Hilary Term
[2015] UKSC 19
On appeal from: [2013] EWCA Civ 616

JUDGMENT

Pham (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Wilson
Lord Sumption
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

25 March 2015

Heard on 18 and 19 November 2014

Appellant
Hugh Southey QC
Alex Burrett

(Instructed by J D Spicer Zeb, Solicitors)

Respondent
Robin Tam QC
Tim Eicke QC
Melanie Cumberland
(Instructed by Treasury Solicitor)

Intervener (Open Society Justice Initiative)
James A Goldston
Simon Cox
Laura Bingham
(Instructed by Freshfields Bruckhaus Deringer LLP)

LORD CARNWATH: (with whom Lord Neuberger, Lady Hale and Lord Wilson agree)

1. The central issue in this appeal is whether the Secretary of State was precluded under the British Nationality Act 1981 from making an order depriving the appellant of British citizenship because to do so would render him stateless. This turns on whether (within the meaning of article 1(1) of the 1954 Convention relating to the Status of Stateless Persons) he was "a person who is not considered as a national by any state under the operation of its law". If this issue is decided against him he also seeks to argue that the decision was disproportionate and therefore unlawful under European law.

Background

2. The appellant was born in Vietnam in 1983 and thus became a Vietnamese national. In 1989, after a period in Hong Kong, the family came to the UK, claimed asylum and were granted indefinite leave to remain. In 1995 they acquired British citizenship. Although none of them has ever held Vietnamese passports, they have taken no steps to renounce their Vietnamese nationality. The appellant was educated in this country and attended college in Kent. At 21 he converted to Islam. Between December 2010 and July 2011 he was in the Yemen, where, according to the security services but denied by him, he is said to have received terrorist training from Al Qaida. It is the assessment of the security services that at liberty he would pose an active threat to the safety and security of this country. That assessment has not yet been subject to judicial examination.

3. On 22 December 2011 the Secretary of State served notice of her decision to make an order under section 40(2) of the British Nationality Act 1981 depriving the appellant of his British citizenship, being satisfied that this would be "conducive to the public good". She considered that the order would not make him stateless (contrary to section 40(4)) because he would retain his Vietnamese citizenship. The order was made later on the same day and served on the appellant, followed by notice of her decision to deport him to Vietnam. Thereafter, the Vietnamese government has declined to accept him as a Vietnamese citizen.

4. The United States of America have asked for him to be extradited to stand trial in that country. The Home Secretary certified that the request of the USA for the extradition of the appellant was valid. The appellant challenged the

request before District Judge Nicholas Evans over several dates during July and October 2013. The District Judge rejected all grounds of challenge in a judgment handed down on 26 November 2013. The Home Secretary made her decision to order the extradition of the appellant on 22 January 2014 and the appellant appealed. The hearing before Aikens LJ and Simon J took place on 15 and 16 July 2014. The parties made further written submissions on 17 and 24 November 2014 and 1 December 2014. The Administrative Court gave its judgment on 12 December 2014, dismissing the appeal ([2014] EWHC 4167 (Admin). At para 91 Aikens LJ held that the issue of the appellant's citizenship "makes no difference to his relevant article 6 rights". The Administrative Court refused to certify a question of general public importance on 30th January 2015. Under the relevant provisions of the Extradition Act 2003, the appellant must be extradited within 28 days, that is, no later than 26 February 2015.

The appeal proceedings

5. On 13 January 2012 he appealed against the decision to remove his British citizenship on legal and factual grounds. His grounds of appeal asserted (inter alia) that he was married to a British citizen with a child, that he was of good character and was not linked to terrorism as claimed, and that the decision was incompatible with his rights under the European Convention on Human Rights. He also claimed that deprivation of British citizenship was prohibited by section 40(4) because it would render him stateless. This was on the grounds that Vietnamese law did not permit dual nationality, and accordingly his Vietnamese citizenship had been lost when he became a British citizen. The Secretary of State had certified (under section 40A(2)) that her decision had been taken in part in reliance on information, disclosure of which would be contrary to the public interest. His appeal accordingly lay to the Special Immigration Appeals Commission (SIAC): Special Immigration Appeals Commission Act 1997, section 2B. By section 4 of that Act the panel may consider not only whether the decision was in accordance with law, but also whether any discretion exercised by the Secretary of State should have been exercised differently.

6. In June 2012 SIAC held a hearing to determine, as a preliminary issue, the issue of statelessness. On 29 June 2012 the panel allowed the appeal, holding that the effect of the Secretary of State's decision would be to render him stateless. On 24 May 2013 that decision was reversed by the Court of Appeal ([2013] EWCA Civ 616: Jackson, Lloyd Jones and Floyd LJJ), which remitted the case to SIAC for further consideration of the other grounds of appeal.

7. SIAC had given a fully reasoned decision on the statelessness issue in an open judgment. As the Court of Appeal noted, it had supplemented its open decision with a separate short closed judgment, which the Court of Appeal had read at the request of the Secretary of State. Although the panel indicated that an appellate court would need to refer to the closed judgment "fully to understand the reasons for our decision" (para 2), the Court of Appeal found nothing in it which affected their conclusions in the case (para 22, per Jackson LJ). In this court neither party has invited us to look at the closed judgment nor suggested that the closed material contains anything which might affect our conclusions on the questions we have to decide.

Consideration by SIAC

8. SIAC noted the course of dealings between the British and Vietnamese governments in connection with the decision made in December 2011. Although there was evidence of discussions between the two governments beginning in October 2011, the panel found that no information "about the identity, date and place of birth or alleged activities of the appellant" was communicated to the Vietnamese government until 22 December. It continued:

> "It is not suggested that the Vietnamese government then had any view about the status of the appellant. There have been extensive discussions between the British and Vietnamese governments about him since then, the relevant parts of which are analysed in the closed judgment. It is a fact that, despite being provided with those details, the Vietnamese government has not expressly accepted that the appellant is (and was on 22 December 2011) a Vietnamese citizen. For reasons explained in the closed judgment, we are satisfied that this omission is deliberate …
>
> There is no evidence or suggestion that the Vietnamese government has taken any action since 22 December 2011 to deprive the appellant of Vietnamese citizenship." (paras 7-8)

9. They were shown extracts of the relevant Vietnamese laws, and heard evidence from two Vietnamese lawyers, Ambassador Binh for the appellant and Dr Nguyen Thi Lang for the Secretary of State. It is unnecessary to do more than summarise the main points, which are not now in dispute.

10. Following the end of the Vietnam war, North and South Vietnam were reunited in 1975, eight years before the appellant was born. At that time nationality was governed by Order 53, dating from 1945, which continued in force until 1988. Under that order children born in Vietnam automatically acquired Vietnamese citizenship. The order also provided (with one irrelevant exception) that a Vietnamese citizen would lose that nationality on acquiring foreign nationality, thus in effect prohibiting dual nationality.

11. That order was replaced by the 1988 Nationality Law, which remained in force until 1998, and was therefore the operative law when the appellant acquired British citizenship in 1995. Article 3 of the 1988 Law provided:

> "Recognition of a single nationality for Vietnamese citizens. The State of the Socialist Republic of Vietnam recognizes Vietnamese citizens as having only one nationality being Vietnamese."

Unlike Order 53 the 1988 law did not in terms prohibit dual nationality. SIAC rejected the appellant's submission that it did so by implication (para 10). It found further (para 17) that the possibility of dual citizenship was expressly acknowledged by a 1990 decree by the Council of Ministers, which made specific provision for "Vietnamese citizens who concurrently hold another nationality". Ambassador Binh, who had played a part in drafting the 1988 legislation, gave evidence of the then policy to encourage the return of Vietnamese citizens who had left the country for political or economic reasons (para 15).

12. Article 8 of the 1988 Law provided that a citizen might lose Vietnamese nationality in four defined circumstances: (1) being permitted to relinquish Vietnamese nationality, (2) being deprived of that nationality, (3) losing that nationality as a result of international treaties, or (4) losing Vietnamese nationality "in other cases as provided for in this Law". Articles 9, 10, 12 and 14 provided further details of the four categories. Article 15 of the 1988 Law provided:

> "1. The Council of Ministers shall determine in all cases the granting, relinquishing, restoration, depriving and revoking of decisions to grant Vietnamese nationality.
>
> 2. Procedures for deciding all questions of nationality shall be determined by the Council of Ministers."

13. The 1988 law was replaced by a new 1998 Nationality Law with effect from January 1999 (para 12). It contained similar provisions in respect of the loss of nationality. The State President was given sole power to determine nationality questions in individual cases. That law was replaced in turn by the 2008 Nationality Law with effect from July 2009. As the panel found (para 13) decision-making power rested with the President; there was no provision for determination of any such issue by a court.

14. The panel accepted, in line with the evidence of the expert for the Secretary of State, that on the basis of the legislative texts alone the appellant remained a Vietnamese citizen:

> "None of the laws since 1988 have provided for automatic loss of Vietnamese citizenship on the acquisition of foreign citizenship. All contained provision for relinquishment - with permission - or deprivation. In each case, the Vietnamese state would play a determinative part: granting or withholding permission to relinquish and making a decision to deprive. Further, article 2 of the 1990 Decree expressly acknowledges the possibility of holding dual citizenship. There being no provision for automatic loss on acquiring foreign citizenship, the natural conclusion is that the effect of article 3 is only that the Vietnamese state will not recognise the foreign citizenship of a Vietnamese national."(para 17)

15. However, in their view the issue could not be determined principally by reference to the text of the law. They accepted Ambassador Binh's evidence, from which they drew the following conclusions:

> "The true position is that stated by Ambassador Binh: the 1988 law was deliberately ambiguous so as to permit the Executive to make whatever decisions it wished. It has, consistently, wished to encourage the return of prosperous and talented individuals of Vietnamese origin, for economic purposes and may even in recent years have encouraged the return of those with strong family connections. It has not, however, lost the ability, as a matter of Vietnamese law and/or state practice, to decline to acknowledge, as Vietnamese citizens, individuals of Vietnamese origin whose return it wishes to avoid.
>
> Now that the Vietnamese government has received adequate information about the appellant, we are satisfied that it does not

> consider him to be a Vietnamese national under the operation of its law. Its decision may to western eyes appear arbitrary. Nevertheless, for reasons which are more fully explained in the closed judgment, we are satisfied that that is the stance of the Vietnamese government. Given that both Vietnamese law and state practice give it that power, we must accept that it is effective. Accordingly, the answer to the preliminary question is that the decision of the Secretary of State to deprive the appellant of his citizenship on 22 December 2011 did make him stateless and so is not permitted under section 40(4) of the 1981 Act." (paras 18-19)

16. On its face this was a conclusion about the position taken by the Vietnamese government subsequent to the relevant decision of the Secretary of State. On that basis, the decision of the Secretary of State would not itself have rendered him stateless at the time it was taken. To understand how the panel related their conclusion to the time of that decision, it is necessary to refer to an earlier passage where they explained their understanding of the issue before them:

> "The precise question which we have to answer is whether, as at 22 December 2011, the state of Vietnam did or not consider the appellant to be a Vietnamese national under the operation of its law. That is not a question which can sensibly be answered by reference only to the inadequate information available to the Vietnamese government as at that date. On the facts of this case, the question must be answered by determining what the settled attitude of the Vietnamese government is to the appellant's status now that it has all the information which it needs to form its view." (para 7)

17. They considered and dismissed a submission by Mr Tam QC for the Secretary of State that if, under the relevant law, the appellant was a Vietnamese citizen on 22 December 2011, "a subsequent decision by the Vietnamese government not to recognise that citizenship would mean that he was not *de jure* stateless when the deprivation order was made". They said:

> "We do not accept that submission. We prefer and have applied the formulation set out above: to determine what the settled view of the Vietnamese government is, now that it knows the facts, and to apply it to the stance that it would have taken if it had known them on 22 December 2011. There is a reasonably close analogy with what might happen in a more conventional

> case. If, under the law of a state, nationality status was doubtful but was subsequently determined by a court of that state, SIAC would be bound to accept that the court's determination applied as at the date of deprivation even if, at that date, the position was unclear." (para 8)

The Court of Appeal

18. The sole substantive judgment was given by Jackson LJ, with whom the other members of the court agreed. He discussed at some length the relevant legislative and non-legislative materials relating to the 1954 Convention relating to the Status of Stateless Persons, including papers and reports produced in connection with a meeting of experts convened by the UNHCR in Prato, Italy in 2010. As will be seen, the availability to us of more up-to-date guidance from the UNHCR makes it unnecessary to comment in detail on his review of the earlier reports.

19. Jackson LJ's principal reasoning is found in paras 88-92 of the judgment:

> "88. The position under Vietnamese nationality law is tolerably clear. Mr Pham retained his Vietnamese nationality through all the events of the 1980s and the 1990s. The 2008 Law did not change Mr Pham's legal status. The fact that in practice the Vietnamese Government may ride roughshod over its own laws does not, in my view, constitute 'the operation of its law' within the meaning of article 1.1 of the 1954 Convention. I accept that the executive controls the courts and that the courts will not strike down unlawful acts of the executive. This does not mean, however, that those acts become lawful.
>
> …
>
> 91. The Vietnamese Government has now, apparently, decided to treat Mr Pham as having lost his Vietnamese nationality. They have reached this decision without going through any of the procedures for renunciation, deprivation or annulment of Vietnamese nationality as set out in the 2008 Law and its predecessors. I do not accept that this can be characterised as the 'position under domestic law' as that phrase is used in para 18 of the Prato Report.

> 92. If the relevant facts are known and on the basis of those facts and the expert evidence it is clear that under the law of a foreign state an individual is a national of that state, then he is not *de jure* stateless. If the Government of the foreign state chooses to act contrary to its own law, it may render the individual *de facto* stateless. Our own courts, however, must respect the rule of law and cannot characterise the individual as *de jure* stateless. If this outcome is regarded as unsatisfactory, the remedy is to expand the definition of stateless persons in the 1954 Convention or in the 1981 Act, as some have urged. The remedy is not to subvert the rule of law. The rule of law is now a universal concept. It is the essence of the judicial function to uphold it."

Statelessness

20. It is common ground that the term "stateless" in section 40(4) has the same meaning as in article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, which reads (in the English version):

> "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."

As the introduction to the Convention makes clear, the French and Spanish versions are "equally authentic" to the English text. They read respectively:

> "Aux fins de la présente Convention, le terme 'apatride' désigne une personne qu'aucun État ne considère comme son ressortissant par application de sa législation."

> "A los efectos de la presente Convención, el término 'apátrida' designará a toda persona que no sea considerada como nacional suyo por ningún Estado, conforme a su legislación."

21. As Jackson LJ explained (para 26ff), academic texts and international instruments on this subject have drawn a distinction between *de jure* and *de facto* statelessness: that is, between those who have no nationality under the laws of any state, and those who have such nationality but are denied the protection which should go with it. It is common ground that the definition in article 1 corresponds broadly to the former category, but equally that it is

the words of the article itself which are determinative. Under the 1969 Vienna Convention on the Law of Treaties article 31(1), those words must be read in good faith and "in the light of [the] object and purpose" of the treaty.

22. The UN High Commissioner for Refugees ("UNHCR") has a special role, as the designated body (under article 11 of the 1961 Convention on the Reduction of Statelessness) to which a person claiming the benefit of the Convention may apply for examination of the claim and for assistance in presenting it to the appropriate authority. The Court of Appeal referred to a report by its senior legal adviser, Hugh Massey, for a meeting of experts convened by the UNHCR in Prato in 2010, and to the report ("Prato Report") which emerged from that meeting. However the Court of Appeal was not apparently referred to the guidelines published by the UNHCR in February 2012, following the Prato Report, nor to the guidance issued in May 2013 by the Secretary of State herself, based to a large extent on the UNHCR guidelines.

23. A further meeting of experts in Tunisia, convened by the UNHCR in autumn 2013, emphasised the need to respect the decision of the state whose nationality is in issue:

> "6. A Contracting State must accept that a person is not a national of a particular State if the authorities of that State refuse to recognize that person as a national. A Contracting State cannot avoid its obligations based on its own interpretation of another State's nationality laws which conflicts with the interpretation applied by the other State concerned."

24. We have the advantage of even more recent guidance from the UNHCR in the form of a handbook issued in June 2014, which draws on the results of the expert meetings and the earlier guidance. The following passage appears under the heading "not considered as a national ... under the operation of its law":

> "*Meaning of 'law'*
>
> The reference to 'law' in article 1(1) should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a

> tradition of precedent) and, where appropriate, customary practice.
>
> *When is a person 'not considered as a national' under a State's law and practice?*
>
> Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status. This is a mixed question of fact and law.
>
> Applying this approach of examining an individual's position in practice may lead to a different conclusion than one derived from a purely formalistic analysis of the application of nationality laws of a country to an individual's case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to 'law' in the definition of statelessness in article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice." (paras 22-24)

25. A similar passage had appeared in the 2012 Guidelines (paras 15-17). This, we were told by Mr Tam on instructions, was the basis of the following "paraphrase" in the Secretary of State's 2013 guidance:

> "Establishing whether an individual is not considered as a national under the operation of its law requires an analysis of how a State applies its nationality laws **in practice** and has applied them to the individual, taking account of any review/appeal decisions that may have had an impact on the individual's status. The reference to 'by the operation of its law' in the definition of a stateless person in article 1(1) is intended to refer to those situations where State practice does not follow the letter of the law." (p 10)

If this wording was intended to imply that there is something in the word "operation" which justifies departure from the letter of the law, it is not to my mind an accurate reflection of the passage in the UNHCR text. That passage, as I read it, is suggesting, not that the law of the country is irrelevant, but

rather that, having regard to the purpose of the article, the term "law" should be interpreted broadly as encompassing other forms of quasi-legal process, such as ministerial decrees and "customary practice".

26. The contrast is brought out in a later passage of the UNHCR handbook dealing specifically with the "Impact of appeal/review proceedings":

> "In instances where an individual's nationality status has been the subject of review or appeal proceedings, whether by a judicial or other body, its decision must be taken into account. In States that generally respect the rule of law, the appellate/review body's decision typically would constitute the position of the State regarding the individual's nationality for the purposes of article 1(1) if under the local law its decisions are binding on the executive. Thus, where authorities have subsequently treated an individual in a manner inconsistent with a finding of nationality by a review body, this represents an instance *of a national's rights not being respected rather than the individual not being a national*.
>
> A different approach may be justified in countries where the executive is able to ignore the positions of judicial or other review bodies (even though these are binding as a matter of law) with impunity. This may be the case, for example, in States where *a practice of discriminating against a particular group is widespread through State institutions*. In such cases, the position of State authorities that such groups are not nationals would be decisive rather than the position of judicial authorities that might uphold the nationality rights of such groups." (paras 47-48, emphasis added)

27. In the first case, where a finding of nationality in respect of an individual has been made by a competent body under the relevant law, his status under the article is not affected by the fact that the finding may be ignored by the state authorities. The position is different, as in the second case, where there is a "practice" of discriminating against a particular group, regardless of the strict legal position. Such a practice, it seems, should be treated as equivalent to the "operation of law" under the article.

28. I do not with respect find some of the UNHCR guidance easy to reconcile with the wording of the article itself, especially when regard is had to the equivalent expressions in the French or Spanish versions. The Spanish

version in particular seems to indicate, perhaps even more clearly than the English or French versions, the need for "conformity" with a law of some kind. Furthermore, the reference to "its" law seems to imply that the starting point, at least, is the relevant national law where one exists. Thus in the present case, the relevant Vietnamese law since 1998 has taken the form of a detailed framework for decisions on the acquisition and loss of nationality. Admittedly decision-making power has been conferred on the executive, and is not subject to court review. But it was expressed in article 15 of the 1988 Law, not as a general discretion, but as a power relating to the "granting, relinquishing, restoration, depriving and revoking of decisions", thus apparently following the pattern of the more detailed provisions in the preceding articles. It is difficult to see how a process of consideration by the state which pays no regard at all to this legal framework could be said to be "by operation" of "its" law.

29. However, Mr Tam, as I understand him, does not seek on behalf of the Secretary of State to question the authority of the UNHCR guidance, nor to rely on any possible difference of emphasis between the three official versions of the text. It is appropriate therefore to take the guidance into account in considering the facts of the present case, without necessarily expressing a concluded view on its accuracy as a legal interpretation of the article.

30. Finally under this section I should note a submission of the intervener (the Open Society Justice Initiative) relying on international jurisprudence relating to human rights. It is sufficient to refer to one of the three cases cited, a decision of the European Court of Human Rights: *Kurić v Slovenia* (2012) 56 EHRR 20. It concerned Yugoslav citizens resident in Slovenia at the time of independence, but who failed to acquire Slovenian citizenship and whose names were "erased" from the register of permanent residents, thus making them stateless. It was not in dispute that the "erasure" and its repercussions amounted to an interference with the "private or family life" of the applicants under article 8 of the Convention (para 339). It was held that the domestic legal system had failed to regulate clearly the consequences of the "erasure", and that it involved an interference which was not "in accordance with the law" as required by article 8(2) (para 346). This decision, unsurprising in its own context, was not concerned with the definition of statelessness in the 1954 Convention, and in my view (like the two other human rights cases cited by the intervener) throws no light on the issues we have to decide.

The issues

31. The issues for this court, as set out in the agreed statement, are:

i) When determining whether a person is considered as a national of a State under the operation of its law (as that phrase is used in article 1(1) of the 1954 Convention):

a) Whether that question is to be decided by reference to the text of the nationality legislation of the State; or

b) Whether the operation of the law of that State is to be taken to include the practice of the government to make decisions which cannot be challenged effectively in the courts.

ii) When considering if it would be lawful to deprive a person of his British citizenship when that deprivation would entail loss by him of citizenship of the EU, whether such consideration falls within the ambit of EU law and whether any (and if so what) consideration must be given to the question of proportionality.

iii) If so, whether it would necessarily be disproportionate and therefore unlawful under EU law to deprive the appellant of his British citizenship for the sole reason that the Vietnamese government does not consider the appellant to be a Vietnamese national under the operation of Vietnamese law, in circumstances in which the appellant has no other nationality.

32. Although these issues have been agreed by counsel for both parties, there is a question whether issues (ii) and (iii), involving reference to European law, are properly within the scope of the preliminary issue as directed by SIAC: that is, whether the Secretary of State's decision was made "in breach of section 40(4) of the British Nationality Act 1981".

Issue (i) – Interpretation of the 1954 Convention

33. Mr Southey QC for the appellant criticises the reasoning of Jackson LJ as being unduly influenced by concerns regarding the "rule of law", and the lack of any process for court review of the decision of the executive in Vietnam. Such concerns, he says, were directly contrary to the approach advocated by the UNHCR guidance quoted above. That indicates that "operation of its law" in article 1(1) refers not to the letter of the law as such, but rather to its operation in practice, even in states where ordinary principles of the rule of law are ignored.

34. In the light of the guidance now available to us, but not to the Court of Appeal, these criticisms have some validity. It is clear that, as understood by the UNHCR at least, the term "law" is to be interpreted broadly as including ministerial decrees or practices, even if not subject to court review, and even where they appear to depart from the substance of the domestic law. Familiar principles of the rule of law, as it would be understood in this country, are not the governing consideration.

35. As I have said, the relevance of the UNHCR guidance is not in dispute. However, even the broadest interpretation suggested by those passages does not in my view provide sufficient support for SIAC's reasoning. In the first place, all the various formulations imply, to my mind, that the state in some form has adopted a position or practice, either in the individual case, or in cases of an identifiable category of which it is part. There is nothing in the evidence relied on by SIAC which goes so far. The 1988 Law was "deliberately ambiguous" on the issue of dual nationality, to allow the Executive to make "whatever decisions it wished". It was not suggested that, as at the date of the Secretary of State's decision itself, the Vietnamese government "had any view about the status of the appellant"; nor was there any "evidence or suggestion" that that government had "taken any action since 22 December 2011 to deprive the appellant of Vietnamese citizenship". All that could be said was that, despite being provided with the necessary information, the Vietnamese government "has not expressly accepted that the appellant is (and was on 22 December 2011) a Vietnamese citizen", and that its omission to do so was "deliberate".

36. It is true that SIAC's final conclusions as to the position of the Vietnamese government (para 19) were expressed rather in more positive terms: the panel was "satisfied" that "it does not consider him to be a Vietnamese national under the operation of its law"; that was referred to as "its decision", albeit "arbitrary" to western eyes; and it was found to be "the stance of the Vietnamese government", for reasons "more fully explained in the closed judgment". I would normally hesitate to depart from such a finding without seeing the closed judgment on which it is said to be at least partly based. However, as already mentioned, the Court of Appeal having read the closed judgment found nothing of significance, nor were we invited by counsel for either party to look at the closed materials. The earlier findings by SIAC, summarised above, indicate that the appellant did not automatically lose his Vietnamese citizenship on acquiring British nationality, and that no action has been taken by the Vietnamese government, before or since 22 December 2011 to deprive him of that citizenship. Nor is there any evidence that the government issued a ministerial decree, or adopted any other form of practice or position which could be treated as equivalent to "law", even in the broadest sense used by the UNHCR. Rather the implication is that it has simply

declined, no doubt for policy reasons, to make any formal decision on the appellant's status, whether under the operation of its own nationality law or at all.

37. There is a further problem with the panel's reasoning. It recognised that it was directly concerned with the position as at the date of the Secretary of State's decision, by which time (on its own findings) no position of any kind could be attributed to the Vietnamese government. It sought to fill that gap by substituting the "settled attitude" of the government on that issue once it had the necessary information. It drew an analogy with a subsequent decision of a court on such status, which would take effect retrospectively. With respect to the panel, that comparison is misplaced. A court may indeed be given the function of determining status as at a particular date in the past. But there is nothing in the Vietnamese law to suggest that such a power was given to the executive under article 15 or its successors, nor in any event that it was purporting to make such a retrospective determination in this case.

38. In conclusion on issue (i), I would accept that the question arising under article 1(1) of the 1954 Convention in this case is not necessarily to be decided solely by reference to the text of the nationality legislation of the state in question, and that reference may also be made to the practice of the government, even if not subject to effective challenge in the courts. However, there is in my view no evidence of a decision made or practice adopted by the Vietnamese government, which treated the appellant as a non-national "by operation of its law", even adopting the broadest view of those words as interpreted by the UNHCR; nor in any event of one which was effective at the date of the Secretary of State's decision. The appeal under this ground must accordingly be dismissed.

Issues (ii) and (iii) – application of European law

39. These issues raise a new question as to whether the Secretary of State's decision fell with the ambit of European law, given that its effect would be to deprive him not only of British citizenship, but also of citizenship of the European Union; and if so what if any consideration must be given to the "proportionality" of the Secretary of State's action under well-established principles of European law. Ability to rely on European law would also, it is said, offer significant procedural advantages identified in *ZZ (France) v Secretary of State for the Home Department* [2013] QB 1136, which would not be available under domestic law.

40. The appellant's case on proportionality, if it arises, can be shortly stated. As Mr Southey submits, it cannot be proportionate to deprive a person of their EU citizenship, in circumstances in which no other state will recognise them as a national so that they will be denied all the benefits of any citizenship anywhere. They are "denied their right to rights". Further, the proportionality principle will be violated if there are less onerous means of achieving the same aim. Where no other state will accept the appellant as a national, there is no reason to think that the objective of removing him from this country will be achieved. The risk to national security is better addressed by other powers available to the Secretary of State to manage the risk, such as under the Terrorism Prevention and Investigation Measures Act 2011.

41. We were told by Mr Southey that these issues were not raised before the Court of Appeal, because they were thought to be foreclosed by the decision of the latter court in *R (G1) v Secretary of State for the Home Department* [2013] QB 1008. Although Mr Tam had not objected to their inclusion in the agreed statement, he submitted that, not having been identified by SIAC as issues for the preliminary hearing, they were not strictly open for consideration by us on this appeal. Furthermore, the issue of principle should not be considered in isolation from the factual issues relevant to proportionality, including the strength of the national security case. The intervener supports the appellant's case on these issues, and further submits that if we are left in any doubt on the application of EU law we should make a reference to the Court of Justice.

European citizenship

Rights under the treaties

42. European citizenship is a relatively new concept, dating only from the entry into force of the Maastricht treaty in 1993. Its present statutory source is article 9 of the Treaty of the European Union ("TEU") (replacing article 17(1), or before amendment article 8, of the EC Treaty), which provides:

> "Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

Further provision is made by article 20 of the Treaty on the Functioning of the European Union ("TFEU"):

> "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

By TFEU article 20(2) citizens of the Union "shall enjoy the rights and be subject to the duties provided for in the Treaties". These rights include, inter alia,

> "(a) the right to move and reside freely within the territory of the Member States;
>
> (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
>
> (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
>
> (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language."

Mr Southey also draws our attention to the rights conferred on European citizens by the Charter of Fundamental Rights of the European Union.

European and domestic authorities

43. The relationship of European and national citizenship was considered by the European court in ***R v Secretary of State for the Home Department, Ex p Kaur*** (Case C192-99) [2001] All ER (EC) 250. The background was that, on its accession to the treaty in 1972, and again in revised form in 1982, the United Kingdom had made declarations as to the meaning of the term "national" as it was to be applied to this country. In 1992, for the purposes of the then Treaty on European Union, which first introduced the concept of EU

citizenship, the Conference of the Representatives of the Governments of the Member States, adopted Declaration No 2, annexed to the Final Act of the Treaty:

> "The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned …"

44. In *Kaur* the applicant was a Kenyan citizen of Asian origin, who had become a citizen of the United Kingdom and Colonies under the British Nationality Act 1948, but was not within the categories recognised as having a right of residence in this country under the Immigration Act 1971 or the British Nationality Act 1981, the terms of which were in this respect reflected respectively in the 1972 and 1982 declarations. It was held by the court that article 8 of the then treaty, under which any person "holding the nationality of a Member State" became a citizen of the Union, had to be interpreted taking account of the declarations.

45. The court referred to its decision in *Micheletti v Delegación del Gobierro en Cantabria* (Case-369/90) [1992] ECR I-4239, para 10, in which it had held that, under international law, it was for each member state, "having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality". Applying that principle, it was held that the 1972 declaration had been intended to clarify "the scope *ratione personae* of the Community provisions which were the subject of the Accession Treaty" and to define the United Kingdom nationals who would "benefit from those provisions and, in particular, from the provisions relating to the free movement of persons". The UK declarations did not have the effect of depriving any person of rights to which that person might be entitled under community law; their consequence rather was "that such rights never arose in the first place" (paras 23-26).

46. This decision was distinguished in Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449, [2010] QB 761, on which Mr Southey principally relies. In that case the applicant had automatically lost his original Austrian nationality when he moved to Germany and acquired nationality there by naturalisation, but he was subsequently deprived of the latter nationality because it had been obtained by deception. The question for the European court was whether the fact that the decision also deprived him of European

citizenship meant that it had to be made in accordance with European principles, including that of proportionality.

47. The Advocate General recognised that, if the scope of the Treaty was not to be widened, national provisions relating to the acquisition and loss of nationality could not come within the scope of Community law "solely on the ground that they may lead to the acquisition or loss of Union citizenship". However, he thought that a case would come within the scope of Community law if it involved "a foreign element, that is, a cross-border dimension". The present case, in his view, involved such a link with Community law because his loss of Austrian nationality arose from his exercise of rights of Union citizenship by moving to Germany (paras 10, 13).

48. The court agreed with the Advocate General's conclusion that European law was engaged, but without so explicitly relying on the cross-border element. The court reiterated the principle, established by *Micheletti* and other cases, that it was for each member state "having due regard to Community law" to lay down the conditions for the acquisition and loss of nationality (para 39); but this did not alter the fact that "in situations covered by European Union law, the national rules concerned must have due regard to the latter" (para 41). It continued:

> "42 It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.
>
> 43 As the Court has several times stated, citizenship of the Union is intended to be the fundamental status of nationals of the Member States …
>
> 44 Article 17(2) EC attaches to that status the rights and duties laid down by the Treaty, including the right to rely on article 12 EC in all situations falling within the scope ratione materiae of Union law ...

> 45 Thus, the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law …
>
> 46 In those circumstances, it is for the Court to rule on the questions referred by the national court which concern the conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status.
>
> …
>
> 48 The proviso that due regard must be had to European Union law does not compromise the principle of international law previously recognised by the Court ... that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law."

49. The court distinguished the case of *Kaur* on the grounds that, since she had not met the definition of a national of the United Kingdom, she could not be deprived of rights which he had never enjoyed; by contrast Dr Rottmann had -

> "unquestionably held Austrian and then German nationality and has, in consequence, enjoyed that status and the rights attaching thereto." (para 49)

It held that withdrawal of naturalisation on account of deception was not objectionable in principle, but that it was for the national court to consider whether the decision in the particular case "observes the principle of proportionality" in respect of its consequences under both European and national law (para 55):

> "56 Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining

> a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.
>
> 57 With regard, in particular, to that last aspect, a member state whose nationality has been acquired by deception cannot be considered bound, pursuant to article 17EC, to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his member state of origin.
>
> 58 It is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his member state of origin."

50. In *R (G1) v Secretary of State* the Secretary of State had made an order under section 40(2) depriving the appellant of British citizenship. He appealed to SIAC, but also brought judicial review proceedings (inter alia) alleging procedural unfairness under domestic and European Union law. Only the last point is relevant to the present appeal. As in this case, Mr Southey QC had relied on the judgment of the European court in *Rottmann* to justify importing procedural principles of EU law. Counsel for the Secretary of State argued that *Rottmann* was concerned with cross-border movement, whereas the present case concerned "a wholly internal situation" (para 36).

51. Laws LJ (giving the leading judgment) found "some difficulties" with the reasoning in that case, in particular as to whether the cross-border element was essential to the decision (para 37). This uncertainty betrayed a "deeper difficulty" which he explained as follows:

> "38. … The distribution of national citizenship is not within the competence of the European Union. So much is acknowledged in *Rottmann* itself (para 39, cited by Advocate General Sharpston in her Opinion in *Zambrano*, para 94), as is 'the principle of international law ... that the Member States have the power to lay down the conditions for the acquisition and loss of nationality' (*Rottmann* para 48). Upon what principled basis, therefore, should the grant or withdrawal of State citizenship be qualified by an obligation to 'have due regard' to the law of the European Union? It must somehow depend upon the fact that since the entry into force of the Maastricht Treaty in 1993 EU citizenship has been an incident of national citizenship, and 'citizenship of the Union is intended to be the fundamental status of nationals of the Member States' (*Rottmann* para 43 and cases there cited).
>
> 39. But this is surely problematic. EU citizenship has been attached by Treaty to citizenship of the Member State. It is wholly parasitic upon the latter. I do not see how this legislative circumstance can of itself allocate the grant or withdrawal of State citizenship to the competence of the Union or subject it to the jurisdiction of the Court of Justice. Article 17(2) of the EC Treaty ('Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby'), referred to at para 44 of the *Rottmann* judgment, does not purport to have any such consequence. A generalised aspiration to the enjoyment of a 'fundamental status' can surely carry the matter no further. In the result I am none the wiser as to the juridical basis of an obligation to 'have due regard' to the law of the European Union in matters of national citizenship."

52. He found difficulty also in understanding the implications of the proposition (*Rottmann* para 48) that such decisions are "amenable to judicial review carried out in the light of European Union law", in particular whether (as implied by paras 53, 55) this referred only to general principles of EU law, such as proportionality and the avoidance of arbitrary decision-making, or as argued by Mr Southey included "provisions of black-letter EU law" (para 40). He also referred to a citation from a more recent case, *McCarthy v Secretary of State for the Home Department* (Case C-434/09) [2011] All ER (EC) 729, para 45, that EU rules governing freedom of movement "cannot be applied to situations … which are confined in all relevant respects within a single Member State".

53. He concluded (with the agreement of his colleagues) that *Rottmann* could not be read as "importing any part of Mr Southey's panoply of black-letter EU law into the process of the appellant's appeal under section 40A", so that the effectiveness of the appellant's remedies must be judged by reference to the standards of the common law (para 42).

54. Finally he raised an issue of competence under the EU treaty:

> "The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation State. They touch the constitution; for they identify the constitution's participants. If it appeared that the Court of Justice had sought to be the judge of any procedural conditions governing such matters, so that its ruling was to apply in a case with no cross-border element, then in my judgment a question would arise whether the European Communities Act 1972 or any successor statute had conferred any authority on the Court of Justice to exercise such a jurisdiction. We have not heard argument as to the construction of the Acts of Parliament which have given the Court of Justice powers to modify the laws of the United Kingdom. Plainly we should not begin to enter upon such a question without doing so. That in my judgment is the course we should have to adopt if we considered that the Court of Justice, in *Rottmann* or elsewhere, had held that the law of the European Union obtrudes in any way upon our national law relating to the deprivation of citizenship in circumstances such as those of the present case." (para 43)

55. I have quoted from the judgment at some length because it raises issues of general importance and some difficulty, which in agreement with Laws LJ I do not think are satisfactorily resolved by the judgment in *Rottmann* itself. Mr Southey relies also on more recent decisions of the European court (*Zambrano v Office National de l'emploi* (Case C-34/09) [2011] ECR I-1177, *Dereci v Bundesministerium für Inneres* (Case C-256/11) [2011] ECR I-11315) for the general proposition (citing *Rottmann*) that TFEU article 20 precludes national measures which have the effect of depriving citizens of the genuine enjoyment of "the substance of the rights conferred by virtue of their status as citizens of the European Union". This formulation, as he says, is not expressly limited to cross-border rights. However, as Mr Eicke notes, the scope of *Zambrano* remains a matter of controversy in domestic case-law (see, for example, *Harrison v Home Secretary* [2012] EWCA Civ 1736). It is sufficient for present purposes to say that none of the more recent European authorities provides clear answers to the questions raised by Laws LJ in *G1*.

Discussion

56. Issues (ii) and (iii) raise a number of difficult issues, which may require detailed consideration either in this court or in Europe. However, the prior question is whether the European law aspects are properly before us at all for decision. In my view they are not. The scope of the present appeal is limited by reference to the preliminary issue defined by SIAC by its order of 1 February 2012, which was confined to the narrow question of statelessness under section 40 of the 1981 Act, and made no mention of issues of European law.

57. It is noteworthy that the grounds of appeal (dated 13 January 2012) raised questions of proportionality under the Convention on Human Rights, but made no mention of EU law. That omission cannot be ascribed to the decision of the Court of Appeal in *G1* which came some months later (4 July 2012). Even at that stage, although SIAC may have been bound by the Court of Appeal decision as a matter of domestic law, that would not necessarily have precluded a request to it to make a reference itself to the European court to determine the application of European law if it thought it material to the resolution of the case (see *R v Plymouth Justices, Ex p Rogers* [1982] QB 863, 869-871).

58. It seems clear that the issue of EU law would raise difficult issues, even before reaching the question of a reference to the European court. I see considerable force in the criticisms made by Laws LJ of some of the reasoning in *Rottmann*. In particular he raises the more fundamental issue of competence (para 54 above): that is, in his words, "whether the European Communities Act 1972 or any successor statute had conferred any authority on the Court of Justice to exercise such a jurisdiction". In the light of his judgment, this is an issue which would need to be considered, in the Court of Appeal or this court, before it would become appropriate to consider a reference to the European court.

59. However, before that stage is reached, in my view, it is important that SIAC, as the tribunal of fact, should first identify the respects, if any, in which a decision on these legal issues might become necessary for disposal of the present case. Mr Southey relies in general terms on the EU requirement of proportionality, but he has not shown how (whatever its precise scope in EU law) it would differ in practice in the present case from the issue of proportionality already before SIAC under the European Convention, or indeed from principles applicable under domestic law.

60. In *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808, a majority of this court endorsed a flexible approach to principles of judicial review, particularly where important rights are at stake (see especially per Lord Mance, at paras 51-55). As Lord Mance said (para 51):

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle. … The nature of judicial review in every case depends on the context."

The judgment also endorsed (para 54) Professor Paul Craig's conclusion (in "The Nature of Reasonableness" (2013) 66 CLP 131) that –

> "both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context."

Those considerations apply with even greater force in my view in a case such as the present where the issue concerns the removal of a status as fundamental, in domestic, European and international law, as that of citizenship.

61. Mr Southey has suggested that the appellant might be able to take advantage of procedural safeguards available under EU law. It is true that in *ZZ (France) v Secretary of State* [2013] QB 1136 the European court lay down strict rules for limiting disclosure on grounds of national security. However, it is impossible for this court to judge in the abstract what practical effect that might have in this case, as compared to disclosure available under domestic or Convention law. That is best considered by SIAC, with access to all relevant material open and closed.

62. For these reasons, I would decline to answer the questions raised by issues (ii) and (iii). If an issue of proportionality under EU law is properly raised before SIAC by amendment of the present grounds of appeal, it would in my view be appropriate and helpful for SIAC to reach a view on its merits, even if only on a hypothetical basis. That would ensure that any future consideration by the higher courts will be informed by a clear understanding of the practical differences if any (substantive or procedural) from the remedies otherwise available.

Conclusion

63. For these reasons I would dismiss the appeal and confirm the order of the Court of Appeal remitting the case to SIAC.

LORD MANCE: (with whom Lord Neuberger, Lady Hale and Lord Wilson agree)

Article 1(1) of the 1954 Convention

64. Under the British Nationality Act 1981 the Secretary of State "may by order deprive a person of a citizenship status if … satisfied that deprivation is conducive to the public good" (section 40(2)), but "may not make [such] an order … if … satisfied that the order would make a person stateless" (section 40(4)). It is common ground that statelessness under section 40(4) must be equated with the concept as used in the Convention on the Status of Stateless Persons 1954, which binds the United Kingdom at the international level. The Secretary of State made an order purporting to deprive the appellant of his British citizenship under section 40(2) on 22 December 2011. The first question on this appeal is therefore whether on that date the appellant was, in the terms of article 1(1) of the 1954 Convention, "a person who is not considered as a national" by the state of Vietnam "under the operation of its law" or, to take the equally authentic French and Spanish versions "par application de sa législation" and "conforme a su legislacíon".

65. As Lord Carnwath points out (paras 22-29), the terms in which the UNHCR and the Secretary of State have given guidance about the meaning of these provisions do not fit easily with any of the authentic versions. Customary practice in the interpretation and application of the law may in some circumstances shape the content of the law itself. The guidance appears to go further, and to contemplate situations in which a state acts contrary to any conceivably legitimate interpretation of the law.

66. However, it is, as Lord Carnwath indicates (para 29), unnecessary on this appeal to express any concluded view on whether or how far practice may supersede law in relation to the concept of statelessness under article 1(1). The position under the terms of the relevant Vietnamese Nationality Law of 2008 is, I agree, clear: the appellant had Vietnamese nationality as at 22 December 2011. All that happened is that the Vietnamese Government has, when subsequently informed by the British Government of its intention to

deport the appellant, declined to accept that he was or is a Vietnamese national.

67. Even if it could be said to have been the practice of the Council of Ministers to treat article 15 of the 2008 Law as enabling it, whenever it wishes, to override or ignore the four categories of situation in which that Law provides for loss of Vietnamese citizenship, that does not establish any practice covering individuals in the appellant's position. SIAC was also wrong to consider that the Vietnamese Government's subsequent attitude could in some way feed back in time, to determine whether the appellant had Vietnamese citizenship on 22 December 2011.

European citizenship

68. The appellant submits that we should address the significance of his citizenship of the European Union, which he will on the face of it lose if the Secretary of State's order depriving him of British citizenship is valid. Article 20(1) TFEU provides that

> "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

The natural corollary is that loss of British citizenship entails loss of Union citizenship.

69. The appellant was effectively precluded below from relying on his Union citizenship, by reason of the Court of Appeal's decision in *R (G1) v Secretary of State for the Home Department* [2013] QB 1008. The appellant submits that this decision was wrong; that the Secretary of State's decision to (in effect) remove his Union citizenship falls within the scope of Union law; and that Union law imposes a pre-condition of proportionality. He also submits that Union law offers another potentially relevant procedural benefit, indicated by the Court of Justice's decision in (Case C-300/11) *ZZ (France) v Secretary of State for the Home Department* [2013] QB 1136. In that case, the Court of Justice held that, notwithstanding the special advocate procedure, the Secretary of State, when she proposes to exclude a person from the United Kingdom on grounds of national security, must communicate to that person "the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence" (para 69).

The appellant argues that the same principle must govern the more severe sanction of withdrawal of citizenship. He submits, finally, that, if the Supreme Court is not prepared to accept his case on these points, it should and must at least make a reference to the Court of Justice for them to be clarified.

70. The Secretary of State takes issue with these submissions. She contends that Union citizenship depends on national citizenship, in the acquisition or loss of which the Union has no role. Further, she contends that, even when considering rights derived from Union citizenship, there must be some cross-border element before Union law is engaged or gives rise to any such rights. In this latter respect, she points to the conclusion reached by this Court in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] 1 AC 271, para 59, that the core rights listed in article 20(2) TFEU (set out in para 84 below) all have a supra-national element.

71. For reasons which will appear, I consider that it is unnecessary and inappropriate at least at this stage to resolve the disagreement between the parties about Union law, or to consider making any reference to the Court of Justice relating to it. The right course is to remit the matter to SIAC, with an indication that it should address the issues in the case on alternative hypotheses, one that the Court of Appeal's decision in *R (G1) v Secretary of State* is correct, the other that it is incorrect.

72. My reasoning is as follows. The appellant's case on Union law rests on two premises: the first is that Union law applies in some relevant respect to a decision by the Secretary of State to remove the appellant's British citizenship and, second, assuming that it does, that it offers advantages over the relevant domestic law which could make the difference between upholding and setting aside the Secretary of State's decision.

73. As to the first premise, the appellant's case rests upon decisions by the Court of Justice indicating that, even though a case may not involve any cross-border element, a decision may be contrary to Union law, if it would "have the effect of depriving" the relevant individual "of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the … Union": (Case C-34/09) *Ruiz Zambrano v Office national d'emploi*, para 42 and (Case C-434/09) *McCarthy v Secretary of State for the Home Department* [2011] ECR I-3375, para 47. This was explained in Case C-256/11 *Dereci v Bundesministerium für Inneres* [2011] ECR I-11315, para 66 as referring to "situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national, but also the territory of the Union as a whole".

74. None of these cases was concerned with withdrawal of Union citizenship, as opposed to the rights attaching to such citizenship while it subsists. However, (Case C-135/08) *Rottmann v Freistaat Bayern* [2010] QB 761, decided a year before any of them, was concerned with a situation in which withdrawal of newly acquired German citizenship would lead to loss of Union citizenship, because Dr Rottmann's previously held Austrian citizenship would not automatically revive. In *Rottmann* the court said that "citizenship of the Union is intended to be the fundamental status of nationals of the Member States" (para 43); it held that a Member State can withdraw national citizenship even though the effect was to withdraw Union citizenship, but that the decision to withdraw must "have due regard to European Union law" (para 45) and that any such withdrawal is conditional upon observance of "the principle of proportionality" (paras 55 and 59). The appellant relies on this as a general statement, establishing that withdrawal of national citizenship, at least because or if it would oblige him to leave the territory of the Union as a whole, is permissible only if and so far as would be compatible with principles of Union law, particularly proportionality and the procedural rule mentioned in para 69 above.

75. In *R (G1)* Laws LJ, in reasons with which the whole court agreed, questioned the Court of Justice's interpretation of the Treaties and left open its competence to restrict Member States' control over those possessing their nationality in this way. He said (para 43):

> "The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation State. They touch the constitution; for they identify the constitution's participants. If it appeared that the Court of Justice had sought to be the judge of any procedural conditions governing such matters, so that its ruling was to apply in a case with no cross-border element, then in my judgment a question would arise whether the European Communities Act 1972 or any successor statute had conferred any authority on the Court of Justice to exercise such a jurisdiction. We have not heard argument as to the construction of the Acts of Parliament which have given the court powers to modify the laws of the United Kingdom. Plainly we should not begin to enter upon such a question without doing so. That in my judgment is the course we should have to adopt if we considered that the Court of Justice, in the *Rottmann* case or elsewhere, had held that the law of the European Union obtrudes in any way upon our national law relating to the deprivation of citizenship in circumstances such as those of the present case."

76. Laws LJ's remarks in *R (G1)* recognise, correctly, that the question he raised is for a United Kingdom court, ultimately one of construction of a domestic statute, the European Communities Act 1972. That follows from the constitutional fact that the United Kingdom Parliament is the supreme legislative authority within the United Kingdom. European law is part of United Kingdom law only to the extent that Parliament has legislated that it should be.

77. When construing a domestic statute, United Kingdom courts apply a strong presumption that Parliament intends legislation enacted to implement this country's European Treaty obligations to be read consistently with those obligations: see eg *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 2 AC 471. But it is not axiomatic that consistency is either always achievable or what Parliament intended or did achieve.

78. Advocate General Cruz Villalón's recent Opinion in (Case C-62/14) *Gauweiler v Deutscher Bundestag*, 14 January 2015, paras 30-69 suggests that

i) European law does not leave it open to any national court to adopt a criterion or benchmark for assessing the vires of a European act (which, presumably, would include a Court of Justice decision) different from that of the Court of Justice (para 53);

ii) any "'reservation of identity', independently formed and interpreted by the competent – often judicial – bodies of the Member States … would very probably leave the EU legal order in a subordinate position, at least in qualitative terms" (para 60).

79. That looks at the matter from one angle. However, Advocate General Villalón added (para 61) that:

> "a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States."

This recognises, perhaps, that Europe has not yet reached a situation where it is axiomatic that there is constitutional identity between the Union and its Members.

80. For a domestic court, the starting point is, in any event, to identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition. The search is simple in a country like the United Kingdom with an explicitly dualist approach to obligations undertaken at a supranational level. European law is certainly special and represents a remarkable development in the world's legal history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed. The question how far Parliament has so willed is thus determined by construing the 1972 Act.

81. Sections 2(1) and 3(1) of the 1972 Act read:

> "2(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable EU right' and similar expressions shall be read as referring to one to which this subsection applies. …
>
> 3(1) For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court)."

82. The breadth of sections 2(1) and 3(1) of the 1972 Act is notable. On one reading, they leave the scope of the Treaty within the sole jurisdiction of the Court of Justice as a question as to its "meaning or effect". Nevertheless, this court in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324, paras 207-208 recognised the potential which exists for jurisdictional limits on the extent to which these sections confer competence on the Court of Justice over fundamental features of the British constitution. Questions as to the meaning and effect of Treaty provisions are in principle capable of being distinguished from questions going to the jurisdiction conferred on the European Union and its court under the Treaties:

compare in a domestic context, the decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. The principle that the orders of a superior court of record are valid until set aside is not necessarily transposable to an issue of construction concerning the scope of sections 2(1) and 3(1) of the 1972 Act or the Treaty provisions and conferral competence referred to in those provisions.

83. The Treaty on European Union enshrines the principle of conferral at its outset in articles 4 and 5:

> "Article 4
>
> 1. In accordance with article 5, competences not conferred upon the Union in the Treaties remain with the Member States.
>
> 2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. …
>
> Article 5
>
> 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
>
> 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

84. In the present context, it is clearly very arguable that there are under the Treaties jurisdictional limits to European Union competence in relation to the grant or withdrawal by a Member State of national citizenship. Fundamental though its effects are where it exists, citizenship of the Union is under the Treaties a dependant or derivative concept – it depends on or derives from national citizenship. That is clear from article 9 TEU and article 20 TFEU, providing:

> "Article 9
>
> In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

> "Article 20
>
> 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> (a) the right to move and reside freely within the territory of the Member States;
>
> (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
>
> (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular

> authorities of any Member State on the same conditions as the nationals of that State;
>
> (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

85. There is nothing on the face of the Treaties to confer on the EU, or on a Union institution such as the Court of Justice, any power over the grant or withdrawal by a Member State of national citizenship, even though such grant or withdrawal has under the Treaties automatic significance in terms of European citizenship. If further confirmation were necessary of the exclusive role of Member States in relation to such a grant or withdrawal, it is amply present in governmental declarations and a Council decision associated with the history and making of the Treaties. The relevance of such declarations and decision as an aid to construction of the Treaties was recently confirmed by the Court of Justice in its Opinion 2/13 dated 18 December 2014 on the draft agreement on the accession of the EU to the European Convention on Human Rights.

86. When the original Treaty on European Union was adopted and first introduced the concept of Union citizenship in 1992, the Conference of the Representatives of the Governments of Member States agreed by Declaration No 2 annexed to the Final Act (quoted by Lord Carnwath in para 43 above) that:

> "wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. …"

87. This was reinforced also in 1992 by *Council Decision concerning certain problems raised by Denmark on the Treaty of European Union* (OJ 1992 C348, p 1). The Decision stated that:

> "Citizenship
>
> The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned."

Although the provisions of this Decision were stated to be arrangements which "apply exclusively to Denmark and not to other existing or acceding Member States", it is difficult to regard a categorical statement about the interpretation of the Treaty as a mere "arrangement" or as irrelevant as an additional aid, if necessary, to understanding the limits of the competence conferred on the Community, or now Union.

88. In any event, the position was again confirmed by United Kingdom Declaration No 63 annexed to the Final Act adopting the Treaty of Lisbon, which shaped the present Treaties. This stated that:

> "63. Declaration by the United Kingdom of Great Britain and Northern Ireland on the definition of the term 'nationals'
>
> In respect of the Treaties and the Treaty establishing the European Atomic Energy Community, and in any of the acts deriving from those Treaties or continued in force by those Treaties, the United Kingdom reiterates the Declaration it made on 31 December 1982 on the definition of the term 'nationals' with the exception that the reference to 'British Dependent Territories Citizens' shall be read as meaning 'British overseas territories citizens'."

89. The 1982 Declaration provided that the terms "nationals", "nationals of Member States" or "nationals of Member States and overseas countries and territories" wherever used in the then European Treaties were to be understood as references to British citizens, British subjects by virtue of the British Nationality Act 1981 with a right of abode in the United Kingdom and citizens of British Dependant Territories whose citizenship was acquired from a connection with Gibraltar.

90. A domestic court faces a particular dilemma if, in the face of the clear language of a Treaty and of associated declarations and decisions, such as those mentioned in paras 86-89, the Court of Justice reaches a decision which oversteps jurisdictional limits which Member States have clearly set at the European Treaty level and which are reflected domestically in their constitutional arrangements. But, unless the Court of Justice has had conferred upon it under domestic law unlimited as well as unappealable power to determine and expand the scope of European law, irrespective of what the Member States clearly agreed, a domestic court must ultimately decide for itself what is consistent with its own domestic constitutional arrangements, including in the case of the 1972 Act what jurisdictional limits exist under the European Treaties and upon the competence conferred on European institutions including the Court of Justice.

91. It will be a very rare case indeed where any problem arises in this connection, and the recipe for avoiding any problem is that all concerned should act with mutual respect and with caution in areas where Member States' constitutional identity is or may be engaged - particularly so where, as in the present context, great care has been taken to emphasise this by declarations accompanying the relevant Treaty commitments. That reflects the spirit of co-operation of which both the Bundesverfassungsgericht and this court have previously spoken.

92. In the light of all these considerations the question posed by Laws LJ may well, at some future date, have to be considered and answered, in order to determine whether the first premise of the appellant's case is correct. But I am satisfied that this is not the occasion to attempt any such task, unless and until the second premise is established – and involves a conclusion that Union law not only offers advantages over the relevant domestic law governing removal of the appellant's citizenship, but offers advantages which are or at least may be critical to the success of the appellant's case.

Proportionality and procedural benefit under Union law

93. I turn to the second premise - that Union law offers potentially decisive advantages over domestic law, if and so far as it requires that (a) any withdrawal of citizenship having the effect of removing European citizenship and requiring the person affected to leave the Union should be measured against a yardstick of proportionality, and that (b) such withdrawal would also only be permissible in the case of removal of citizenship on grounds of national security if the person affected had been informed of and was able to address "the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence".

94. In a judgment in *Kennedy v Charity Commission* [2014] UKSC 20, [2014] 2 WLR 808, paras 55-56, with which Lord Neuberger and Lord Clarke agreed, and with the reasoning in which I understand Lord Toulson also to have agreed (para 150), I concluded that there would be no real difference in the context of that case between the nature and outcome of the scrutiny required under common law and under article 10 of the Convention on Human Rights, if applicable. The judgment noted (para 51) that:

> "The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle. … The nature of judicial review in every case depends on the context."

95. The judgment also endorsed (in para 54) Professor Paul Craig's conclusion (in "The Nature of Reasonableness" (2013) 66 CLP 131) that "both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context" and continued:

> "The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law. Whatever the context, the court deploying them must be aware that they overlap potentially and that the intensity with which they are applied is heavily dependent on the context. In the context of fundamental rights, it is a truism that the scrutiny is likely to be more intense than where other interests are involved."

96. In short, proportionality is - as Professor Dr Lübbe-Wolff (former judge of the Bundesverfassungsgericht which originated the term's modern use) put it in *The Principle of Proportionality in the case-law of the German Federal Constitutional Court* (2014) 34 HRLJ 12, 16-17 - "a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction", "just a rationalising heuristic tool". She went on:

> "Whether it is used as a tool to *intensify* judicial control of the state acts is not determined by the structure of the test but by the degree of judicial restraint practised in applying it."

Whether under EU, Convention or common law, context will determine the appropriate intensity of review: see also *Kennedy*, para 54.

97. The present appeal concerns a status which is as fundamental at common law as it is in European and international law, that is the status of citizenship. Blackstone (*Commentaries on the Laws of England* Book I, p 137) states the position as follows:

> "A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without licence. … But no power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will; no, not even a criminal. For exile, and transportation, are punishments at present unknown to the common law; …"

The last two sentences of this passage were cited and approved by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 2) [2008] UKHL 61; [2009] AC 453, paras 43-44. In the same case, para 70, Lord Bingham identified the relevant principles by the following quotations, in terms with which the Secretary of State did not quarrel:

> "Sir William Holdsworth, *A History of English Law* (1938), vol X, p 393, states:
>
> 'The Crown has never had a prerogative power to prevent its subjects from entering the kingdom, or to expel them from it.'
>
> Laws LJ, in para 39 of his *Bancoult (No 1)* judgment which the Secretary of State accepted, cited further authority:

> ‘For my part I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen's dominions of which he is a citizen. Sir William Blackstone says in *Commentaries on the Laws of England* ,15th ed (1809), vol 1, p 137: 'But no power on earth, except the authority of Parliament, can send any subject of England out of the land against his will; no, not even a criminal.' Compare *Chitty, A Treatise on the law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (1820), pp 18, 21. *Plender, International Migration Law*, 2nd ed (1988), ch 4, p 133 states: 'The principle that every state must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute …' and cites authority of the European Court of Justice in *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358, 378-379 in which the court held that 'it is a principle of international law … that a state is precluded from refusing its own nationals the right of entry or residence'. Dr Plender further observes, *International Migration Law*, p 135: 'A significant number of modern national constitutions characterise the right to enter one's own country as a fundamental or human right', and a long list is given.’”

The same authorities were recently cited and applied by this court in *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20, [2012] 1 WLR 1604.

98. Removal of British citizenship under the power provided by section 40(2) of the British Nationality Act 1981 is, on any view, a radical step, particularly if the person affected has little real attachment to the country of any other nationality that he possesses and is unlikely to be able to return there. A correspondingly strict standard of judicial review must apply to any exercise of the power contained in section 40(2), and the tool of proportionality is one which would, in my view and for the reasons explained in *Kennedy v Charity Commission*, be both available and valuable for the purposes of such a review. If and so far as a withdrawal of nationality by the United Kingdom would at the same time mean loss of European citizenship, that is an additional detriment which a United Kingdom court could also take into account, when considering whether the withdrawal was under United Kingdom law proportionate. It is therefore improbable that the nature, strictness or outcome of such a review would differ according to whether it was conducted under domestic principles or whether it was also required to be conducted by reference to a principle of proportionality derived from Union law. On these points, I agree with what Lord Carnwath says in paras

59-60 of his judgment, as well as with what Lord Sumption says in paras 108-109 of his judgment.

99. As to the appellant's case that Union law would or might entitle him to particulars of the essence of the case against him which he would not be able to obtain at common law, that raises both the question whether domestic law would also entitle him to whatever measure of protection Union law might entitle him and a potential question, if any difference exists, whether it could have any practical significance in this case. These questions should, at least in the first instance, only be addressed, if they arise, in the course of full consideration of the facts and issues by SIAC. Again, I agree with what Lord Carnwath says in para 61 of his judgment.

100. For these reasons, I too would dismiss the appeal and confirm the Court of Appeal's order remitting the case to SIAC.

LORD SUMPTION: (with whom Lord Neuberger, Lady Hale and Lord Wilson agree)

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

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

102. I also agree that having determined that the Home Secretary's decision did not render Mr Pham stateless, this court should not deal with the remaining issues, but should remit them to SIAC. Not only are those issues no part of the preliminary issue which SIAC directed, but they are unsuitable for determination by this court in the absence of any of the relevant findings of fact and without the judgment of either court below.

103. I add a judgment of my own in order to address a point which was raised with counsel in the course of the hearing but not developed in argument, and which appears to me to be of some importance. One of the questions to be remitted to SIAC is the impact (if any) of EU law on the remaining issues raised by Mr Pham's application. The main reason why this is said to matter is that if the withdrawal of Mr Pham's British nationality was within the ambit of EU law it will be necessary to apply to the decision the principle of proportionality. This assumes that the principle of proportionality as it applies in EU law is liable to produce a different result in a case like this by comparison with ordinary principles of English public law. I question whether this is necessarily correct.

104. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, at p 410, Lord Diplock envisaged the possibility that English law might adopt proportionality from continental systems of public law as an additional ground of review. In fact, the courts have applied a proportionality test to acts of public authorities said to contravene principles of European Union law and or to interfere with rights protected by the European Convention on Human Rights, both of which incorporate proportionality as an integral part of their test for legal justification. But they have not adopted proportionality generally as a principle of English public law. With the progressive enlargement of the range of issues which are affected by EU law or the Convention (or, increasingly, by both), this has produced some rather arbitrary distinctions between essentially similar issues, depending on the source of law which is invoked as a ground of challenge. The present case is

a particularly striking illustration of this problem. If a person could be deprived of European citizenship as such, a test of proportionality would in principle have to be applied. On the other hand, if the matter turns wholly on domestic law and only the three traditional grounds of review recognised in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 are applied, then no test of proportionality would be applied. In fact, European citizenship is acquired or lost as the incidental consequence of acquiring or losing British citizenship. The Home Secretary's decision therefore affects Mr Pham's status in both respects. It is hardly satisfactory to apply a proportionality test to the decision so far as it affects his European citizenship but not so far as it affects his British nationality when the decision is a single indivisible act. An alternative approach would be to regard European citizenship as a mere attribute of national citizenship. That would be consistent with the fact that it is wholly parasitic on national citizenship. But it is not consistent with some of the wider dicta of the Court of Justice of the European Union treating European citizenship as "fundamental".

105. However, although English law has not adopted the principle of proportionality generally, it has for many years stumbled towards a concept which is in significant respects similar, and over the last three decades has been influenced by European jurisprudence even in areas of law lying beyond the domains of EU and international human rights law. Starting with the decision of the House of Lords in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 it has recognised the need, even in the context of rights arising wholly from domestic law, to differentiate between rights of greater or lesser importance and interference with them of greater or lesser degree. This is essentially the same problem as the one to which proportionality analysis is directed. The solution adopted, albeit sometimes without acknowledgment, was to expand the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality.

106. This approach was originally adopted in dealing with rights protected by the Convention, at a time when it did not have the force of law and the courts were unwilling to apply any presumption that domestic legislation was intended to be construed consistently with it. Many of these rights had been recognised at common law for many years, in some cases since the famous opening chapter of Blackstone's *Commentaries* ("The Rights of Persons"). In *Bugdaycay*, the House of Lords recognised that a more exacting standard of review was required when the decision of a public authority interfered with a "fundamental" right. That case concerned the right to life, which is perhaps the most fundamental of all rights. But I doubt whether it is either possible or desirable to distinguish categorically between ordinary and fundamental rights, applying different principles to the latter. There is in reality a sliding

scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference. As Lord Bridge of Harwich observed in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, at pp 748-749, the courts are "perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it." In *R v Ministry of Defence, Ex p Smith* [1996] QB 517, the Court of Appeal adopted the following statement of principle from the argument of counsel (Mr David Pannick QC) at p 554:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

This is in substance a proportionality test, but with the important difference that the court declined to judge for itself whether the decision was proportionate, instead asking itself whether a rational minister could think that it was. This is why when the case came before the European Court of Human Rights (*Smith and Grady v United Kingdom* (1999) 29 EHRR 493, at para 138) it was held that the test applied by the English courts was not sufficient to protect human rights.

107. The differences between proportionality at common law and the principle applied under the Convention were considered by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, at paras 27-28. In a passage with which the rest of the House of Lords associated itself, he identified three main differences: (i) a proportionality test may require the court to form its own view of the balance which the decision-maker has struck, not just decide whether it is within the range of rational balances that might be struck; (ii) the proportionality test may require attention to be directed to the relative weight accorded to competing interests and considerations; and (iii) even heightened scrutiny at common law is not necessarily enough to protect human rights. The first two distinctions are really making the same point in different ways: balance is a matter for the decision-maker, short of the extreme cases posited in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. But it may

be questioned whether it is as simple as this. It is for the court to assess how broad the range of rational decisions is in the circumstances of any given case. That must necessarily depend on the significance of the right interfered with, the degree of interference involved, and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision-maker was called on to make given the subject-matter. The differences pointed out by Lord Steyn may in practice be more or less significant depending on the answers to these questions. In some cases, the range of rational decisions is so narrow as to determine the outcome.

108. Although the full facts have not yet been found, it seems likely that the outcome of this case will ultimately depend on the approach which the court takes to the balance drawn by the Home Secretary between Mr Pham's right to British nationality and the threat which he presented to the security of the United Kingdom. A person's right in domestic law to British nationality is manifestly at the weightiest end of the sliding scale, especially in a case where his only alternative nationality (Vietnamese) is one with which he has little historical connection and seems unlikely to be of any practical value even if it exists in point of law. Equally, the security of this country against terrorist attack is on any view a countervailing public interest which is potentially at the weightiest end of the scale, depending on how much of a threat Mr Pham really represents and what (if anything) can effectually be done about it even on the footing that he ceases to be a British national. The suggestion that at common law the court cannot itself assess the appropriateness of the balance drawn by the Home Secretary between his right to British nationality and the relevant public interests engaged, is in my opinion mistaken. In doing so, the court must of course have regard to the fact that the Home Secretary is the statutory decision-maker, and to the executive's special institutional competence in the area of national security. But it would have to do that even when applying a classic proportionality test such as is required in cases arising under the Convention or EU law, a point which I sought to make in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] 3 WLR 1404, at paras 31-34.

109. Thus in *Daly* itself the Appellate Committee accepted that legal professional privilege in respect of documents in a prisoner's cell might have to be qualified in the interest of allowing searches for the purpose of maintaining order and suppressing crime but it held the particular searches to be unlawful. This was because it thought that the concerns of the service were exaggerated and did not accept the evidence of the prison service that they were necessary: see Lord Bingham at paras 18-19. The result, as Lord Bingham pointed out, was the same in that case as if the Human Rights Act had been in force. Correspondingly, in other cases the strength of the justification or the breadth of the decision-maker's margin of judgment may be such that the facts would

satisfy either test of proportionality. In *Brind*, restrictions on the broadcasting of statements by persons representing proscribed organisations were held to be lawful because of what the Appellate Committee regarded as the limited character of the restrictions by comparison with the important public interest in combatting terrorism. Professor Paul Craig has persuasively argued that a similar approach to rationality review is implicit in a substantial body of domestic case law extending over half a century, whether the rights engaged originate in domestic law or in EU or the Convention: "The Nature of Reasonableness Review" (2013) 66 CLP 131. As Lord Mance recently observed in *Kennedy v Charity Commission* [2014] 2 WLR 808, at para 51, the common law no longer insists on a single, uniform standard of rationality review based on the virtually unattainable test stated in *Wednesbury*.

110. I agree with the observations of Lord Mance and Lord Carnwath, which are to the same effect, and I understand a majority of the court to take the same view. For these reasons, it would assist the future course of these proceedings if in dealing with the remaining issues SIAC were to take the common law test as its starting point and then say in what respects (if any) its conclusions are different applying article 8 of the Human Rights Convention or EU law. It may well turn out that in the light of the context and the facts, the juridical source of the right made no difference.

111. I also agree with the important reservations which Lord Mance has expressed about the relevance of EU law to questions of national citizenship.

LORD REED:

112. I agree with the judgment of Lord Carnwath. There is also much in the judgments of Lord Mance and Lord Sumption with which I agree, including Lord Mance's observations about EU law and British nationality. I add some observations on the question of the relationship between reasonableness and proportionality as principles of domestic administrative law, as I would prefer to express my thoughts on that issue in my own words. It should be made clear at the outset that this important and difficult question has not been the subject of detailed argument. In the circumstances, I shall say no more than is necessary to assist SIAC when the case returns to that tribunal.

113. It may be helpful to distinguish between proportionality as a general ground of review of administrative action, confining the exercise of power to means which are proportionate to the ends pursued, from proportionality as a basis for scrutinising justifications put forward for interferences with legal rights.

114. In the first context, there are a number of authorities in which a finding of unreasonableness was based upon a lack of proportionality between ends and means. Examples include *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 and *R v Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 1 WLR 1052. There are also authorities which make it clear that reasonableness review, like proportionality, involves considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision-maker's view depending on the context. The variable intensity of reasonableness review has been made particularly clear in authorities, such as *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, and *R v Ministry of Defence, Ex p Smith* [1996] QB 517, concerned with the exercise of discretion in contexts where fundamental rights are at stake. The rigorous approach which is required in such contexts involves elements which have their counterparts in an assessment of proportionality, such as that an interference with a fundamental right should be justified as pursuing an important public interest, and that there should be a searching review of the primary decision-maker's evaluation of the evidence.

115. That is not to say that the *Wednesbury* test, even when applied with "heightened" or "anxious" scrutiny, is identical to the principle of proportionality as understood in EU law, or as it has been explained in cases decided under the Human Rights Act 1998. In *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, Lord Steyn observed at para 26, with the agreement of the other members of the House of Lords, that there was a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality in cases where Convention rights were at stake. In *Brind*, the House of Lords declined to accept that proportionality had become a distinct head of review in domestic law, in the absence of any question of EU law. This is not the occasion to review those authorities.

116. Nevertheless, the application of a test of reasonableness may yield the same outcome as the application of a test of proportionality. Lord Slynn, a former Advocate General and Judge at the European Court of Justice, observed in *R v Chief Constable of Sussex, Ex p International Trader's Ferry Ltd* [1999] 2 AC 418, 439:

> "In *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 the House treated *Wednesbury* reasonableness and proportionality as being different. So in some ways they are though the distinction between the two tests in practice is in any event much less than is sometimes supposed. The

> cautious way in which the European Court usually applies this test, recognising the importance of respecting the national authority's margin of appreciation, may mean that whichever test is adopted, and even allowing for a difference in onus, the result is the same."

117. As Lord Slynn's observations indicate, and as was explained in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, paras 69-72, proportionality is not a monolithic principle, expressed and applied in a uniform way in different legal systems and in different contexts. In particular, the intensity of review, whether under the Human Rights Act or under EU law, depends on a variety of factors, including the nature of the right which is involved, the seriousness of the interference with that right, and the nature of the justification for that interference: see, for example, in relation to EU law, *Tridimas, The General Principles of EU Law*, 2nd ed (2006), chapters 3 and 5.

118. The cases which I mentioned in para 114 might be contrasted with others concerned with the scrutiny of justifications advanced for interferences with legal rights. In a number of cases concerned with important rights, such as the right of access to justice and legal professional privilege, the court has interpreted statutory powers to interfere with those rights as being subject to implied limitations, and has adopted an approach amounting in substance to a requirement of proportionality, although less formally structured than under the Human Rights Act. Examples include *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198 and *R (Daly) v Secretary of State for the Home Department.* In the former case, the legislation was interpreted, against the background of the European Convention on Human Rights, as authorising the minimum intrusion into correspondence passing between a prisoner and a solicitor which was objectively established as being necessary to fulfil the aim of ensuring that the correspondence was bona fide legal correspondence. In a similar context, it was held in *Daly* that the infringement of prisoners' rights to maintain the confidentiality of their privileged legal correspondence was greater than was shown to be necessary to serve the legitimate public objectives identified.

119. One can infer from these cases that, where Parliament authorises significant interferences with important legal rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality.

120. The present case concerns the Secretary of State's power under section 40(2) of the British Nationality Act 1981 to deprive a person of a citizenship status if satisfied that deprivation is conducive to the public good. Given the fundamental importance of citizenship, it may be arguable that the power to deprive a British citizen of that status should be interpreted as being subject to an implied requirement that its exercise should be justified as being necessary to achieve the legitimate aim pursued. Such an argument has not however been advanced at the hearing of this appeal, and it would be inappropriate to express any view upon it.

121. If the question of proportionality under EU law is raised before SIAC, it may well be that the answer is the same as it would be under domestic law, applying either the approach to reasonableness which I have discussed in paras 114 to 116, or the approach to vires which I have discussed at paras 118 to 120. That will however be for SIAC to determine.