Hearing Dates: 19 & 20th May 2008
Date of Judgment: 23rd May 2008

IN THE SPECIAL IMMIGRATION APPEALS COMMISSION

Before:

THE HONOURABLE MR JUSTICE MITTING (Chairman)
SENIOR IMMIGRATION JUDGE LANE
MR J MITCHELL

HILAL ABDUL-RAZZAQ ALI
AL JEDDA APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

MR R HERMER & MR G GOODWIN-GILL (instructed by Public Interest Lawyers) appeared on behalf of the Appellant.

Mr J SWIFT (instructed by the Treasury Solicitor) appeared for the Secretary of State

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OPEN JUDGMENT

MR JUSTICE MITTING :

Facts and issue

1. The Appellant was born on 1st May 1957 in Kirkuk of Iraqi parents. He left home and, it seems, Iraq in about 1975 when he was eighteen. On 17th November 1992, with his then wife and two children, he arrived in the United Kingdom. He claimed asylum on 24th November 1992. He was granted refugee status on 5th August 1994 and indefinite leave to remain in the United Kingdom on 7th July 1998. He applied for British citizenship on 3rd November 1998. It was granted on 12th June 2000. He and his first wife were divorced in 2001. He married a Syrian woman in 2001 and took a second, Jordanian, wife soon after. He has a son by each wife. He travelled to Iraq, via the United Arab Emirates, in September 2004. On 10th October 2004 he was detained by United Kingdom forces in Iraq. His detention was the subject of litigation which culminated in the decision of the House of Lords in *R(Ota Al Jedda)(FC) v Secretary of State for Defence* [2007] UKHL 58. He was released from detention on 30th December 2007. He remains in Iraq.

2. On 12th November 2007 the Secretary of State gave notice to the Appellant that she was minded to make an order under section 40(2) of the British Nationality Act 1981 depriving him of his British citizenship on the ground that she was satisfied that deprivation was conducive to the public good. She invited representations from him about the decision that she was minded to make. He made none. On 12th December 2007 the Secretary of State informed the Appellant that she had decided to make an order depriving him of his British citizenship. The order was made on 14th December 2007. He appeals against that order.

3. One of the grounds upon which he appeals is that the effect of the order will be to make him stateless. Section 40(4) of the 1981 Act provides:

> "The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless".

By an order dated 8th February 2008, I directed that that issue be determined as a preliminary issue. This hearing has been devoted solely to that issue.

Preliminary Questions

4. Mr Swift, for the Secretary of State, concedes that for the purposes of this appeal, the task of the Commission is to determine whether or not the decision of the Secretary of State was to make the Appellant stateless. We accept that concession and believe it to be right, even though there does not appear to be an express statutory foundation for that approach. The issue is of great importance to the Appellant and is capable of being determined by the Commission. These considerations suggest that the Commission can and should determine the issue. There are, however, two qualifications which emerge from the language of section 40(4): the issue must be determined as at the date upon which the Secretary of State made her order. What the Commission is determining is whether or not that order made the Appellant stateless – i.e. that it did so on the date on which it was made. Subsequent events, notably the

subsequent renunciation by him of Iraqi citizenship could not make unlawful an order lawful when made. And it is for the Appellant to demonstrate that the order would make him stateless, not for the Secretary of State to demonstrate that it would not have that effect. In so far as the issue turns upon questions of fact, the burden of proof is on the Appellant, on balance of probabilities.

5. The interpretation of Iraqi law is, strictly, a question of fact. We have, accordingly, received expert evidence, in the form of written reports from Judge Raid Juhi Al Saedi, for the Appellant, and a written report supplemented by oral evidence from Ian David Edge, a barrister and academic, for the Secretary of State. Each side submits that the expert evidence relied on by the other is flawed. Mr Swift submits that Judge Al Saedi's report should not be admitted in evidence at all, because he is unwilling or unable to allow himself to be questioned and so cannot fulfil all of the duties of an independent expert witness. He further submits that Judge Al Saedi does not deal adequately with some of the critical questions so that little weight can be placed upon his opinion on those matters. Mr Hermer submits that Mr Edge's knowledge of Iraqi nationality law is superficial and that his opinion upon it is of little or no weight. We do not accept Mr Swift's submission that we should exclude the evidence of Judge Al Saedi. He is a serving Iraqi investigative Judge, on an academic sabbatical in the United States of America. It is said, and we accept, that the government of Iraq have lawfully required of him that, although he may give advice about Iraqi law, he may not appear in any court to be questioned about it. Such a requirement is understandable: the Iraqi government is entitled to be concerned about, and to discourage the questioning of its Judges in the courts of other countries. Judge Al Saedi's unwillingness to be questioned upon his report does not persuade us that he lacks the independence, let alone integrity, required of an expert witness. We admit his reports. The fact that he cannot be questioned about his opinions does, however, detract from their force and utility. In one critical aspect (the meaning and effect of Article 11 of the Law of Administration for the State of Iraq for the Transitional Period of 8th March 2004 ("TAL")) his reports are laconic and contain only one sentence of assertion as to their effect: that the TAL "had no direct effect on the procedure of the nationality status of Iraqis who formerly held Iraqi citizenship". Questioning might have elucidated Judge Al Saedi's reasoning and so permitted a conclusion to be formed about the validity of his assertion. The lack of that opportunity greatly reduces the utility of his opinion and the reliance which we can place upon it. Neither Judge Al Saedi nor Mr Edge claim any particular expertise, whether acquired by study or by practice, in Iraqi nationality law. Judge Al Saedi has practised in the criminal and family jurisdictions of Iraq; and Mr Edge has acquired a broad knowledge of Middle Eastern legal systems, with particular emphasis on Sharia Law. His knowledge has permitted him to identify the writings of the then leading expert on Iraqi nationality law, Professor Gaudi. On one important issue (the need or otherwise for an Iraqi citizen acquiring, by free choice, the citizenship of another country to notify the Iraqi authorities of that fact) he relies on an article written by Professor Gaudi, which we have read, and on his own experience of the administrative systems of other Middle Eastern countries. The latter is of little assistance in determining Iraqi law on the topic. Comparison of what Professor Gaudi wrote with Mr Edge's conclusion satisfies us, for reasons which we will explain, that it is not soundly based.

6. The result of these shortcomings in the expert evidence is that we cannot decide the critical questions of Iraqi law by reference only to the expert evidence which we have received. Mr Hermer submits that, in those circumstances, we should reach our own conclusions about the meaning and effect of Iraqi law, applying English canons of construction to it. The task is made more difficult by the fact that the texts which we have to consider are in translation from the Arabic: and, as Mr Edge explained, Arabic words are often capable of bearing more than one meaning. The approach which we have adopted is to attempt, with the aid of Mr Edge and Judge Al Saedi, to discern the meaning and effect of Iraqi laws by applying a familiar domestic technique: to analyse the words used against the historical and statutory background in such a way as to give effect to the apparent intention of the legislators; and, in so doing, to attempt to resolve anomalies and absurdities in a way that does least violence to the language and apparent purpose of the laws.

7. The Secretary of State's letters of 12th November and 12th December 2007 both refer to deprivation of citizenship on the ground that it is "conducive to the public good", rather than to the statutory grounds set out in section 40(2), that the Appellant "has done anything seriously prejudicial to the vital interests of – (a) the United Kingdom…..". We have received no submissions on this difference and make no decision about it.

Iraqi nationality law

8. Iraq was carved out of the Ottoman Empire. Article 5 of the Constitution of the Kingdom of Iraq of 21st March 1925 provided that "Iraqi nationality shall be defined by a special law and will be acquired or lost in accordance with the terms thereof". The "special law" was the Iraqi nationality law of 9th October 1924. Article 2 contains the following definitions:

> "(a) Iraqi – A person who holds the Iraqi nationality by birth, naturalisation, or by other means
>
> (b) Foreigner – Non-Iraqi".

Article 3 provided that "whoever used to hold the Ottoman nationality and resided regularly in Iraq on the sixth of August 1924 shall lose his/her Ottoman nationality and shall be considered a holder of the Iraqi nationality as of the aforementioned date".

Article 8 provided that a person born to an Iraqi father, regardless of the place of birth was deemed to be an Iraqi national. Article 13 dealt with loss of Iraqi nationality:

> "Any Iraqi who gets naturalised with a foreign nationality of a foreign country by his/her choice shall lose the Iraqi nationality. His/her new nationality shall not be recognised in Iraq unless it is approved by the Iraqi government. If he/she returns to Iraq, the Iraqi government has the right to determine whether to consider him/her an Iraqi national or to exclude him/her from Iraq."

It is common ground that the second sentence refers to capitulations (the exemption of foreigners from parts of the law of Iraq) and did not establish as a condition of the loss of Iraqi nationality by dint of acquiring foreign nationality by choice, the approval of the Iraqi government.

9. The 1924 law was repealed by Article 21 of Iraqi Nationality Law number (43) of 1963. (The citation of the law as number (46) in the translation on the UNHCR website is almost certainly mistaken). We have been supplied with two translations of this law, neither, as far as we can tell, official. We set out the translations of the relevant articles in the following order: first, that obtained by Mr Edge from the internet; secondly, the unofficial translation transmitted to the UNHCR in October 1996.

Article 1:

> "The following expressions will have the meanings designated herein:
>
> 1. the Iraqi: the person who holds the Iraqi nationality
>
> 2. The Foreign: the non-Iraqi"

Article 1:

> "The following expressions shall have the following meanings:
>
> 1. Iraqi national – the person possessing Iraqi nationality
>
> 2. The Alien – non-Iraqi National"

Article 4:

> "Will be considered as an Iraqi national, this who:
>
> 1. Was born in Iraq or abroad for a father holding the Iraqi nationality…"

Article 4:

> "Shall hereby deemed to be an Iraqi national:
>
> 1. Every person born in or outside Iraq of a father possessing Iraqi nationality"

Article 11:

> "1. Each Iraqi who has acquired a foreign nationality in a foreign country upon his free choice will be denied the Iraqi nationality
>
> 2. If the person who lost the Iraqi nationality upon paragraph (1) has returned to Iraq in a legal manner and has lived in it

> for one year can be considered by the Minister as acquiring the Iraqi nationality after that year and as from the date of returning if submitting an application to retain the nationality before the lapse of said period of time"

Article 11:

> "1. Every Iraqi national who has acquired a foreign nationality in a foreign country by his own choice shall lose his Iraqi nationality
>
> 3. If the person who has lost his Iraqi nationality under item 1 of this article returns to Iraq in a legal manner and resided there for one year, the Minister may deem him after the lapse of this year to be acquiring the Iraqi nationality from the date of his return if he submits a request to restore the Iraqi nationality before the expiration of the said period"

Mr Edge accepts, as do we, that the phrase "will be denied" in Article 11.1 in his translation is better rendered as "lose".

Article 20 provided for the withdrawal by the Minister of Interior of Iraqi nationality in the case of an Iraqi national who accepted military service or work for a foreign state without permission or who resided abroad and joined a foreign body or agency whose purpose was the destruction of the social and economic system of the Iraqi state.

10. The constitution of Iraq was replaced provisionally at least twice, on the last occasion before the 2003 invasion, in 1990. We have not been shown the text of these provisional constitutions. Decisions with legal force appear to have been issued by the Revolutionary Command Council. By decision number (666) of 7th May 1980 that Council resolved that "1. The Iraqi nationality would be denied to each Iraqi of a foreign origin if found not loyal to the country and the people as well as the national and social supreme objectives of the Revolution".

Subsequent expressions of Iraqi law suggest that executive decisions were also taken to withdraw Iraqi citizenship for political, religious, racial, or sectarian reasons, but we have been shown no text of any such decision or resolution authorising it.

11. On 8th May 2003, the permanent representatives of the United States of America and the United Kingdom notified the President of the United Nations Security Council of their intention to provide for the security and provisional administration of Iraq as occupying powers under international law through the Coalition Provisional Authority ("the Authority"). By resolution 1483 the Security Council resolved to play a vital role in the reconstruction of Iraq and the restoration and establishment of national and local institutions for representative governments and by operative paragraph 4 called upon the Authority "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future". By operative paragraph 9 the Security Council supported "the formation, by the people of Iraq with the help of the

Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibility of the Authority". By regulation number 6 of 13th July 2003, the Authority recognised the formation of "the Governing Council" as the principal body of the Iraqi interim administration, pending the establishment of an internationally recognized, representative government of the people of Iraq, consistent with Resolution 1483". By resolution 1500 of 14th August 2003, the Security Council welcomed "the establishment of the broadly representative Governing Council of Iraq on 13 July 2003, as an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq". By the Authority's memorandum number 6 of 3rd September 2003, the Authority recognised the appointment to the Governing Council of the interim ministers named in an annex. By resolution 1511 of 16th October 2003, the Security Council reaffirmed the sovereignty and territorial integrity of Iraq and underscored the temporary nature of the exercise by the Authority of the specific responsibilities, authorities and obligations under applicable international law and by operative paragraph 4 determined "that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period until an internationally recognized, representative government is established and assumes the responsibilities of the Authority".

12. The TAL was promulgated on 8th March 2004. One of the critical issues which we have to decide is its status in international law. This is a question of law, not fact. If its provisions became part of the law of Iraq, its interpretation is, strictly, a matter of fact. We have applied to its interpretation the approach set out in paragraph 6 above. When the hearing started, we understood it to be common ground that the TAL was promulgated by or under the authority of the Governing Council either on its own authority or jointly with the Authority. Lord Bingham certainly understood it to be promulgated by the Governing Council: see the first sentence of paragraph 13 at 2007 UKHL 58. Mr Hermer and Mr Goodwin-Gill now dispute that proposition. We will address the issue in due course. The TAL is a wide ranging document. Its preamble states its purpose: "This law is now established to govern the affairs of Iraq during the transitional period until a duly elected government, operating under a permanent and legitimate constitution achieving full democracy, shall come into being". Article 2 defines the transitional period as running from 30th June 2004 to the formation of an elected Iraqi government pursuant to a permanent constitution, in any case no later than 31st December 2005. The transitional period was to consist of two phases: the first beginning with the formation of a fully sovereign Iraqi interim government, taking power on 30th June 2004. (In fact, the handover occurred on 28th June 2004) and the second after elections for a national assembly which were to occur by 31st January 2005 at the latest. Article 3 provided:

> "(A) This law is the Supreme Law of the land and shall be binding in all parts of Iraq without exception. No amendment to this law may be made except by a three fourths majority of the members of the National Assembly and the unanimous approval of the Presidency Council. Likewise, no amendment

> may be made that could abridge in any way the rights of the Iraqi people cited in Chapter Two…
>
> (B) Any legal provision that conflicts with this Law is null and void…".

Article 4 provided that the system of government should be republican, federal, democratic and pluralistic with power shared between federal and regional authorities. Article 5 subjected to the armed forces to civilian control. Article 6 provided:

> "The Iraqi Transitional Government shall take effective steps to end the vestiges of the oppressive acts of the previous regime arising from forced displacement, deprivation of citizenship…".

Articles 7 and 9 provided for Islam to be the official religion of the State and for Arabic and Kurdish to be the two official languages. Chapter 2 was headed "Fundamental Rights". Article 10 provided that the governmental structures of the State would be "an expression of the free will and sovereignty of the Iraqi people". Article 11 contained detailed provision regulating Iraqi nationality and must be set out in full:

> "(A) Anyone who carries Iraqi nationality shall be deemed an Iraqi citizen. His citizenship shall grant him all the rights and duties stipulated in this Law and shall be the basis of his relation to the homeland and the State.
>
> (B) No Iraqi may have his Iraqi citizenship withdrawn or be exiled unless he is a naturalised citizen who, in his application for citizenship, as established in a court of law, made material falsifications on the basis of which citizenship was granted.
>
> (C) Each Iraqi shall have the right to carry more than one citizenship. Any Iraqi whose citizenship was withdrawn because he acquired another citizenship shall be deemed an Iraqi.
>
> (D) Any Iraqi whose Iraqi citizenship was withdrawn for political, religious, racial, or sectarian reasons has the right to reclaim his Iraqi citizenship.
>
> (E) Decision Number 666 (1980) of the dissolved Revolutionary Command Council is annuled, and anyone whose citizenship was withdrawn on the basis of this decree shall be deemed an Iraqi.
>
> (F) The National Assembly must issue laws pertaining to citizenship and naturalisation consistent with the provisions of this Law.

> (G) The Courts shall determine all disputes arising from the application of the provisions relating to citizenship."

Article 12 provided that "all Iraqis" are equal in their rights and that discrimination "against an Iraqi citizen" on familiar grounds was prohibited. Article 13 provided for freedom of expression, assembly and association and that "each Iraqi" had the rights of free movement, to demonstrate and strike, to freedom of thought, conscience etc. and to privacy. Article 14 provided that "the individual" had the right to security, education, healthcare and social security. Article 15 dealt with protection against unlawful detention and with fair trial rights. Those entitled to these rights were referred to as "persons". Article 16 dealt with property rights for "each Iraqi citizen". Articles 17, 18 and 19 dealt with arms, taxation and asylum. Article 20 afforded to "every Iraqi who fulfils the matters stipulated in the electoral law" the right to stand for election and to vote. Article 21 prohibited state authorities from interfering with the right of "the Iraqi people" to develop the institutions of civil society. Article 23 concluded with the following words:

> "Non-Iraqis within Iraq shall enjoy all human rights not - inconsistent with their status as non-citizens".

Chapters 3, 4 and 5 dealt with the establishment of a transitional government, legislative authority and executive authority. Chapter 6 established a Federal Judicial Authority including, for the first time in Iraq, by Article 44, a Federal Supreme Court. Chapters 7, 8 and 9 dealt with the establishment of special Tribunals and Commissions, regions, governorates and municipalities and for the transitional period.

13. By operative paragraph 1 of resolution 1546 of 8th June 2004, the Security Council endorsed "the formation of a sovereign Interim Government of Iraq, as presented on 1 June 2004, which will assume full responsibility and authority by 30 June 2004 for governing Iraq while refraining from taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office as envisaged in paragraph four below". Paragraph 4 endorsed the timetable for transition to democratic government set out in the TAL. Paragraph 2 welcomed the fact that by 30 June 2004 the occupation and the Authority would cease to exist. In fact, these events took place on 28th June 2004.

14. A new Iraqi constitution was accepted by referendum on 15th October 2005 and came into force on 20th May 2006. The TAL was "annulled" on the same date by Article 143. Article 18 dealt with citizenship/nationality.

> "Article 18
>
> First: Iraqi citizenship is a right for every Iraqi and is the basis of his nationality.
>
> Second: Anyone who is born to an Iraqi father or to an Iraqi mother shall be considered an Iraqi. This shall be regulated by law.
>
> Third:

> (A) An Iraqi citizen by birth may not have his citizenship withdrawn for any reason. Any person who had his citizenship withdrawn shall have the right to demand its reinstatement. This shall be regulated by law…
>
> Fourth: An Iraqi may have multiple citizenships. Everyone who assumes a senior, security or sovereign position must abandon any other acquired citizenship. This shall be regulated by law…
>
> Sixth: Citizenship provisions shall be regulated by law. The competent courts shall consider the suits arising from those provisions".

The Iraqi Nationality Law of 2006 came into force on 7th March 2006. As in the case of the 1963 law we have two translations of it and set them out in the same order as before:

Article 1 "For the purposes of this law the following terms shall have the meaning opposite to them…

> (B) Iraqi: A person who enjoys Iraqi citizenship"

Article 1 "For the purposes of this Law: …..

> (C) "Iraqi" means a person enjoying Iraqi nationality".

The Arabic word for citizenship and nationality is the same, so that nothing turns on the use of different English words in translation.

Article 2

> "A person who gained Iraqi citizenship in accordance with the provisions of the annulled Iraqi Citizenship Law No. (42) of 1924, the Iraqi citizenship law No. (43) of 1963, the Law of Granting Iraqi Citizenship to Arabs No. (5) of 1975 and the resolutions of the dissolved Revolutionary Command Council (of granting Iraqi Citizenship) shall be deemed an Iraqi citizen".

Article 2

> " 'Iraqi national' includes those persons who acquired Iraqi nationality under the provisions of :
>
> the Law of Iraqi Nationality (42/1924; repealed);
>
> the Law of Iraqi Nationality (43/1963);
>
> the Law Granting Iraqi Nationality to Arabs (5/1975); and

Resolutions of the abolished Revolutionary Command Council concerning Iraqi nationality"

Article 3

"A person who shall be deemed Iraqi if he/she:

(A) Is born to an Iraqi father or mother…"

Article 3

" 'Iraqi' means:

a) a person born to either an Iraqi father or an Iraqi mother"

Article 10

"First: An Iraqi holding foreign citizenship shall keep his Iraqi citizenship unless he declares in writing the relinquishment of his Iraqi citizenship.

Second: Iraqi Courts shall apply the Iraqi law to anyone holding Iraqi citizenship and the citizenship of a foreign country.

Third: An Iraqi who has relinquished his Iraqi citizenship may regain it, if he has legitimately returned to Iraq and resided in it for a period of not less than one year. After the elapse of such period, the Minister may consider him to have gained Iraqi citizenship from the date of his return. In case he submitted an application to regain the Iraqi citizenship before the elapse of the abovementioned period. Benefiting from this right shall be once only".

Article 10

"1. An Iraqi who acquires a foreign nationality retains it unless he renounces his Iraqi nationality by an official written request.

2.Iraqi courts apply the Iraqi law to any individual holding both Iraqi nationality and the nationality of the foreign state.

3. An Iraqi who renounces his Iraqi nationality has the right to reclaim it once he has legally returned to Iraq and has been a resident of Iraq for no less than a year. When one year has passed, it is at the Minister's discretion to decide whether the Claimant may retain his Iraqi nationality before the end of the period required. The individual may exercise this right only once."

Article 21 "annulled" or "repealed" Law number (43) of 1963.

Appended to the 2006 Nationality law were "justifying reasons" or "motives" which, according to Mr Edge, whose evidence on this point is not disputed, serve as an aid to interpretation.

> "In order to unify the provisions of Iraqi citizenship and to annul the texts relating to the withdrawal of Iraqi citizenship from an Iraqi who obtained an foreign citizenship and in order to enable the Iraqi whose Iraqi citizenship was withdrawn arbitrarily to regain it formally and for the purpose of binding the Iraqi to his country wherever he is throughout the world and drive him to belong to the soil of Iraq despite gaining another citizenship, this law is enacted"

> "This law was passed with the aim of codifying the regulations on Iraqi nationality and of repealing statutes detailing the revocation of Iraqi nationality for an Iraqi who had acquired a foreign nationality and to enable an Iraqi whose Iraqi nationality was inequitably revoked to reclaim it pursuant to principles; and to connect an Iraqi to his homeland wherever he may be throughout the world and to build his sense of belonging to the land of Iraq, even though he may hold another nationality"

The determinative issues

15. There are four determinative issues:

1. Did the Appellant lose his Iraqi nationality when he was granted British citizenship on 12th June 2000?

2. What, under international and Iraqi law, was the status of the TAL?

3. If the answer to Question 1 is, yes, did the Appellant regain Iraqi nationality/citizenship by virtue of Article 11(C) of the TAL?

4. If the answer to Question 3 is, no, did the Appellant regain Iraqi nationality/citizenship by virtue of Article 18.2 of the 2005 Constitution and Articles 2 and 10.1 of 2006 Nationality Law?

Analysis and Conclusions

16. The Appellant was born an Iraqi national by virtue of Article 8 of the 1924 law. His status was preserved by Article 4.1 of the 1963 law. The grant of British citizenship to him on 12th June 2000 resulted from his own application at a time when he resided in the United Kingdom. Accordingly, he acquired a foreign nationality "upon his free choice" and so, subject to a contention advanced by Mr Edge, lost his Iraqi nationality at that date by virtue of Article 11.1 of the 1963 law. Mr Edge asserts that the Appellant did not automatically lose his Iraqi nationality: formal notification to the Iraqi authorities was required before he did so. Because he does not suggest that he did so, Mr Edge believes that the Appellant did not lose his Iraqi nationality under 11.1. He bases that opinion in part upon his knowledge of other Middle Eastern legal

systems – in our opinion a factor of little weight in construing an Iraqi statute – but principally upon his understanding of an article published in Baghdad in 1974 by the leading Iraqi authority on nationality questions, Professor Daudi. His reasoning is set out in paragraphs 8 – 12 of his report. He confirmed it in evidence. He bases his opinion on two passages on pages 2 and 3 of Professor Daudi's article:

> "If a national acquires a foreign nationality by his choice and actually enters into this nationality and becomes by rule of law a citizen of the foreign state that has granted him nationality he will lose his Iraqi nationality by rule of law and/but this national must inform the Iraqi government that he has acquired an foreign nationality by choice in this case and will present for this official evidence issued by the relevant authorities in the state whose nationality he has acquired legalised in accordance with established principals in accordance with Iraqi law"

> "The acquisition of the foreign nationality will be by choice if an Iraqi seeks it by applying for it to be granted to him to the relevant authorities in a foreign state while he is present there, or if a nationality is imposed on him in a foreign state by his actual long-term residence in it or by his birth in its territory or for any other reason and he does not reject it, rather he holds to it willingly and expresses his positive desire by written or spoken application to Iraqi representative missions abroad or by written application to the Ministry of the Interior that he has acquired this foreign nationality. Silence alone about the nationality imposed on an Iraqi abroad is not considered the equivalent of a positive voluntary action for the purpose of loss of Iraqi nationality…"

Professor Daudi then goes on to give examples of circumstances in which Iraqi nationality was not lost on the acquisition of foreign nationality.

17. We accept that, as a matter of Iraqi administrative procedure, it was necessary for an Iraqi national who wished to divest himself of Iraqi nationality on the voluntary acquisition of foreign nationality to notify the Iraqi authorities. Otherwise, they might continue to hold him to his obligations as an Iraqi national under Article 21 of the 1963 law. However, as Professor Daudi states, Iraqi nationality is lost by operation of law when foreign nationality is acquired "upon his free choice". The analysis of Iraqi law in the second citation and in the examples which follow it demonstrate the need for an Iraqi national who has had foreign nationality imposed upon him to signify his acceptance of it. Professor Daudi's comments have no bearing upon the case of an Iraqi national who demonstrates his free choice by applying for foreign nationality. Accordingly, in our view, the fundamental premise of Mr Edge's conclusion is wrong. We prefer the opinion of Judge Al Saedi on this question, which follows the straightforward wording of Article 11.1. Judge Al Saedi's view accords with the conclusion which we would have reached upon the straightforward approach to interpretation stated in paragraph 6 above.

18. Mr Goodwin-Gill submits that,

i) the TAL was drafted and promulgated by the occupying powers (the Authority), not by the Governing Council

ii) Under settled principals of international law the Authority had no power to promulgate law which altered Iraqi nationality law.

19. The second proposition is unquestionably correct. We accept the analysis of the international law applicable to the administration of occupied territory by belligerent occupiers set out by Professor Christopher Greenwood QC in chapter 7 of the Administration of Occupied Territory in International Law published by Oxford University Press in 1992. "The belligerent occupant derives its authority not from international law but from the successful exercise of military power" (P250). The occupant acquires temporary authority, not sovereignty, over the occupied territory. It is permitted and required to administer the occupied territory, but has a duty "unless absolutely prevented" to respect the existing law of the territory. Save that an occupying power is not required to respect domestic laws which offend international norms (for example, the Nuremberg Laws) it does not have a general legislative competence permitting it to change the law of the occupied territory, beyond what is necessary to undertake the administration of the territory. However widely the obligation under Article 43 of the Hague Regulations to restore "l'ordre et la vie publics" is construed, it cannot extend to legislating for the nationality of those within or associated with the occupied territory. Mr Goodwin-Gill cites a pertinent example: the occupying powers of Germany after the Second World War did not purport to alter German nationality law, laid down in 1913. We do not accept Mr Swift's submission that Security Council resolutions 1483 and 1511 confer upon the Authority relevant powers beyond those available to it under established international law as the instrument of the occupying powers. If Article 11 of the TAL was promulgated solely by the Authority, it was ineffective to alter Iraqi nationality law.

20. That fact alone suggests that it was not the Authority which promulgated the TAL; or, at least, that it did not do so alone. The governments of the United States of America and of the United Kingdom can be taken to have been attempting to comply with international law in the administration of the occupied territory of Iraq: hence the letter of 8th May 2003 and their early and repeated submission to the decisions of the Security Council. The only sensible explanation of the legal basis for the TAL is that it was promulgated by or, at least, with the express approval of, the Governing Council. Only an organ of the Iraqi state with the capacity to alter nationality law could effectively have promulgated Article 11. The Governing Council undoubtedly had that capacity. Mr Goodwin-Gill submits, without evidence, that it is notorious that the members of the Governing Council were appointees of the United States. We prefer and accept the authoritative description by the Security Council in resolution 1500 of the Governing Council as "broadly representative". Further, and decisively we accept as authoritative the determination of the Security Council in operative paragraph 4 of resolution 1511 "that the Governing Council and its ministers are the principal bodies of the Iraqi interim administration, which, without prejudice to its further evolution, embodies the sovereignty of the State of Iraq during the transitional period…". The Security Council was, throughout, seized of the matter of the administration of Iraq and its restoration as a sovereign and independent state. Its determination that the Governing Council embodied the sovereignty of the State of Iraq recognised that body as having all of the attributes of a sovereign state other than

those temporarily usurped by the occupying powers. Only such a body could legislate for Iraqi nationality and the other matters set out in the TAL. It was, of course, not fully sovereign. It lacked one of the essential elements of any fully sovereign state – the monopoly of the exercise of lawful force within its territory. Nevertheless, it had the capacity to promulgate law in areas where its power existed, and did so. The TAL is a law promulgated by a competent sovereign authority and has the force of law in Iraq under international law.

21. We have no doubt that the TAL became part of Iraqi law upon promulgation or, at the latest, on the formation of a fully sovereign interim government on 28th June 2004. Judge Al Saedi does not suggest otherwise. Indeed, his comments on the TAL appear to assume its effectiveness. Mr Edge states that the TAL was and is controversial, but that it has been accepted by the Federal Supreme Court as, until the coming into force of Article 93 of the 2005 Constitution, providing the legal basis for its existence and powers. Mr Hermer criticised Mr Edge for not producing an Arabic or translated copy of its ruling and, with some sarcasm, submitted that Mr Edge's evidence on this point should not be accepted. We have no reason whatever to doubt the trustworthiness and accuracy of Mr Edge's evidence on this point and accept it. The decision of the Federal Supreme Court is plainly consistent with Article 143 of the 2005 Constitution which "annulled" the TAL. "Annulled" has been used in translation as a synonym for "repealed". We have no reason to doubt that it was similarly used here. Repeal presupposes lawful enactment. The sovereign authorities of Iraq have, accordingly, recognised the existence and effectiveness of the TAL. Our conclusion is that it did form part of Iraqi law from 8th March 2004 or 28th June 2004 until 20th May 2006.

22. The answer to the third question depends upon the meaning and effect of the second sentence of Article 11(C) of the TAL:

> "Any Iraqi whose citizenship was withdrawn because he acquired another citizenship shall be deemed an Iraqi".

23. Mr Hermer submits that in the TAL a distinction is to be drawn between an "Iraqi" and an "Iraqi national and/or Iraqi citizen". He accepts that "citizen" and "national" are synonymous in Arabic and treated as synonymous in Article 11(A); but that an "Iraqi" is not necessarily either. We pressed him to state his understanding of what the draftsman meant by "an Iraqi". His three attempts were:

> "Someone who falls within the definition of the Iraqi nation"
>
> "Someone who is afforded some protection under the TAL who is not an Iraqi citizen"
>
> "A relationship to the nation of Iraq that falls short of citizenship".

The difficulty with these attempted definitions is that they lack content. The last two merely state what "an Iraqi" is not. The first is meaningless. In our view, if the draftsman intended that the words "an Iraqi" should have a meaning different from that of an Iraqi national or citizen, he must have had in mind some positive quality, background or circumstance which distinguished him from an Iraqi national or citizen.

It is impossible to discern from the text of the TAL any such distinction. For example, Article 12 provides that "all Iraqis" are equal in their rights without regard to gender etc. and that discrimination against "an Iraqi citizen" on the basis of his gender etc. is prohibited. It is self evident that "Iraqi" and "Iraqi citizen" are being used synonymously in this article. Likewise, in Article 13 the reference to the rights of "each Iraqi" are clearly afforded to each Iraqi citizen not to two distinct classes of Iraqi. No sensible purpose can be discerned in limiting the right to own real property to an Iraqi citizen in Article 16(C), but to give the right to stand for election and to vote to every "Iraqi". Finally, the last sentence of Article 23 is incomprehensible if "Iraqi" does not mean "Iraqi citizen": "non-Iraqis" within Iraq have all human rights not inconsistent with their status as "non-citizens". On Mr Hermer's analysis, someone who is merely "an Iraqi", would be neither a "non-Iraqi" nor a citizen. The only sensible reading of the other provisions of the TAL is that that the draftsman treated "Iraqi" and "Iraqi national/citizen" as synonymous.

24. This interpretation undoubtedly creates anomalies within Article 11, but they are rectifiable with only modest corrections to the language used. The difficulty may have arisen as Mr Hermer and Mr Goodwin-Gill contend, because the text of the TAL was originally drafted in English and later translated into Arabic. No difficulty arises in relation to Article 11(B): a provision that "no Iraqi may have his Iraqi citizenship withdrawn or be exiled unless he is a naturalised citizen…" has a clear meaning if "Iraqi" means "Iraqi citizen". All that the clause means is that an Iraqi citizen may not have his (Iraqi) citizenship withdrawn or be exiled unless he is a naturalised citizen who has falsified his application for citizenship. No violence needs to be done to clause 11(C): all it means is that each Iraqi citizen has the right to carry more than one citizenship and that any former Iraqi citizen whose citizenship was withdrawn because he acquired another citizenship is deemed to be an Iraqi citizen. Article 11(D) and (E) can be similarly construed. Further, Mr Hermer's literal construction of 11(E) produces a nonsense. Decision number (666) provided that "the Iraqi nationality will be denied to each Iraqi of a foreign origin if found not loyal to the country…". The obvious purpose of Article 11(E) was to revoke this loss of nationality. If all that it achieved was to deem that the individual was "an Iraqi", who did not reacquire nationality or citizenship it would achieve nothing.

25. Mr Hermer submits that, even if that construction is correct, Article 11 did not produce an operative change in Iraqi nationality law: it was no more than an interim constitutional framework for the enactment of a specific law dealing with the topic. Judge Al Saedi supports this view. It accords with previous and subsequent Iraqi constitutional practice: the 1924 Nationality Law was required to give effect to the 1925 Constitution, as was the 2006 Nationality Law to give effect to Article 18 of the 2005 Constitution. It is Judge Al Saedi's opinion and Mr Hermer's submission that all former citizens of Iraq who lost their citizenship, for whatever reason and by whatever means, have to apply under the 2006 Nationality Law to reacquire Iraqi citizenship: otherwise, Article 11 of the TAL contains the inexplicable anomaly that a former Iraqi citizen who lost his citizenship by operation of law or under Decision number (666) (whose citizenship is automatically restored) is in a better position than a former Iraqi citizen whose citizenship was withdrawn for political religious racial or sectarian reasons (who only has the right to reclaim Iraqi citizenship). This is an anomaly, for which only a weak reason has been advanced by Mr Swift: that the Iraqi authorities might not have wished to take back as citizens all who were excluded by

deliberate decision for those reasons. The existence of an anomaly in an imperfectly drafted article is not, however, a reason for refusing to give full effect to those parts of it which are plain in meaning. We are in no doubt that Article 11(C) should be treated as having immediate effect. One of the principal purposes of the TAL was to provide for rights for Iraqis in the period before a fully sovereign government and legislative assembly was established. Unless Article 11 took immediate effect, the discredited provisions of the 1963 Nationality Law and, even more strikingly, of the decisions of the Revolution Council as to nationality and citizenship would have continued to have effect. This would have affected, amongst other matters, those who were entitled to stand for or vote in elections under Article 20. There was every reason for the Governing Council to identify with immediate effect those who were and were not Iraqi citizens in the transition period. Article 11(F) required the National Assembly to enact laws but purported (ineffectively, because the subsequently adopted Constitution could have provided otherwise) that they should be consistent with the provisions of "this law". In fact, the new provisions were. Article 10 of the 2006 Nationality Law continued to preserve the right to dual nationality of an Iraqi citizen originally conferred by Article 11(C) of the TAL. Save in the unusual circumstances of a person such as the Appellant, who perceives it as being in his interest not to have Iraqi nationality when deprived of British citizenship, no disadvantage occurs to an Iraqi citizen with dual nationality: if he does not wish to keep his Iraqi nationality, he can relinquish it by simple notice in writing.

26. For the reasons given, we conclude that the Appellant regained his Iraqi nationality/citizenship at the latest on 28th June 2004. He did not relinquish it in writing under Article 10.1 of the 2006 Nationality Law. Accordingly, he was not made stateless by the decision of the Secretary of State to revoke his British citizenship.

27. Our provisional view, which was quite firm, was that, even if the above analysis is wrong, the Appellant is considered by the Iraqi State to be an Iraqi national by virtue of the combined effects of Articles 2 and 10.1 of the 2006 Nationality Law. He gained Iraqi citizenship on birth in accordance with the provisions of the Law of 1924. Under Article 2 of the 2006 Law, he was, therefore, deemed to be an Iraqi citizen. He had not lost his citizenship under Article 10.1. However, both Mr Edge and Judge Al Saedi are of the opinion that that analysis is wrong. Accordingly, it may well be that our provisional view would have to give way to theirs. Because the issue does not arise on our analysis of the effect of Article 11(C) of the TAL, it is unnecessary to decide it.

28. For the reasons given, the order of the Secretary of State was not unlawful under section 40(4) of the 1981 Act.