLEESON

MRS J BATTLEY

BETWEEN:

E3 AND N3

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

MR N. SHELDON and MR J. STANSFELD (instructed by the Government Legal Department) **appeared on behalf of the Secretary of State**

MR D. LEWIS (instructed by the Special Advocates' Support Office) **appeared as Special Advocate**

MR H. SOUTHEY QC and MR A. MACKENZIE (instructed by Duncan Lewis Solicitors) **appeared on behalf of the Appellant**

OPEN JUDGMENT

A. Introduction

1. This is the hearing of a preliminary issue in two linked appeals, namely whether the decisions of the Secretary of State for the Home Department ("the Respondent") have rendered E3 and N3 ("the Appellants") stateless.

2. The narrowness of the issue has the tendency to conceal its complexity. This is so notwithstanding that the very point has been recently been considered by the Commission in G3 v SSHD, SC/140/2017, where the Respondent was unsuccessful. In these circumstances, a preliminary issue arises within the preliminary issue, namely whether it is even open to the Respondent to seek to persuade this constitution of the Commission to reach a different conclusion.

3. The basic facts may be briefly stated.

4. E3 was born in the UK on 27th May 1981. Accordingly, he was a British Citizen at birth pursuant to relevant provisions in the British Nationality Act 1948. Both his parents were Bangladeshi citizens at the time of this birth. It follows that E3 was, at least at the time of his birth, a Bangladeshi citizen by descent pursuant to provisions of the Citizenship Act 1951, which we will later mention.

5. On 4th June 2017 the Respondent made an order pursuant to section 40(2) of the British Nationality Act 1981 depriving E3 of his British citizenship, on terrorist-related and national security grounds. The Respondent's stance is that his decision does not render E3 stateless. E3 is currently in Bangladesh having entered that country on a British passport with a "NVR" (no visa required) stamp. Nothing turns directly on this last aspect of the case.

6. N3 was born in Bangladesh on 12th December 1983. It is common ground that he was a British citizen at birth by virtue of section 2(1)(a) of the 1981 Act owing to the status of his parents. Although is it apparent that the legal route by which E3 was a British citizen (without prejudice to this appeal) differs from E3's, nothing turns on this.

7. On 31st October 2017 the Respondent made an order depriving N3 of his British citizenship on grounds broadly similar to those pertaining to E3. He is currently in Turkey.

8. In relation both to E3 and N3, the Respondent determined in June and October 2017 respectively that they were British/Bangladeshi dual nationals, in which circumstances deprivation of British citizenship does not render them stateless. It is common ground that, in the event that this Commission should come to a contrary conclusion, these appeals must be allowed because the effect of the Respondent's determinations would, *ex hypothesi*, render the Appellants stateless. The inquiry to be undertaken on these appeals is, in a nutshell, whether at the date of the Respondent's deprivation orders the Appellants held Bangladeshi nationality: see SSHD v Al Jedda [2014] AC

253, paragraph 32.

9. The resolution of the preliminary issue hinges on various provisions of Bangladeshi law which we now expound or summarise.

B. Key Provisions of Bangladeshi Law

10. By section 4 of the Citizenship Act 1951 (previously the Pakistani Citizenship Act 1951, but amended in 1972 by Presidential Order), anyone born in Bangladesh after the commencement date is a citizen of Bangladesh by birth. By section 5, anyone born after the commencement date is a citizen of Bangladesh by descent if his father or mother was a citizen of that country at the time of his birth. Thus, section 4 applies to N3 and section 5 to E3. By rule 8 of the Citizenship Rules 1952, anyone claiming citizenship on account of birth must do so on a prescribed form. Rule 9 applies *mutatis mutandis* to citizenship by descent.

11. Section 14 of the Citizenship Act 1951, as amended in 1972, provides in material part as follows:

> **"Dual citizenship or nationality not permitted**
> (1) Subject to the provisions of this section if any person is a citizen of Bangladesh under the provisions of this Act, and is at the same time a citizen or national of any other country, he shall, unless he makes a declaration according to the laws of that country renouncing his status as a citizen or national thereof, cease to be citizen of Bangladesh.
> (1A) Nothing in sub-section (1) applies to a person who has not attained twenty-one years of age"

12. Bangladesh ceded from Pakistan on 26th March 1971 and declared independence. On 15th December 1972 the Bangladeshi Citizenship (Temporary Provisions) Order 1972 (Presidents' Order No. 149 of 1972) was enacted with effect from Independence Day. The 1972 Order has the status of primary rather than secondary legislation - it was enacted at a time when the President has such powers. By Article 2:

> "Notwithstanding anything contained in any other law, on the commencement of this Order, every person shall be deemed to be a citizen of Bangladesh -
>
> (i) who or whose father or grandfather was born in the territories now comprised in Bangladesh and who was a permanent resident of such territories on the 25th day of March 1971, and continues to be so resident; or
> (ii) who was a permanent resident [of Bangladesh on 25th March

1971 and continues to be so].

13. By Article 3, in the event of doubt as to qualification to be deemed to be a Bangladeshi citizen, the Government's decision is final. Further, by Article 4 the Government has power to grant citizenship to any person who applies for it on the prescribed form.

14. On 23rd May 1973 the 1972 Order was amended by Article 2 of the Bangladeshi Citizenship (Temporary Provisions) (Amendment) Act 1973, and the following Articles were inserted:

> "2A. A person to whom Article 2 would have been ordinarily applied but for his residence in the United Kingdom shall be deemed to be permanent resident in Bangladesh.
> Provided that the Government may notify, in the Official Gazette, any person or categories of persons to whom this Article shall not apply.
> 2B. Notwithstanding anything contained in any other law for the time being in force or in this Order, a person who -
> i. owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state or
> ii. is notified under the proviso to Article 2A
> shall not qualify himself to be a citizen of Bangladesh."

15. The 1973 version of Article 2B was replaced in 1978 by the following wording, introduced by further primary legislation in the form of military ordinance at a time of political unrest:

> "2. (1) Notwithstanding anything contained in Article 2 or in any other law for the time being in force, a person shall not, except as provided in clause (2), qualify himself to be a citizen of Bangladesh if he -
> (i) owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state or
> (ii) is notified under the proviso to Article 2A:
>
> Provided that a citizen of Bangladesh shall not, merely by reason of being a citizen or acquiring citizenship of a state specified in or under clause (2), cease to be a citizen of Bangladesh.
>
> (2B) The Government may grant citizenship of Bangladesh to any person who is a citizen of any state of Europe or North America or of any other state which the Government may, by notification in the Official Gazette, specify in this behalf."

16. Rule 3 of the Bangladeshi Citizenship (Temporary Provisions) Rules 1978 makes provision for the making of applications under Article 2B.

17. All the provisions set out above were enacted in English. On 18th March 2008 a statutory notification (SRO No. 69 - Law/2008 ("the 2008 Instruction"))

was issued in the Bangla language by order of the President of Bangladesh. Various translations have been supplied, but the following appears to be both the most authoritative and coherent:

> "The Government, in the exercise of the power conferred in sub-article (2) of article 2B …, by cancelling all the circulars or directives or orders or notifications issued hereinbefore in this behalf, has issued the following directives only in the case of the United Kingdom as regards granting or continuation of Bangladeshi citizenship of those Bangladeshis who have acquired citizenship of the United Kingdom:
>
> a) The Bangladeshi citizenship of any citizen of Bangladesh according to the law as in force in Bangladesh shall remain as it is notwithstanding their acquiring citizenship of the United Kingdom, unless the oath to be taken for acquiring citizenship of that country does contain any oath to renounce allegiance to their own country (Bangladesh);
> b) In the aforesaid circumstances, the citizen of Bangladesh, who has acquired citizenship of the United Kingdom, shall not be required to obtain dual citizenship from the Government of Bangladesh;
> c) All Bangladeshis who have acquired citizenship of the United Kingdom may retain and use their Bangladeshi passports;
> d) On the expiry of their validity, their passports shall have to be renewed as usual;
> e) Bangladeshi passports can be issued again to those who had previously acquired citizenship of the United Kingdom.
>
> 2. This order shall be applicable only in the case of citizens of Bangladesh acquiring citizenship of the United Kingdom.
>
> 3. This order is issued in the public interest and shall come into force forthwith".

C. The Decision of SIAC in G3

18. The judgment in G3 was handed down by the Commission, Lane J presiding, on 15th December 2017.

19. The section of the judgment, "The Commission's Approach to the Evidence", is not contested by the parties before us, save in two respects. It follows that we are able to adopt it, in particular the very helpful distillation at paragraph 19.

20. The areas of contest concern the Commission's treatment at paragraph 16 of its determination of the Supreme Court's decision in Pham v SSHD [2015] 1 WLR 1591, as well as the incidence and application of the burden and standard of proof. We will therefore need to return to these matters below.

21. The G3 Commission heard evidence from two experts, Professor Hoque for the Appellant and Mr Ghani for the Respondent. Served by way of

exculpatory material was a report by Mr Al Amin Rahman which broadly supported Professor Hoque's reasoning and conclusions. Unfortunately for the Respondent, Mr Ghani proved to be an unsatisfactory expert witness in a number of respects. His evidence was not "pellucid"; he conceded that the proviso to Article 2B(1) of the 1972 Order, as amended, had no application to the present case, because G3 was not permanently resident in Bangladeshi on the date of Independence (he had not yet been born); and, he drew an uncomfortable distinction between *de jure* and *de facto* citizenship. Further, aspects of Mr Ghani's textual analysis of the 2008 Instruction did not avail the Respondent.

22. Ultimately, the G3 Commission was not persuaded that the 2008 Instruction applied to G3. As a matter of legal analysis, it was concluded that this Instruction did not apply to those acquiring British nationality at birth. Without much enthusiasm, the G3 Commission rejected the submission that the 2008 Instruction applied to G3 as a matter of settled practice. It is unnecessary for us to set out the G3 Commission's close reasons in any detail because we do not doubt that their decision and ours will be read together.

23. It is worthy of note that the G3 Commission had very limited evidence from the Bangladeshi authorities as to how the 2008 Instruction was applied in practice (paragraph 91). The G3 Commission rejected Mr Neil Sheldon's late application for an adjournment to adduce further evidence, on the ground that the significance of the 2008 Instruction "must have been evident to the Respondent for some weeks" (paragraph 96), and G3's personal circumstances, and those of her two young children, were precarious (paragraphs 2 and 99). However, at paragraph 98 the door was apparently left ajar for the Respondent to seek to persuade the Commission to reach a different conclusion on further evidence. In particular:

> "... the findings in this appeal are not necessarily determinative of any future appeal brought by a person in a similar position to G3."

24. The Respondent did not seek to appeal the Commission's decision in G3.

D. The *Note Verbale*

25. On 7th January 2018 the High Commission in Dhaka, acting no doubt on behalf of the FCO, submitted *Note Verbale* No. POL/02/18 to its counterpart in Bangladesh. On 3rd June 2018 the Ministry of Foreign Affairs, having received instructions from the responsible department, the Security Service Division, Ministry of Home Affairs, presented its compliments and provided four succinct answers to the questions posed. Mr Hugh Southey QC for the Appellant accepted that these answers came from the correctly designated department, and in the Commission's view the questions posed were appropriately non-leading and non-case specific.

26. There is a debate between the parties as to whether the answers provide

Dhaka's interpretation of the relevant legal provisions or an exposition of current practice and policy in the Ministry, or a combination of the two. Postponing consideration of that issue, we note that the view has been expressed that the 2008 Instruction has "retrospective effect", that it is applied both to those who were naturalised as British citizens before 18th March 2008 (the date of its coming into force) and those who were British at birth, and is applied to those who had reached the age of 21 before the operative date.

E. Abuse of Process?

27. Mr Southey for the Appellant submitted very strongly that no good reasons have been put forward for departing from G3, and that in all the circumstances of this case it would be an abuse of process both to permit the Respondent to adduce the *Note Verbale* and to make submissions upon it, and/or to invite the Commission to revisit G3 in circumstances where it could and should have been appealed.

28. The Commission adopted the pragmatic course of noting Mr Southey's objection at the outset of the appeal, receiving the disputed evidence *de bene esse*, and resolving to determine the point as a quasi-preliminary issue in this judgment. We did not believe that the objection could fairly be determined as a "pure" preliminary issue without any reference to the potential underlying merits of the substantive matters.

29. Mr Southey deployed a number of authorities in support of his argument. We will consider these below. In outline, his submissions were as follows:

(1) The Respondent could and should have deployed any material and submission which is new in this appeal before the G3 Commission.
(2) The Respondent initially sought to link E3's case with G3, and then at a late stage sought a stay of E3.
(3) The Respondent's resources considerably outweigh those of the Appellants, and the inherent unfairness of the closed procedure is an additional factor.
(4) The Respondent has "expert-shopped". Disclosed by way of exculpatory material in these appeals is a yet further expert report which broadly support the Appellants' case. The sole expert who supports the Respondent's case arrived on the forensic scene very late in the day, and Mr Sheldon's final submissions placed little reliance on her reports and evidence. Essentially, therefore, the Respondent's present case is grounded on submissions which could and should have been advanced before.
(5) In any event, no good reason has been advanced for departing from G3, which remains the firm and clear starting-point.

30. In our judgment, there is no absolute bar to a party re-litigating a point which it has already lost and decided not to appeal, but the Commission should be slow to permit this without good explanation and reason. Much depends on the nature of the issues in dispute, the relevant party's reasons for not adducing relevant evidence and submissions on an earlier occasion, and the

apparent quality of the further evidence which is sought to be adduced. These propositions are the combined effect of cases such as Devaseelan [2002] UKIAT 00282, Ocampo v SSHD [2006] EWCA Civ 1276 and AA (Somalia) v SSHD [2007] EWCA Civ 1040. The correct legal analysis is not *res judicata* or issue estoppel, but something akin to abuse of process. The burden of persuasion is intensified in a case where the Secretary of State is the party seeking to re-open the issue. Moreover, it needs to be emphasised that abuse of process is not a synonym or cipher for overall unfairness or prejudice. Professor Hoque has been able to deploy detailed written arguments in rebuttal of the Respondent's case, both new and old, but the Appellants are entitled to maintain their submissions under this rubric regardless of their inability to show any prejudice.

31. The Respondent now seeks to argue that the proviso to Article 2B(1) to the 1972 Order applies to these Appellants and is the source of their entitlement to dual nationality. In G3 Mr Ghani conceded in cross-examination that the proviso could not apply to individuals born after March 1971. At first blush, it appeared to the Commission to be at least arguable that this concession should not have been made; but the fact remains that it was made. Furthermore, pre-reading Ms Nabila Rafique's voluminous reports before the hearing fell short of persuading us that her approach to the proviso could be right, even assuming that the concession had been wrongly made. Had this been the only issue in this appeal, we would not have permitted Mr Sheldon to re-open it.

32. Had it not been for the *Note Verbale*, we would have come to the same conclusion in relation to the 2008 Instruction. The G3 Commission carried out a thorough textual and contextual analysis of the 2008 Instruction, and the inadequacy of the Respondent's expert evidence did not prevent an appeal. There was none. If regarded as an insight into the correct legal interpretation of the Instruction, the *Note Verbale* is notably bereft of reasoning and analysis. Ms Rafique's evidence to some extent disowned the *Note Verbale* as reliable and accurate. In truth, the Respondent's better case is that the *Note Verbale* represents evidence of practice or policy, and in that respect is normative rather than exegetical, but Mr Sheldon's primary submission in opening was that it does no more than interpret the law - to be fair, his alternative submission went further. However, ultimately the Commission has come to the conclusion that in the particular circumstances of the present case it would not be an abuse of process for the Respondent to rely on the *Note Verbale* in support of its overarching submission that the 2008 Instruction does apply to those, amongst others, who acquired British nationality at birth. Our reasons are as follows.

33. The G3 Commission clearly felt that the issue was not clear-cut, could discern no obvious policy reason why the 2008 Instruction should not apply to British-born as opposed to British-naturalised Bangladeshis, noted that there is no evidence of British Bangladeshis experiencing any difficulties in South Asia, noted that the evidence then forthcoming from Dhaka was terse and inadequate, and said in terms that the issue might be re-litigated on further evidence. Although we agree with Mr Southey that the G3

Commission could not properly dictate the legal approach any subsequent Commission might take, it seems to us that paragraphs 91 and 98 of its judgment are at least some indication that the Respondent was not at fault for any dilatoriness by the Bangladeshi authorities. We have come independently to the same conclusion. Additionally, there is some force (its precise extent must await fuller consideration below) in the point that a benevolent or purposive approach to the 2008 Instruction works no injustice, and overall is consonant with the "public interest" that Article 3 expressly recognises and enjoins. If the *Note Verbale* should be taken at face value, it may be said to constitute at least the stepping-stone to a conclusion that the 2008 Instruction is applied extremely broadly.

34. We confess that the merits of this issue are finely balanced, and we have not overlooked Mr Southey's submission that the Respondent's case on the *Note Verbale* is primarily advanced without reference to Ms Rafique. The Respondent has been heavily reliant on the industry and analysis of its legal team headed by Mr Sheldon. Furthermore, we also accept the submission that there will no doubt be linguistic nuances in the original Bangla which have been lost in translation. However, these are all reasons supporting the proposition that, in a situation where the burden of proof is firmly on the Respondent, caution should be exercised before concluding that it has been discharged. They are not reasons for abstaining from embarking on the exercise in the first place.

35. We have decided to address the substance of the Respondent's new case on the proviso to Article 2B(1) of the 1972 Order, but we do so briefly. Given the need to address the 2008 Instruction, it is unsatisfactory in a case of this sort to leave untidy loose ends.

36. It follows that the G3 Commission's reasoning and conclusions represent only the starting-point, albeit a solid one, for our consideration of the merits of this appeal, and not the endpoint.

F. The Expert Evidence

37. The Appellants' expert was Professor Ridwanul Hoque PhD, Professor of Law at the University of Dhaka. He has an immensely impressive *cv* and has provided two extremely detailed, if not dense, reports. Given that Professor Hoque testified in G3, and his evidence has been summarised by the Commission in that case, we can be fairly brief. We confine our summary to the two issues which we have already identified, viz. the meaning and scope of the proviso to Article 2B(1) of the 1972 Order, and the correct interpretation of the 2008 Instruction in the light of the *Note Verbale*.

38. In Professor Hoque's opinion, Article 2B(2) of the 1972 Order confers a broad power on the Government to confer Bangladeshi citizenship on those who are also or already citizens of Europe, the USA and any other State that the Government may specify. The typical mechanism for doing this is to grant what are called "Dual Nationality Certificates". Further, the non-

obstante clause at the start of Article 2B(1) has the effect that section 14 of the 1951 Act remains applicable.

39. Paragraphs 35 and 36 of Professor Hoque's first report are not altogether easy to follow, and he was cross-examined upon them by Mr Sheldon. On the Commission's reading of these paragraphs, Professor Hoque is saying as follows:

    (1) Clause (1) of Article 2B(1) is a separate and independent provision, empowering the authorities to determine whether someone is deemed to be an initial citizen of Bangladesh (i.e. a citizen as at the date of Independence).
    (2) Clause (1) prevails over Article 2B(2).
    (3) The proviso to Article 2B(1) does not affect Article 2B(2) or section 14.
    (4) Article 2B(1) applies only to Urdu-speaking Biharis whose allegiance to Bangladesh was in question.
    (5) It follows that the proviso covers only Pakistan (or Urdu-speakers from India who owe allegiance to Pakistan).
    (6) In any event, the proviso does not bite on dual citizenship, an issue covered by Article 2B(2).
    (7) "On the other hand, the proviso clearly addresses clause (1) and its impact must necessarily be read to prevent dual citizens of Bangladesh or citizens by descent from falling within the purview of disqualification mentioned in Article 2B(1)".

40. In his oral evidence, Professor Hoque said that the approach to non-obstante clauses in Bangladeshi legislation differs from that which obtains in England and Wales. He did not accept that Article 2B(1) prevailed over the other sources of law identified in that clause. Then he said that the enactment of the 1978 amendments to the 1972 Order was "hurried", that the proviso was in the wrong place, and (as he put it) the content of the proviso carried into Article 2B(2). Professor Hoque did not accept the proposition that the proviso to Article 2B(1) is directed at ensuring that those who already hold Bangladeshi citizenship do not lose it, and Article 2B(2) is directed at enabling those who do not hold such citizenship to apply for it.

41. As for the 2008 Instruction, which Professor Hoque describes as a "statutory notification", his evidence has not changed in the face of Ms Rafique's evidence and the *Note Verbale*. In short, Professor Hoque remains of the view that the 2008 Instruction applies only to naturalisation cases. Professor Hoque disagrees with Ms Rafique's translation of the Bangla term "nagorikottoprapto" in what he describes as the preamble to the 2008 Instruction (confusingly there would appear to be no first-numbered paragraph), observes that in any event the language of sub-paragraph (a) ("grohan") is clear, and is of the opinion that preambular words cannot override the clear and unambiguous provisions in the text.

42. Professor Hoque has also subjected the *Note Verbale* to a close textual analysis, and has concluded that the answers given by the responsible department in Bangladesh are not legally correct, save (at least in part) on the

issue of retrospectivity (we would prefer the term, "retroactivity", but nothing turns on this). The 2008 Instrument has retrospective effect only in relation to those who fall within clause 1(e), in other words those who have accepted or acquired UK citizenship but no longer hold Bangladeshi passports. It does not apply to acquisition at birth cases, and in any event (or perhaps in the alternative) it does not apply to those who would already have lost their Bangladeshi nationality by operation of law at the age of 21 pursuant to section 14.

43. At paragraphs 83-86 of his first report, Professor Hoque makes a number of important points. The legal status of the *Note Verbale* must be called into question. Specifically:

> "The responses are at best extra-official interpretation, they are mere opinions communicated to the British representatives through a diplomatic letter … It would have binding effect, had it been issued officially as an official order as another SRO by the Ministry of Home Affairs. … The relevant part of [article 152 of the Bangladeshi constitution] [defines] "law" [as] "any Act, ordinance, rule, regulation, bye law, notification or other legal instrument, and any custom and usage, having the force of law in Bangladesh".

44. At paragraph 84 of his first report, Professor Hoque emphasises that the *Note Verbale* cannot be regarded as an *official* instrument which falls within this definition of "law".

45. Professor Hoque's second report is largely a reiteration of the opinions expressed in the first. The Commission has taken all of this into account, as well as the voluminous materials annexed to both reports, but does not believe it necessary to provide any further summary.

46. Ms Nabila Rafique, the Respondent's expert, has provided four reports to the Commission, although there is a considerable degree of replication and overlap. Ms Rafique is an Advocate of the Supreme Court of Bangladesh who moved to this country in 2014 to work in private practice as a legal adviser, and then solicitor, advising on a range of matters touching on the application of Bangladeshi law to those resident in or nationals of the UK.

47. In relation to the proviso to Article 2B(1), Ms Rafique's written evidence is as follows:

> "Though Bangladeshi law prima facie does not allow dual nationality [s.14(1) of the 1951 Act], I believe the legislation did not bite in E3's case until he reached 21 years of age on 27/5/02. Following this date, his Bangladeshi citizenship subsisted and remained intact by the proviso in Article 2B(1), but he was required to procure a certificate if he wanted to "qualify himself" as a citizen. Though he falls under Article 2B(2), I believe he can take advantage of the proviso in Article 2B(1) as 2B(2) is referred in the beginning of 2B(1) - "except as provided in clause (2)" - therefore the proviso

will apply to him as well".

48. Ms Rafique adds that the effect of Article 2B is to render section 14 "dormant" or to negate it, and that there is a difference between being entitled to Bangladeshi citizenship and qualifying oneself to or for it: the latter is concerned with holding oneself out to the world for the purposes of property, inheritance, and other official transactions.

49. As for the 2008 Instruction, Ms Rafique's opinion is that its effect is that Bangladeshi citizens who are also citizens of the UK no longer have to possess dual nationality certificates to "qualify themselves" as Bangladeshi citizens. Her translation of "nagorikottoprapto" is that the term is apt to cover those who acquire a status by entitlement or as of right. On our understanding of her evidence, the use of the term "grohan" (twice) in sub-clause (a) would "at first glance" only cover those who acquire British citizenship by naturalisation, but "on a thorough reflection of the words used in the preamble, it is evident that the legislation covers Bangladeshis which [sic] are British by birth as well". Ms Rafique deploys a number of subordinate arguments to support this approach, but we confess that we have found them difficult to follow.

50. Ms Rafique also explains that the NVR regime, not exactly akin to citizenship but in practice little different, is routinely adopted by her firm because it is "hassle free". There is nothing in her evidence to suggest that there has been any reliance on alleged rights under the 2008 Instruction, and she has not drawn the Commission's attention to any case law or public pronouncements in Bangladesh which support her argument.

51. Ms Rafique has also opined on the *Note Verbale*. In her opinion, the legal basis for the statement that it is applied retrospectively "is not clear". Ms Rafique does not accept the entirety of the Government's legal reasoning regarding the interplay between the Citizenship Act 1951 and section 2B of the 1972 Order, including the 2008 Instrument purportedly made under that latter provision. More importantly:

> "In this particular instance, it is clear from their responses that the Ministry of Home Affairs will apply this SRO retrospectively and to someone who had reached 21 years of age before 18/3/08 [the date of implementation of the 2008 Instruction]. What is important to note is that there was a policy reason for the SRO to be issued as it was issued in the public interest (clause 3) which means it was intended to be for the benefit [of] as many people as possible, which could be the guiding reason for their decision. So, unless the Government is successfully challenged in a court of law in Bangladesh on allowing the SRO to have … retrospective effect, the position remains that the SRO has retrospective effect as Security Division of the Ministry of Home Affairs has chosen it to be so, given that they are both the formulating and implementing organ for the SRO."

G. Discussion

52. The Commission's assessment of the expert evidence in this case is that it is sub-optimal. Professor Hoque has a truly excellent *cv* and in many respects his written evidence to the Commission was thoughtful, reflective and well-presented. However, his reports were too long, repetitive, sometimes abstruse and overly dense. His evidence has failed to meet the very high standards he set for himself, just by way of example, in his Report on Citizenship Law: Bangladesh presented to the European University Institute in December 2016. More worrying, Professor Hoque often gave indirect and obscure answers to the clear questions put to him in cross-examination, and on occasion he lost us completely. To be fair to him, he was hampered by the fact and quality of the video-link, but his tendency to prevaricate or obfuscate led us to conclude that aspects of his evidence lacked the objectivity and balance of an ideal expert. For similar reasons, we were even more unimpressed by Ms Rafique's evidence, which on occasion gave the impression that she was constructing arguments and reasoning to avail the Respondent rather than assist the Commission. We simply cannot accept her argument that "qualify oneself" means something different from "deemed to be a citizen of" (see, for example, the wording of Article 3 of the 1972 Order), and Ms Rafique was extremely unclear as to how the proviso to Article 2B(1) is supposed to operate.

53. Both experts were more helpful on the meaning and application of the 2008 Instruction and the *Note Verbale*. They, unlike the Commission, can grapple with the true meaning of different Bangla verbs and their cognates (acquire, acquiring, acquisition), and they have greater experience and knowledge of Bangladeshi law and practice. Putting to one side the textual points, to which we will return, to the extent that there is a material difference between the views of Professor Hoque and Ms Rafique on matters of Bangladeshi law and practice, we prefer the evidence of the former.

54. The Commission notes that the Respondent has obtained expert evidence from Mr Al Amin Rahman and Mr Arefin Ashraf Khan which is generally consonant with the conclusions, albeit not necessarily each and every step of the reasoning, of Professor Hoque. We give some weight to this evidence although it was not tested in cross-examination. We have ignored the evidence of Mr Ghani.

55. Both Professor Hoque and Ms Rafique relied on high authority in Bangladesh to support their respective conclusions. We have considered this jurisprudence with care, in particular the decision of the Appellate Division of the Supreme Court of Bangladesh in Bangladesh v Professor Golam Azam, but have concluded that it does not avail either party.

56. Turning first of all to the proviso to Article 2B(1) of the 1972 Order, we do not consider that it bears the wide and general application urged on us by the Respondent.

57. On the coming into force of the Bangladesh Citizenship (Temporary Provisions) Order 1972 on 15th December 1972, with effect from 26th March 1971, anyone falling within Article 2 was deemed to be a Bangladeshi citizen regardless of anything provided for in the Citizenship Act 1951. The practical effect of this was that the 1951 Act did not apply to anyone who met the qualifying conditions set forth in Article 2, including permanent residence in Bangladesh on Independence Day, and that this statute therefore only applied to those who were born after March 1971. In practical terms, therefore, section 3 of the 1951 Act was disapplied in relation to anyone who fell within Article 2. On the other hand, sections 4 and 5 of the 1951 Act continued to apply to anyone born after Independence Day.

58. It is not clear why the Bangladeshi President chose to legislate in this manner, conspicuously on a temporary basis, but this is the clear and evident effect of these complementary provisions.

59. We agree with Mr Sheldon that in 1973 legislation was introduced which had both an inclusionary and an exclusionary purpose. The inclusionary purpose was to deem those resident in the UK who otherwise would have fallen within Article 2 as entitled to Bangladeshi citizenship, unless the proviso was applicable. The proviso to Article 2A (and to Article 2) is in a form familiar to a British lawyer. The exclusionary purpose was to exclude from qualification those who owed allegiance to a foreign state. Obviously, this language targeted those who owed allegiance in some way to Pakistan, and we take Professor Hoque's point about Urdu-speaking Biharis. The 1973 iteration of Article 2B did not contain any proviso, and consequently no further difficulty arises.

60. The 1978 amendments were introduced by ordinance at a time of military rule, and Professor Hoque may well be right in observing that they have all the hallmarks of undue haste and (we would add) confusion. We must therefore take this in stages.

61. The non-obstante clause at the start of Article 2B works perfectly well in the context of the 1973 amendments. The clause makes clear that anyone who owes allegiance to a foreign state is disqualified regardless of any qualification he might have under the 1951 Act or Article 2 of the 1972 Order.

62. Does the non-obstante clause govern the proviso? Applying ordinary canons of statutory interpretation it does, but the meaning of the proviso remains obscure. When pressed by the Commission, Mr Sheldon accepted that the proviso was a qualification of or derogation from Article 2B(1)(i), and we would be inclined to agree. Mr Sheldon further submitted that the proviso is a provision of wide and general application devoted to paradigm cases of dual nationality. It is designed to cater for those who already hold Bangladeshi nationality and to ensure that they do not lose it. Here, however, we part company with Mr Sheldon.

63. Logically, for the Respondent's case to be right, *either* it would have to be

demonstrated that the proviso conferred a right which did not otherwise exist, *or* that it recognises a right which arises elsewhere in the legislative scheme. Under pressure from the Commission, Mr Sheldon appeared to place his eggs in the second basket rather than the first - he submitted that the right arises under sections 4 and 5 of the 1951 Act, as the case may be.

64. Both as a matter of language and logic, Mr Sheldon was correct not to seek to place his eggs in the first metaphorical basket. The wording of the proviso is not to confer a right; rather, it predicates or assumes a right which already exists, or which may be conferred elsewhere in Article 2B. Furthermore, the Commission cannot see how a provision which on its face is designed to disapply the exception to Article 2 contained within Article 2B(1)(i) can operate as the originator of a fresh and new right which had not otherwise arisen. In other words, a person who is no longer disqualified does not (without more) become qualified unless and until that qualification is separately and independently established. We reiterate that the wording of the proviso is not such as to confer such a qualification.

65. No doubt for these reasons, and maybe others, Mr Sheldon invoked sections 4 and 5 of the 1951 Act. But the difficulty here is that the non-obstante clause is of general application to Article 2B, including the proviso; and, in any event, the Respondent is seeking to have his cake and eat it. If the 1951 Act applies, then so does the whole of the Act including, for these purposes, section 14. There is no basis for applying part of the 1951 Act, and disapplying part of the non-obstante clause, in order to identify the locus of the relevant right. In other words, the right in sections 4 and 5 becomes, in Hohfeldian terms, a "no right" on the Appellants' 21st birthdays.

66. The other insurmountable difficulty from the Respondent's perspective is that there is simply no basis for treating the proviso to Article 2B(1) as the premier operative provision in the case of dual nationality rather than Article 2B(2). This latter provision is clearly intended to be the governing provision, and this is why the 2008 Instruction was introduced - purportedly under Article 2B(2). If the proviso were intended to have the wide reach invoked by Mr Sheldon, then Article 2B(2), which operates on the basis of discretion rather than entitlement, would have minimal or nugatory effect. Mr Sheldon suggested that it might apply to those who have little or no connection to Bangladesh through ancestry, but here he was surely clutching at straws. Such cases fall under the vestigial power recognized by Article 4. The correct analysis is that dual nationality cases are intended to be covered by Article 2B(2), with the consequence that Mr Sheldon simply cannot be right about the content and breadth of the proviso.

67. It is easier to reach firm conclusions as to what the proviso does not mean, as opposed to what it does mean. The burden is of course on the Respondent, but it is unsatisfactory to leave this question unanswered. The Commission confesses that it has struggled with according the proviso any sensible practical meaning. Mr Southey submitted that the proviso is simply a belt and braces or avoidance of doubt provision which underlines the fact that a person who receives a discretionary grant under Article 2B(2) does not

thereby lose his Bangladeshi citizenship. The difficulty with this argument is that there is no need to provide this form of safety-net in a case governed by Article 2B(2). A person who is granted Bangladeshi citizen as a dual national cannot immediately, and by the very fact of such grant, be at risk of losing it, particularly in circumstances where the non-obstante clause includes the sub-clause, "except as provided in clause (2)".

68. Nor is it right, in the Commission's view, to base its conclusion on the point which was conceded by the Respondent's expert before the G3 Commission. To the extent that the right predicated by the proviso to Article 2B(1) might conceivably arise under Article 2 of the 1972 Order, the concession was rightly made; but it is not Mr Sheldon's case that the right does arise in this fashion. In the Commission's view, the non-obstante clause has the effect of disapplying Article 2 as much as it does anything in the 1951 Act. Furthermore, insofar as we have understood Professor Hoque's complex, recondite argument on this topic, we do not think that his reasoning relies on Article 2. Our objections to the Respondent's case are more fundamental.

69. The proviso is both poorly conceived and poorly drafted. The Commission concludes that its purpose was to make it entirely clear that the bare fact of dual nationality did not constitute a case as falling within Article 2B(1)(i), being a provision concerned - as a matter of historical context albeit not necessarily its language - with allegiance to a hostile state. Beyond that, the proviso was clearly unnecessary, for the reason we have given under paragraph 67 above.

70. The Commission unhesitatingly rejects the Respondent's new case based on the proviso to Article 2B(1) to the 1972 Order.

71. As for the 2008 Instruction, it is convenient to address this in the first instance without reference to the *Note Verbale*.

72. The evidence before this Commission has differed slightly from what was before the G3 Commission, and we have summarized Ms Rafique's evidence. Although she was not an impressive expert, we suspect that she was less unimpressive than was the Respondent's then expert in G3. We must record the considerable assistance we have received from both Counsel, whose submissions before us, particularly when pressed on matters of apparent concern or difficulty, were uniformly excellent.

73. Mr Sheldon repeated many of the submissions he made in G3. His primary submission, founded on the text as well as one answer which came from Professor Hoque in cross-examination, was that the opening clause of paragraph (a) is dealing with the concept of acquisition by whatever means, and that the "unless" clause is addressing the particular case of acquisition by naturalisation which requires the taking of an oath. Thus, the "unless" is concerned with a particular type of case, but the general rule is to be found in the preceding wording. Moreover, he submitted that there was no sensible reason in logic or policy for confining the 2008 Instruction to cases of acquisition by naturalisation.

74. Mr Southey drew attention to the different Bangla terms for "acquired" and "acquiring", and noted that Ms Rafique appeared to accept that the "grohan" in clause (a) suggests an affirmative step and therefore may well be concerned with naturalisation. Ms Rafique's argument was that the "grohan" in clause (a) was subject to the "nagorikottoprapto" in what she has designated as the preamble. Professor Hoque was *ad idem* with Ms Rafique as to clause (a). He accepted in cross-examination that "acquired" can mean "acquired by birth", although he also said that it did not mean this in context. Professor Hoque also said that the preamble could not overbear the clear meaning of the text of clause (a). Aside from textual arguments, Mr Southey submitted that there were sound policy reasons for confining the 2008 Instruction to naturalisation cases. Bangladesh is heavily dependent on foreign remittances. Bangladesh has an interest in encouraging its nationals resident in Bangladesh to move to countries such as the UK, and it is therefore in Bangladesh's interests to facilitate naturalisation. On the other hand, those who are born in the UK can be encouraged to send foreign remittances by schemes such as NVR. Making dual citizenship discretionary means that permanent return can be controlled, and undesirables can be denied citizenship.

75. There is a paucity of case-law on the 2008 Instruction, and the Commission's attention was not drawn to anything material. Further, we see very limited force in the arguments that the 2008 Instruction may be contrary to Article 28 of the Constitution (Ms Rafique suggested that this was a possibility) or that the instrument is *ultra vires*. The Commission cannot regard itself as operating some form of judicial review jurisdiction in Dhaka.

76. If a case does fall within the 2008 Instruction, we accept Ms Rafique's evidence that dual nationality is addressed as a matter of entitlement rather than discretion. Thus, if the cases of E3 and N3 are governed by the 2008 Instruction, they were dual nationals of Bangladesh and the UK as at the date of deprivation.

77. A close textual analysis of the 2008 Instruction has proved to be very difficult. The instrument is written in Bangla in a somewhat imprecise and discursive style, and the exact nuance of words such as "grohan", "prodan" and "nagorikottoprapto" has probably eluded us. As has already been pointed out, the Commission has received an authoritative translation of the 2008 Instruction from an experienced legal translator who is also an advocate of the Supreme Court of Bangladesh, and Mr Das informs us that "prapto" means "getting, obtaining, attaining something", and "prodan" means "to give or grant something". He does not assist with the exact meaning of "grohan".

78. Undertaking this exercise without reference to the *Note Verbale*, we would come to the same conclusion as did the G3 Commission, for broadly similar reasons. There is force in the submission that there is no clear reason why the 2008 Instruction should not cover acquisition at birth cases, and we also take the point that there is no evidence that section 14 of the 1951 Act has created

difficulties for UK/Bangladeshi dual nationals wishing to exercise rights within Bangladesh. On the other hand, the evidence before the Commission is no doubt incomplete, and the reason for the absence of practical problems may well be found in the NVR scheme. It is also noteworthy that had the 2008 Instruction been applied in Bangladesh with the generosity attributed to its Government suggested by the Respondent, one would have expected to see commentary to that effect.

79. The Commission agrees with Mr Southey that clauses (a), (b) and (c) are examining the position of those who are Bangladeshi citizens and *then* acquire UK nationality. This is made plain by the wording of (b) and (c), and is more than tolerably clear from the language used, as well as the context, of (a). Moreover, the natural and ordinary meaning of (a) is that the acquisition of UK nationality in point is that which entails and flows from the swearing of an oath rather than the passive operation of law. This would be so regardless of the precise meaning to be accorded to "grohan", although on that issue we prefer Professor Hoque's evidence to Ms Rafique's. The Commission also considers that it flows from the above, or perhaps follows in any event, that if someone has lost his Bangladeshi citizenship on his 21st birthday by operation of section 14(1) of the 1951 Act, that person cannot be regarded as one whose citizenship of that country shall, or can, "remain as it is". To that extent, a literal reading of clause (a) indicates that it does not have retrospective effect.

80. For the foregoing reasons, the Commission would hold, if the issue fell to be determined without reference to the *Note Verbale*, that as a matter of Bangladeshi law the 2008 Instruction does not apply to the Appellants.

81. The Respondent's questions to the Bangladeshi authorities sought the latter's opinion as to the correct application of the 2008 Instruction. The focus of the questioning was the true position under Bangladeshi law, although in our view it is possible to adopt a slightly subtler approach. The questioner might only be asking: how do you interpret the 2008 Instruction as a matter of law? Further or alternatively, he or she might be asking: whatever it means as a matter of strict or black letter law, how do you apply it in practice?

82. This distinction, which on any view is a fine one when it comes to the position of a responsible public authority applying the relevant law as it understands it to be, was not made explicit in the four questions posed. It is probable that those who drafted these questions wanted to find out how the Bangladeshis applied a law which a separate organ of the State had enacted in 2008. This may explain why Mr Sheldon's primary submission in opening the case to us was formulated as it was. By the time he came to his closing arguments, Mr Sheldon placed greater emphasis on the *Note Verbale* constituting evidence of policy and practice.

83. This new emphasis was, in the Commission's view, correctly made, because if the *Note Verbale* is said to be no more and no less than the author's opinion of what the law is, it carries very little weight. Both experts have criticised this document, we have concluded for good reason. A

memorandum which is expressed to be parasitic on another instrument, and is held out to be no more than exegetical, cannot carry the day. On the other, a memorandum which is evidence of practice, without prejudice to its strict legal meaning, might be regarded as more weighty. Thus in G3 the Commission separately considered the issue of practice, and was clearly troubled by where its analysis led.

84. A question arises as to whether the *Note Verbale* does indeed contain evidence of the Bangladeshi authorities' practice in this domain. The use of the verb "applied" could be regarded as synonymous with "interpreted"; on the other hand, it could mean "this is how we apply it in practice".

85. The logically prior question arises of whether it is even open to the Respondent to rely on evidence of practice in a statelessness case. Consideration during the hearing was given to the decision of the Supreme Court in Pham. In that case the Secretary of State did not seek to question UNHCR guidance to the effect that the phrase "under operation of its law" could be taken to apply to State practice (paragraph 29). In the view of Lord Carnwath JSC, it was unnecessary to decide the point because there was no evidence of any relevant practice adopted by the Vietnamese government (paragraph 38, assented to by three other Supreme Court justices out of a panel of seven). Lord Mance JSC strongly doubted whether a practice that was inconsistent with or said to supersede law could be relevant at all (paragraphs 65 and 66). Lord Sumption JSC, with whom three other Supreme Court justices agreed, was not convinced that practice could stand for law in the 1954 Convention (paragraph 101). Lord Reed JSC agreed with Lord Carnwath.

86. Strictly speaking, Pham is not authority for the proposition that practice is relevant in a case such as this. The point was not argued, and there was no evidence that the Vietnamese government adopted a practice which treated the Appellant as a non-national. It follows that we cannot agree with paragraph 16 of the G3 Commission's reasoning on this issue.

87. In paragraph 38 of Pham, Lord Carnwath stated in terms that the issue did not necessarily fall to be determined solely with reference to the text of the nationality legislation in question, and "reference may also be made to the practice of the state in question, even if not subject to effective challenge in the courts". If correct, this would mean that state practice could be relevant even if the government in question acted arbitrarily and in defiance of the rule of law. If the Commission has correctly understood the ramifications of Lord Carnwath's judgment, it would hesitate before coming to the same conclusion.

88. However, Bangladesh is a constitutional Republic which adheres to the rule of law, and (on the evidence before this Commission) incorporates a system of judicial review. We are not therefore in the realm of potential arbitrariness or capriciousness. Furthermore, it has not been lost on the Commission that the Bangladeshi authorities' application of the 2008 Instruction, assuming that the *Note Verbale* accurately sets this out, is entirely benevolent inasmuch

as it represents an addition to rather than a subtraction from existing rights. The fact that the Appellants lose out vis-à-vis the UK is nothing to the point.

89. Although Pham is not binding authority for any proposition which might avail the Respondent, the Commission considers that in the particular circumstances of this case there can be no principled objection to taking it into account. This conclusion reflects the majority view in Pham which, albeit obiter, is strongly persuasive. Had the instant case entailed a subtraction from existing rights, the Commission would have been considerably more cautious, and may well have required further submissions from the parties.

90. In our view, the critical question is whether the *Note Verbale* does represent sufficiently compelling evidence of established practice in Bangladesh such as to discharge the burden of proof which rests on the Respondent. For these purposes it matters little whether the question is posed in terms of how the authorities in Bangladesh chose to interpret the law they have caused to come into effect, or how they choose to apply it in practice. The dividing line between law and practice is somewhat difficult to identify, and we would be content to treat the instant case as a form of hybrid.

91. At this stage, it is convenient to introduce our consideration of the second legal issue in respect of which the parties are not *ad idem*, namely the incidence and application of the burden of proof. More precisely, the issue is whether on an appeal under the relevant provisions of the Special Immigration and Appeals Commission Act 1997 ("the SIAC Act 1997"), the burden is on the Appellants or on the Respondent to prove the fact of statelessness. The circumstances in which this point has arisen now fall to be explained.

92. On 23rd October 2018 the Commission received a Note from the Appellants' counsel drawing our attention to the decisions of the Court of Appeal in Hashi v SSHD [2016] EWCA Civ 1136 and AS (Guinea) v SSHD [2018] EWCA Civ 2234. The latter decision was handed down on 12th October 2018, being the second day of the hearing before us. AS (Guinea) is authority for the propositions that in a situation where a person seeks to qualify under the Immigration Rules for LTE or LTR as stateless, the burden of proof resides on him or her; that it is incumbent on such an individual to take all reasonably practicable steps to submit relevant material to the authorities; and, furthermore, that s/he ought to apply for nationality of the State with which there is the closest connection. The Commission agrees with the Appellants that this authority does not directly bear on section 40(4) of the 1981 Act, which is a provision not concerned with qualification but deprivation. Additionally, the Appellants have, through Professor Hoque, submitted relevant evidence bearing on the issue of settled practice, and have therefore discharged any obligation on them to place salient material before us. The Commission do not understand it to be the Respondent's case that the Appellants should have applied for Bangladeshi citizenship at any stage: the Crown's argument is that the Appellants enjoyed such citizenship or nationality as a matter of right on the relevant dates in 2017.

93. Paragraphs 23 and 24 of Hashi are more directly in point:

> "No doubt the Secretary of State has the burden of showing that she was satisfied that her order would not make Mr Hashi stateless. That is a comparatively easy burden to discharge and Mr Hashi does not challenge that she was so satisfied.
>
> But Mr Hashi is entitled to and does assert that she was wrong to be so satisfied and on that question he must have the relevant burden of proof. If at the end of the day the court is left in genuine doubt whether a person who is to be deprived of his British citizenship would be stateless, his claim to challenge the Secretary of State's decision will fail. Such cases will inevitably be rare since, if the challenge is a serious matter, there will have to be evidence of the relevant law as there was in this case. The court will then make up its mind on that evidence as SIAC did. In Al-Jedda v SSHD [2012] EWCA Civ 358, Richards LJ recorded (paras 112-3) that there was no dispute in that case that the burden of proof was on the applicant on the balance of probabilities. He expressed no surprise at the absence of dispute. Neither do I."

94. Strictly speaking, as Mr Sheldon accepts, this passage is *obiter* and not essential to the Court of Appeal's decision. However, it is strongly persuasive. Undeterred, Mr Southey submitted that it was *per incuriam* (we are not convinced that he needed to put his argument so high), because it is inconsistent with other authority, including Pham and A/S Tallinna Laevauhisus v Estonian State Steamship Line [1947] 80 Ll Rep 99, and draws an unprincipled distinction between the position of the Respondent on the one hand and this Commission on the other. On this latter point, see paragraph 32 of the judgment of Lord Wilson JSC in Al-Jedda in the Supreme Court ([2014] AC 253).

95. On 25th October Mr Sheldon replied in writing. He expressed his gratitude to Mr Southey for drawing these authorities to the Commission's attention, and observed that he was unaware of them. Given that these authorities scarcely avail the Appellants' case, the Commission would also like to record our appreciation for Mr Southey, his junior and their instructing solicitors, and observe that their conduct has been in the very best tradition of the legal profession.

96. Mr Sheldon submitted that Hashi amounts to strong support for the proposition - albeit not binding authority - that the burden is on the Appellants. There is also strongly persuasive authority in the form of Al-Jedda (per Richards LJ) and Abu Hamza v SSHD (Appeal No. SC/23/2003), and the absence of adverse comment by Lord Wilson. The Commission will need to return to Mr Sheldon's submission on the Estonian State Steamship Line case which we do not record at this stage.

97. The Commission has reflected on these written submissions, and has

determined that there is no need for further oral argument. Our starting-point is that foreign law and the issue of statelessness is one of fact. As Lindblom LJ observed in Hashi, the vast majority of appeals in nationality cases do not turn on the incidence of the burden of proof - we would add, for no other reason that most cases are not finely balanced. The issue for the Respondent under section 40(4) is whether the making of a deprivation order would render the individual in question stateless. Nothing turns on the meaning of "satisfied" because, once an appeal has been brought under section 2B of the SIAC Act 1997, the salient question of fact must now be determined by the Commission. Under section 4 of that Act, the Commission must allow the appeal if it considers that the Respondent's section 40(4) determination "was not in accordance with the law … applicable to the case". Thus, if the Commission is of the view that the Respondent should have been satisfied that his deprivation order would render the Appellants stateless, the Commission is obliged to allow the appeal. This is not an exercise akin to judicial review, because the Commission's fact-finding exercise takes into account all the available evidence, whether or not it was considered by the Respondent.

98. In our judgment, the wording of section 4(1) of the SIAC Act 1997 confers a burden on the Appellants to prove that deprivation would render them stateless. This does not entail any form of proportionality assessment, *pace* Mr Southey: it is a pure question of fact, to be determined primarily on the expert evidence. If, for example, there was no evidence of foreign law placed before the Commission, the burden would not be capable of being discharged. The language of section 4(1), read in conjunction with section 40(4) of the 1981 Act, does not place a burden on the Respondent to prove anything, still less a negative.

99. However, if these appeals were being decided without reference to the *Note Verbale*, the burden residing on the Appellants would have been discharged. That is clear from our anterior findings. In short, the Commission has reached favourable conclusions from the Appellants' perspective as to the meaning, effect and application of relevant provisions of Bangladeshi law as set forth in the 1951 Act, the 1972 Order and the 2008 Instruction. The question, though, is how we should approach the *Note Verbale*. It is said to be evidence of settled practice which makes all the difference. Is it incumbent on the Appellants to prove that the *Note Verbale* is not (sufficient) evidence of settled practice, and/or if the Commission is left harbouring a doubt (per Hashi) are we required to determine this appeal in the Respondent's favour?

100. The Commission does not consider that the law continues to treat the Appellants as having to shoulder the relevant burden. *Generally*, the burden is on the Appellants in this appeal, as we have already pointed out. However, within the ambit of this appeal a *specific* question has arisen in relation to the *Note Verbale*. Is there a settled or established practice in Bangladesh such that individuals in the position of these Appellants are deemed to be entitled to nationality of that country? The *Note Verbale* is put forward by the Respondent as being sufficient evidence of such a practice. In this context we part company with paragraph 6 of Mr Sheldon's latest Note, which appears to

us to elide what we have called the general and the specific questions, and would hold that the burden of proof must be on the Respondent in connection with that issue.

101. The decision of the Court of Appeal in the Estonian State Steamship Line case is directly in point. Specifically:

> "The material proposition of foreign law must be proved by a duly qualified expert in the law of the foreign country and the burden of proof rests on the party seeking to establish that law."

102. Mr Southey did not take the point that the content of the *Note Verbale* has not been properly proved in any event (see also, Phipson on Evidence, 19th edition, paragraph 33-76), and we therefore say nothing more about that. The real point here is that "the material proposition of foreign law" is that there is a settled or established practice in Bangladesh which means that these Appellants are not stateless. Envisaged in these specific terms, the burden of proof must reside on the Respondent because he is contending that such a practice exists. If the position were otherwise, exiguous evidence of state practice would be sufficient in a case such as this to engender a level of doubt which, in line with Hashi, would require the Commission to dismiss the appeals.

103. The Commission therefore resolves the issue of legal principle in the Appellants' favour. The G3 Commission appear to have proceeded on the same basis although it was deprived of any submissions to the contrary. The issue now arises as to whether the Respondent has persuaded us to the probabilistic standard that there does exist in Bangladesh a settled or established practice which means that the Appellants were not stateless in 2017.

104. The resolution of this question has proved to be uncommonly difficult. We must proceed on the basis that the *Note Verbale* was given in good faith and the Bangladeshis did not know why these particular questions were being put. In any event, a cynic could point out that had the Bangladeshis suspected the true reason, they might have preferred to give an explanation which led to the Appellants being stateless, and having to return to the UK. At paragraph 65 of his judgment in Pham, Lord Mance JSC refers to a practice which is "contrary to any conceivably legitimate interpretation of the law". Upon careful reflection, we cannot conclude that the *Note Verbale* goes so far as to articulate such a practice. An application of the 2008 Instruction which chimes with its policies and objects, read benevolently, could legitimately lead to a state of affairs whereby Bangladeshi citizens who are dual nationals at the time of their birth do not require the discretionary grant of dual nationality certificates. This would be a purposive construction *par excellence*, but it would not be illegitimate in the sense contemplated by Lord Mance. Such an application of the 2008 Instruction, as a matter of practice or policy, would also be consistent with the absence of evidence of any problems facing the many hundreds of thousands of dual nationality Bangladeshis, many of whom have an enduring interest in their ancestral

homeland.

105. On the other hand, the Commission is confronted by the nature and terms of the *Note Verbale*, the sparseness of the reasoning it provides, the assumption underlying it that this is what the law provides, and what Professor Hoque calls an "extra-official interpretation", falling short of custom and usage which has force of law in Bangladesh. There is no evidence, beyond what is said in the *Note*, that this is how the 2008 Instruction has been applied in Bangladesh on a systematic basis. Ms Rafique could have provided it had it existed, but instead has informed the Commission that the NVR system is her standard mode of recourse, seemingly because it is hassle free. All we have is the absence of evidence of any difficulty, which absence could well be explained by the NVR scheme. It is surprising that, on a matter of this potentially far-reaching importance, the *Note Verbale* is all that there is.

106. Ms Rafique has failed to address, still less refute, Professor Hoque's arguments as summarised under paragraph 43 above. Moreover, if there were ever to be a dispute on this topic, it is unclear what status the judicial review court in Bangladesh would accord to the *Note Verbale*. If Her Majesty's Government gave similar assurances in a document of this sort, these would not be regarded (*pace* Professor Hoque) as "extra-official", and a good reason would need to be adduced in the Administrative Court for departing from them. Yet, the Commission has no idea what status or weight would be given to the *Note Verbale* as a matter of the public law of Bangladesh. In this regard we continue to note Professor Hoque's observations relating to Article 152 of the Bangladeshi constitution.

107. On the basis of Professor Hoque's evidence, it is difficult to conclude that the *Note Verbale* represents evidence of a settled practice in Bangladesh, still less one which satisfies the standards imposed by, or inherent in, the rule of law.

108. The Commission continues to recognise the difficulty of this point, and assesses the merits as being finely balanced. Ultimately, however, the Commission remains unpersuaded that the *Note Verbale* clinches the case for the Respondent.

109. We should add that as part of our consideration of this preliminary issue, the Commission has received CLOSED material and submissions. We have however determined the preliminary issue in this case without reference to the CLOSED material: our reasons have been briefly encapsulated in a CLOSED judgment.

H. Disposal

110. These appeals must be allowed.

Mr Justice Jay