



25 March 2015

PRESS SUMMARY

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

[2015] UKSC 19

On appeal from [2013] EWCA Civ 616

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Wilson, Lord Sumption, Lord Reed and Lord Carnwath

BACKGROUND TO THE APPEAL

The central issue in this appeal is whether the respondent was precluded from making an order depriving the appellant of his British citizenship because to do so would render him stateless. This turns on whether he was considered as a national by Vietnam “under the operation of its law” (article 1(1) of the 1954 Convention relating to the Status of Stateless Persons). Alternatively, the appellant argues that the decision was disproportionate under European Union law.

The appellant was born in Vietnam in 1983. In 1989 his family came to the UK, claimed asylum and were granted indefinite leave to remain. In 1995 he acquired British citizenship. The appellant took no steps to renounce his Vietnamese nationality. On 22 December 2011 the Home Secretary deprived him of his British citizenship under section 40(2) of the British Nationality Act 1981 because she suspected that the appellant was involved in terrorist activities. Vietnamese officials have since declined to acknowledge that Mr Pham is a national of Vietnam. He appealed against the respondent’s decision to the Special Immigration Appeals Commission (“SIAC”) on various grounds, including that he had lost his Vietnamese citizenship and therefore the decision made him stateless, contrary to section 40(4) of the 1981 Act. On a preliminary hearing on this issue, SIAC allowed the appeal on the basis that in practice it was the Vietnamese executive who made nationality decisions, and Mr Pham would not have been considered to be a Vietnamese national by the executive on 22 December 2011 had it been asked at that point. The Court of Appeal allowed the Secretary of State’s appeal and held that Mr Pham was a Vietnamese national on the relevant date under the text of Vietnamese laws.

JUDGMENT

The Supreme Court unanimously dismisses the appeal and remits to SIAC to decide the remaining issues in the appeal. Lord Carnwath gives the lead judgment. Lord Mance, Lord Sumption and Lord Reed give concurring judgments. Lord Neuberger, Lady Hale and Lord Wilson agree with Lord Carnwath, Lord Mance and Lord Sumption.

REASONS FOR THE JUDGMENT

Lord Carnwath observes that the question under article 1(1) is not necessarily to be decided solely by reference to the text of the nationality law of the state in question. Reference may also be made

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to the government's practice, even if not subject to effective challenge in the courts. However, even on the broad interpretation suggested by the UN High Commissioner for Refugees in its guidance, there is no evidence of a decision or practice of the Vietnam government which treated the appellant as a non-national "by operation of its law". Nor in any event was there evidence of a decision that was effective at the date of the Home Secretary's decision of 22 December 2011; unlike a court, the decision of the executive cannot take effect retrospectively. [34-38]

On the further issues of EU law, in the judgment of the Court of Justice of the European Union in *Rottman* [2010] ECR I-1449, the Court did not explicitly state that a Member State's decision as to the acquisition or loss of national citizenship, without any cross-border element, is outside the scope of EU law. [48] Lord Carnwath observes that this raises issues of general importance; however, the European point was not properly before the court for decision in this appeal as the preliminary issue defined by SIAC was confined to the question of statelessness. [55-56] Lord Carnwath sees force in criticisms of some of the reasoning in *Rottman*. The issue would need to be considered by the domestic courts before it would be appropriate to consider a reference to the CJEU. However, before that stage is reached it is important that the tribunal of fact, SIAC, should first identify the respects in which a decision on these legal issues might be necessary for disposal of the case, including how the EU requirement of proportionality would differ in practice in the present case from proportionality under the European Convention on Human Rights, an issue already before SIAC, or from applying domestic law principles. [58-59] Lord Carnwath, Lord Mance and Lord Sumption agree that in this case, the nature and intensity of review may not differ whether under domestic law or EU law. [59-60, 98, 109-110] As to whether EU law offers greater procedural safeguards than domestic law, Lord Carnwath states that it is impossible to judge in the abstract what practical effect that might have and this is best considered by SIAC. [59-61, 100]

Lord Mance agrees it is unnecessary at this stage to resolve the dispute about EU law. [71] It is very arguable that there are under the Treaties jurisdictional limits to EU competence in relation to the grant or withdrawal by a Member State of national citizenship. [84] A national court must ultimately decide for itself what is consistent with its domestic constitutional arrangements, including what jurisdictional limits exist on the competence of EU institutions. [90] Lord Mance further notes that proportionality could in principle be an appropriate standard of review at common law for a decision removing a status as fundamental as citizenship. [98]

Lord Sumption adds that a different test for EU or human rights issues than for domestic issues produces arbitrary distinctions which depend on which source of law is invoked as a ground of challenge: in the present case, it would be rather unsatisfactory to apply a proportionality test to the decision so far as it affects Mr Pham's EU citizenship but not his British citizenship. [104-105]

Lord Reed notes that proportionality as a general ground of review of administrative action is distinguishable from proportionality as a basis for scrutinising justifications for interferences with legal rights. In the first sense, the domestic test of reasonableness has been held not to be identical to proportionality in EU or human rights law. Nevertheless, the tests may sometimes yield the same outcome. [112-116] As to the second sense, in a number of cases concerned with statutory powers to interfere with important common law rights, the court has interpreted the powers as subject to implied limits, adopting in substance a requirement of proportionality, though less formally structured than that under the Human Rights Act 1998. [118-119] Given the fundamental importance of citizenship, arguably the power to remove it should be subject to that implied limit; Lord Reed reserves his view on this as it was not argued. [120]

NOTE: References in square brackets are to paragraphs in the judgment. This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.shtml>