Appeal No: SC/114/2012
Hearing Date: 13th & 14th June 2012
Date of Judgment: 29th June 2012

SPECIAL IMMIGRATION APPEAL COMMISSION

BEFORE:

THE HONOURABLE MR JUSTICE MITTING
UPPER TRIBUNAL JUDGE ALLEN
MR P NELSON

BETWEEN:

'B2'

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

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MR H SOUTHEY QC & Mr A Burrett (instructed by JD Spicer & Co. Solicitors) appeared on behalf of the Appellant

MR R TAM QC & Miss M Cumberland (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State

MR A McCULLOUGH QC & Miss S Rahman (instructed by the Special Advocates Support Office) appeared as Special Advocates.

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JUDGMENT ON PRELIMINARY ISSUE

Background

1. The appellant was born on 9th February 1983 of Vietnamese parents in Mongai Vietnam. It is common ground that he was a Vietnamese national by birth, under Article 2.1 of the Order of the Chairman of the Provisional Government of the Democratic Republic of Vietnam, Ho Chi Minh, No. 53 dated 20th October 1945. He says that his parents told him that they and he left Vietnam when he was one month old and travelled by sea to Hong Kong, where the family remained for approximately seven years. In August 1989 they arrived in the United Kingdom and claimed asylum. They were granted indefinite leave to remain and granted British citizenship in 1995. The appellant does not believe that his parents or he took any step to renounce their Vietnamese nationality. The only document which the appellant has evidencing any connection with Vietnam is his birth certificate. Neither he nor, it seems, his parents have ever held a Vietnamese passport.

2. On 20th and 22nd December 2011 the Secretary of State took a series of steps in relation to the appellant. First on 20th December, she decided to deprive him of British citizenship on conducive grounds for reasons of national security. On 22nd December the decision notice was served upon him. Later on the same day, the Secretary of State made an order under section 40(2) of the British Nationality Act 1981 depriving the appellant of his British citizenship. That order was then served on the appellant, together with notice of a decision by the Secretary of State to deport him to Vietnam under section 3(5)(a) of the Immigration Act 1971. He was then detained. On 13th January 2012 the appellant appealed against both decisions to SIAC. One of the grounds of appeal against the deprivation decision is that the order to deprive him of citizenship would make him stateless, so that the Secretary of State was not permitted to make it under section 40(4) of the 1981 Act. On 1st February 2012, SIAC ordered that a preliminary hearing be held to determine that question. That hearing was held on 13th and 14th June 2012. This is SIAC's open judgment on that question. There is also a closed judgment, to which any appellate court would need to refer fully to understand the reasons for our decision.

3. Because a small number of documents which should have remained closed in the interests of the international relations of the United Kingdom were inadvertently disclosed to the appellant's representatives, there has been a short private session from which the public and the appellant, but not his legal representatives (who gave appropriate undertakings) were excluded. We have taken into account the evidence adduced and the submissions made in that private session, but there is no need for a confidential judgment upon them. Our principal conclusions are set out in this open judgment. One matter of detail is dealt with in the closed judgment.

4. It is unnecessary to set out the Secretary of State's open case justifying the decisions to deprive and deport in any detail. A brief summary is required to understand the position of the Vietnamese government about the Secretary of State's decisions. The open case is that the appellant, having converted to

Islam, became an Islamist extremist. He admits that he travelled to Yemen in December 2010 and remained there until 25th July 2011. It is the assessment of the Security Service that while there, he received some form of terrorist training from Al Qaida of the Arabian Peninsula and would, if at liberty, pose an active threat to the safety and security of the United Kingdom and its inhabitants.

Law

5. Section 40(4) of the 1981 Act provides that the Secretary of State may not make an order under section 40(2) "*if he is satisfied that the order would make a person stateless*". For the reasons given in paragraph 5 of SIAC's decision in *Abu Hamza* SC/23/2003 5th November 2010 we are satisfied that the reference in section 40(4) is to *de jure* statelessness as defined in Article 1.1 of the Convention relating to the status of stateless persons done at New York on 28th September 1954:

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

It is common ground that if, when the appellant was deprived of his British citizenship, he was not considered by the Socialist Republic of Vietnam as a Vietnamese national, the deprivation order would have made him stateless and so would be prohibited under section 40(4). The determinative question is, therefore, whether, as at 22nd December 2011, the appellant was or was not considered as a national by the Vietnamese state under the operation of its law.

6. In the ordinary case, in which nationality laws are laid down in legislation passed by the relevant state which are interpreted and, in the event of a dispute between an individual and the executive branch of the state, determined by a court, the question is to be answered by discerning the meaning of the law as it would be applied by the courts of that state. That would be so even if the executive arm of the state refused to recognise an individual's nationality: see paragraphs 17 and 18 of *S1, T1, U1 and V1 v. SSHD* SC/106-109/2011 27th October 2011. That approach may not be determinative in the case of Vietnam. There is evidence (in open principally that of the expert called by the appellant, Ambassador Nguyen Quy Binh) that, whatever the terms of Vietnamese nationality law, it is in law and in practice the executive arm of the Vietnamese state, at its highest levels, which decides, at least in the case of overseas Vietnamese, who is and who is not a Vietnamese national. For reasons which we explain below, we accept this proposition. It follows that the normal approach to the issue of statelessness will not produce the correct answer to the preliminary question. As SIAC observed in *Abu Hamza* at paragraph 6, the definition of stateless person in Article 1.1 of 1954 Convention has as its premise the principle that it is for a state to determine, under its law, who are and who are not its nationals. The state is entitled to allocate that decision to the executive branch. If, as is the case in Vietnam, it is the view of that branch of the state which is determinative, not that which might, applying ordinary canons of construction to its legislation, be that of its courts.

7. No information about the identity, date and place of birth or alleged activities of the appellant was communicated by the British government to the Vietnamese government until 22nd December 2011. 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 22nd December 2011) a Vietnamese citizen. For reasons explained in the closed judgment, we are satisfied that this omission is deliberate. The precise question which we have to answer is whether, as at 22nd 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.

8. There is no evidence or suggestion that the Vietnamese government has taken any action since 22nd December 2011 to deprive the appellant of Vietnamese citizenship. No question, therefore, arises about the effect of any subsequent decision of the Vietnamese government, unless a submission made by Mr. Tam QC is correct. He submits that if, under the operation of the law of Vietnam, the appellant was a Vietnamese citizen on 22nd 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. 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 22nd 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. (The issue would not have arisen in this form prior to the amendment of section 40(2) by the Immigration Asylum and Nationality Act 2006, because the deprivation order could not have been made before the appeal against the deprivation decision, by which time the stance of the Vietnamese government would have been clear.)

Vietnamese nationality law - legislation

9. From 20th October 1945 until 15th July 1988, the principal "legislative" instrument applicable to Vietnamese nationality was Order Number 53 of 20th October 1945 of the Chairman of the Provisional Government. It contained only nine short articles. For present purposes, only Article 7.1 is directly relevant. It provided that a Vietnamese citizen would lose Vietnamese nationality on "being granted a foreign nationality". Order 53 did not prohibit the holding of dual nationality by one category of persons: under Article 4, Vietnamese people who had been granted French nationality were deemed to

be Vietnamese citizens, but were required to renounce French nationality by declaration. If they did not, they lost their right to vote and stand for election.

10. The 1988 Nationality Law passed on 28th June 1988 by the Eighth National Assembly of the Socialist Republic of Vietnam came into force on 15th July 1988. Ambassador Binh, who had a hand in drafting the law, gave evidence, to which we refer below, about its evolution. Article 3 provided:

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

Articles 8, 9 and 10 dealt with loss of Vietnamese nationality, which was to occur in one of four circumstances, of which only three might be relevant:

> "*1. Being permitted to relinquish Vietnamese nationality*
>
> *2. Being deprived of Vietnamese nationality…*
>
> *4. Losing Vietnamese nationality in other cases as provided for in this law*".

(Mr. Southey QC argued, without express support from Ambassador Binh that this included automatic loss on the acquisition of foreign nationality by virtue of the effect of Article 3. We do not accept that submission. Article 8.4 refers to circumstances affecting children which are set out in Articles 12.1 and 14.2). Article 9 provided that a Vietnamese citizen "*may be permitted to relinquish Vietnamese nationality*" on legitimate grounds, provided that he requested permission, which would be refused if he was performing military service, owed tax, was being prosecuted or was serving a sentence imposed by a court or if relinquishment would endanger Vietnamese national security. Article 10 provided that a Vietnamese citizen resident abroad could be deprived of Vietnamese nationality for political reasons. Under the heading "*Power to decide questions of nationality*" Article 15 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*".

The 1988 Nationality Law remained in force until 1st January 1999, when the 1998 Nationality Law came into effect. It was the legislative instrument applicable at the date on which the appellant acquired British citizenship in 1995.

11. The 1988 Nationality Law was supplemented by Decree No. 37/HDBT of 5th February 1990 issued by the Council of Ministers. Article 2 provided,

> "*Vietnamese citizens who concurrently hold another nationality (because they has naturalised another nationality without*

> *losing (*in Ambassador Binh's view, correctly translated as "relinquishing"*) their Vietnamese nationality or because of the conflict of laws between the laws of Vietnam and foreign countries) shall be protected by the Vietnamese government in accordance with the international law and customs when being abroad, and shall be treated like other Vietnamese citizens when being in Vietnam.*
>
> *In order to be permitted to renounce Vietnamese nationality, these Vietnamese citizens have to follow the procedures as provided in this decree.*"

(The Decree went on to set out the grounds on which a Vietnamese citizen residing abroad could be permitted to renounce Vietnamese nationality).

12. The 1988 Nationality Law was replaced, with effect from 1st January 1999, by the 1998 Nationality Law passed by the Xth National Assembly of the Socialist Republic of Vietnam on 20th May 1998. It reiterated recognition of single nationality only in Article 3. For the first time, it introduced the concept of "Vietnamese living abroad", who might be either Vietnamese citizens or people of Vietnamese origin who reside in foreign countries. Articles 6 and 7 provided that the Vietnamese state should adopt policies to encourage people of Vietnamese origin who are not Vietnamese citizens to maintain close relations with their families and native land, to have their Vietnamese nationality restored and to enjoy their rights and to perform their obligations as citizens while abroad. Broadly similar provisions to those contained in the 1988 law dealt with loss, relinquishment and deprivation of Vietnamese nationality (Articles 23 – 25). Articles 31 – 36 identified the relevant parts of the state which had power to determine nationality questions. The State President alone exercised power in relation to individual cases of naturalisation, restoration, relinquishment and deprivation (Article 32). Tellingly, the only power vested in a Vietnamese Court was to resolve disputes between individuals about Vietnamese nationality (Article 40.2).

13. The 1998 Nationality Law was replaced, with effect from 1st July 2009 by the 2008 Nationality Law passed by the XIIth National Assembly of the Socialist Republic of Vietnam on 13th November 2008. It maintained the distinction between Vietnamese citizens and persons of Vietnamese origin permanently residing abroad and maintained, but in a qualified form, the single nationality provision in Article 3 of both previous laws:

> "*The state of the Socialist Republic of Vietnam recognises that Vietnamese citizens have a single nationality, Vietnamese nationality, unless it is otherwise provided for by this law*".

Similar provision was made to that in the 1988 law to encourage people of Vietnamese origin residing abroad who were not Vietnamese nationals to maintain close relations with their families and homeland and to create favourable conditions for those who had lost Vietnamese nationality to restore it. Article 13.2 provided that,

> "*Overseas Vietnamese who have not yet lost Vietnamese nationality as prescribed by Vietnamese law before the effective*

> *date of this law may retain their Vietnamese nationality and within five years after the effective date of this law, shall make registration with overseas Vietnamese representative missions to retain their Vietnamese nationality*."

Article 23 provided for restoration of Vietnamese nationality in six cases – having applied for permission to return to Vietnam, having a close relative who was a Vietnamese citizen, having made meritorious contributions to Vietnamese national construction and defence, being helpful to the state of Vietnam, conducting investment activities in Vietnam and, confusingly,

> "*Having renounced Vietnamese nationality for acquisition of a foreign nationality but failing to obtain permission to acquire the foreign nationality.*"

Persons permitted to restore Vietnamese nationality were required to renounce their foreign nationality except in three specified cases and if permitted to do so by the President. As in the case of the 1998 law, elaborate provision was made for the elements of the Vietnamese state which had decision-making powers in relation to the nationality of individuals. In every case, they resided ultimately in the President. We have not found or been referred to any provision entrusting determination of any such issue to a court.

Vietnamese nationality law and practice – the expert evidence

14. Expert evidence was given by two Vietnamese lawyers now in different fields of private practice, Ambassador Binh for the appellant and Dr. Nguyen Thi Lang for the Secretary of State. Both were criticised for omissions in their reports – in the case of Ambassador Binh, that he made no reference to the 1988 law and in the case of Dr. Lang, that she made no reference to Article 3 in the 1988 or 1998 laws. In the case of both, it was suggested that their experience did not fully qualify them to comment on the nationality issues arising in this case. We were satisfied that both experts did their best to give their honest and independent opinions to SIAC and that, with the reservations expressed below, they were qualified to express the opinions which they did. We were much assisted by their evidence.

15. As already noted, Ambassador Binh played a part in the drafting of the 1988 Nationality Law. He did not play any part in drafting any subsequent law or decree. When the 1988 law was drafted, Vietnam had just begun to open itself to the outside world. Until then, significant elements had fought the French colonial power, then each other and the United States, then China and then Cambodia. About 3 million people, almost all of them disaffected for political or economic reasons, had fled the country. It is unlikely that many of them would have wished to return or been welcomed back if they had done so. The government of Vietnam then decided (perhaps following the example of China) to enter the global market place. To that end, it required capital and knowledge – both of which could be provided from within the Vietnamese diaspora. According to Ambassador Binh, there were two views within the Vietnamese government about dual nationality. As director general of the legal department he and a colleague from the Consul General Department prepared a draft which expressly acknowledged dual nationality. After it was

circulated within the Vietnamese government, it was rejected and Article 3 adopted in its place. Consequently, the principle of single nationality was, in Ambassador Binh's opinion, preserved by the 1988 law. He reached that opinion as a matter of law, not administrative practice: in his view, the meaning of Article 3 was that a Vietnamese citizen who acquired foreign nationality lost his Vietnamese citizenship. However, just over seven months later, the Council of Ministers issued Decree No. 37/HDBT of 5th February 1990 which, in Article 2, expressly acknowledged the possibility that Vietnamese citizens might acquire another nationality without losing or relinquishing their Vietnamese nationality. Ambassador Binh described this as contrary to the 1988 law. He was delighted when the 2008 law was passed which in his (clearly correct) view expressly recognises dual nationality subject to the cut off provided for in Article 13.2.

16. Dr. Lang set out her understanding of meaning and effect of Article 3 of the 1988 and 1998 laws as follows:

> "*Where a Vietnamese national acquires a second nationality, the meaning of the "principle of single nationality" set out in Article 3 of the 1998 Nationality Law is as follows: Vietnamese law does not recognise that he has any nationality other than Vietnamese. But because Vietnamese law does not have any provision depriving him of Vietnamese nationality on acquisition of the other nationality, Vietnamese law does not regard him as having lost Vietnamese nationality even though the other country regards him as having acquired their nationality. Vietnamese law simply regards him as continuing to be a sole Vietnamese national.*"

In support of her view, she relies on statements made by Dr. Tran That, Director of the Department of Judicial Administration in the Ministry of Justice at the time that the 2008 law was under consideration. His comments are not easy to follow, but do acknowledge the existence, in principle and in practice, of dual nationality. Unsurprisingly, in a state dominated by the executive, he lays emphasis on flexibility, for example,

> "*The law on nationality is proposed to reserve single nationality with, however, flexible provisions in some specific cases…*
>
> *However we will have flexible provisions, if overseas Vietnamese citizens, having not renounced their Vietnamese nationality, live in the foreign country which allows such Vietnamese citizens to naturalise its nationality without renouncing the Vietnamese nationality, we will recognise such foreign nationality, which also means these Vietnamese shall hold dual nationality. Of course, any provision must base on the reality as such is just a tool reflecting the policies of the party and the state towards overseas Vietnamese to ensure their utmost rights and benefits*".

Similar, somewhat confusing, statements also appear on a posting on the website of the Vietnamese Embassy in Buenos Aires and in statements made

at the time of the passing of the 2008 law by the Minister of Justice. Describing the position under the 1988 and 1998 law, he said

> "*None of these laws provided that Vietnamese citizens shall lost their Vietnamese nationality upon obtaining foreign nationality. However, the statement above shall pop up in the mind of many people an idea that it shall not recognise Vietnamese citizens holding foreign nationality*".

Conclusion

17. If the preliminary question were to be decided by reference to the text of the legislative instrument set out above, we would have preferred the view of Dr. Lang. 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.

18. However, the issue is not to be determined principally by reference to the text of Vietnamese nationality laws. In one respect, their text is significant: the 1988, 1998 and 2008 laws all provide that all decisions about the nationality of an individual of Vietnamese origin are to be made by the executive arm of the state: the Council of Ministers under the 1988 law and the President under the 1998 and 2008 laws. In Ambassador Binh's opinion, which we accept this aspect of the laws accurately reflects practice: a decision taken by the Council of Ministers or President as appropriate would not be open to challenge in the courts. Neither he nor Dr. Lang were able to cite any case in which such a challenge had been made, still less succeeded. In Dr. Lang's opinion, if such a challenge were to be made, the Administrative Court could overturn a government decision, even one made by the President. She believed that the courts would make that decision independently of the executive. In the event – which we consider would not occur – that such a challenge were to be made, it would be unlikely to do the individual any good. As the U.S. State Department report for 2010 makes clear, the communist party of Vietnam and State control the courts, and not vice versa (see paragraph 10.04 of the UKBA Vietnam Country of Origin Information Report dated 20th April 2012). We are satisfied that Dr. Lang's view, which is not based on experience (all applications for recognition of dual nationals handled by her have been accepted by officials without the need for litigation) is naïve. 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.

19. 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 22nd December 2011 did make him stateless and so is not permitted under section 40(4) of the 1981 Act.

20. Mr Southey submitted that because the decision deprived the appellant of EU citizenship, so requiring it to be subject to the requirement of proportionality, the burden of proving that it would not make him stateless lay on the Secretary of State. We do not accept that submission, but, because of the conclusion which we have reached about the preliminary issue it is unnecessary for us to do more than state our rejection of it.