

**Deprivation of nationality:
Implications for the fight against statelessness**

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1. *Introduction*

While there is a strong consensus that statelessness is an evil to be eradicated, the consensus is not universal and there are situations where it is regarded by some as, at the very least, the lesser evil. Deprivation of nationality is one of those areas where the apparent consensus is placed under particularly acute strain, in particular when deprivation of nationality is a response to national security concerns.

This paper sets developments in law, policy and practice on the deprivation of nationality in their legal and historical context and examines the effect that these have had on attitudes to statelessness. It examines whether permitting deprivation of nationality on national security grounds undermines broader work to eradicate statelessness.

2. *Deprivation of nationality: Development of the law*

Deprivation cases can be divided into those in which a person is deprived of their nationality on the grounds that it was obtained through fraud or falsity, and cases where a person's poor character and/or conduct is the basis of the deprivation. In the former case, the State may conclude that the result of the fraud is that a person never held a particular nationality in the first place. In cases of fraud, it may be easier procedurally for a State to treat the grant as a nullity than to go through

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a deprivation procedure.¹ Deprivation cases can be further divided into those in which a person is rendered stateless by the deprivation and those in which a dual (or multiple) national is deprived of one of their nationalities. There is not uniformity between international and regional instruments in their treatment of deprivation of nationality, or of these distinctions.

The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930² provides at Article 7:

‘In so far as the law of a State provides for the issue of an expatriation permit, such a permit shall not entail the loss of the nationality of the State which issues it, unless the person to whom it is issued possesses another nationality or unless and until he acquires another nationality. An expatriation permit shall lapse if the holder does not acquire a new nationality within the period fixed by the State which has issued the permit. This provision shall not apply in the case of an individual who, at the time when he receives the expatriation permit, already possesses a nationality other than that of the State by which the permit is issued to him.

The State whose nationality is acquired by a person to whom an expatriation permit has been issued, shall notify such acquisition to the State which has issued the permit.’

Article 15 of the 1948 Universal Declaration of Human Rights provides:

‘(1) Everyone has the right to a nationality.
(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.’

A decade later, in *Trop v Dulles*,³ Chief Justice Earl Warren said:

‘... the deprivation of citizenship is not a weapon that the government may use to express its displeasure at a citizen’s conduct, however rep-

¹ In the UK, for example, the question of nullity is considered first in deprivation of citizenship cases as set out in the Home Office Nationality Instructions, vol 1, ch 55, and those wishing to study deprivation of citizenship there should be alive to the need to examine cases of nullity as part of this.

² Adopted 12 April 1930, entered into force 1 July 1937, 179 LNTS 89.

³ 356 US 86 (31 March 1958).



reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship ..., I believe his fundamental right of citizenship is secure.'

Deprivation of citizenship he characterized as 'cruel and unusual punishment', contrary to the US Constitution. It is often assumed that Chief Justice Warren was talking of deprivation of nationality resulting in statelessness but he was not; the subject of the decision was deprivation of nationality *tout court*.⁴

There has to this day been no dissent from the judgment in *Trop v Dulles* in the courts of the United States. As a consequence of the judgment, the United States Immigration and Nationality Act⁵ frames loss of nationality by a 'natural born' or naturalised citizen as a voluntary act of relinquishing nationality, using the language 'shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality'.

The fiction of a voluntary act has been maintained, even by those urging the State to adopt new and more punitive approaches where national security is threatened. For example it was maintained in the Bill unsuccessfully introduced before the US House of Representatives by Representative Michelle Bachman on 8 September 2014,⁶ which proposed to amend the Immigration and Nationality Act by inserting new grounds into the list of acts that would constitute voluntary relinquishment that are cited above, for example accepting, serving in, or performing the duties of any office, post, or employment in a 'foreign terrorist organisation'.

While it has held in the United States, *Trop v Dulles* did not reflect a consensus among different States of the world. It did not even reflect

⁴ Germany under its Basic Law (art 16(1)) similarly sets its face against deprivation of citizenship on grounds of character but there is no fiction of voluntary relinquishment: '(1) No German may be deprived of his citizenship. Citizenship may be lost only pursuant to a law, and against the will of the person affected only if he does not become stateless as a result'. Since 1 January 2000, German citizenship may be lost by a person who voluntarily serves in a foreign army (over and above compulsory military service) unless permission so to do is obtained from the German government whether by automatic grant or individually. *Staatsangehörigkeitsgesetz* (StAG) of 15 July 1999, Federal Law Gazette, vol I, at 1618.

⁵ 8 USC 1481.

⁶ HR 5408 (113th) 'Terrorist Denaturalization and Passport Revocation Act'.



an agreed position where the deprivation would result in statelessness. At about this time, Member States of the United Nations were meeting in conference to draw up what became the 1961 UN Convention on the Reduction of Statelessness. Deprivation was one of the matters on which agreement could not be reached when the UN conference which adopted the Convention first met in 1959 and was one reason for its adjourning to 1961.

The Chinese representative took the *Trop v Dulles* approach, opposing deprivation in any circumstances.⁷ The representative of Ceylon (now Sri Lanka) took the opposite view.⁸ The UK opposed deprivation of the natural born but supported deprivation of the naturalized, a position it was to repudiate in 2002 as described below.⁹ The concerns that led States to be cautious about deprivation of citizenship differed. For Pakistan, the danger lay when a person is outside the State, because the State is powerless to act against them and there was the prospect that through deprivation the State would foist its national on other country,¹⁰ while for Yugoslavia a State needed deprivation only when a person was outside its territory and thus beyond its control and the reach of its criminal law.¹¹

The 1961 Convention on the Reduction of Statelessness permits the deprivation of nationality resulting in statelessness where nationality was obtained through fraud, but limits the circumstances in which a person can be left stateless by deprivation on grounds of character.¹² The Holy See, opposed to deprivation resulting in statelessness but not deprivation per se, brokered the compromise that ultimately prevailed.¹³

Article 8(1) of the Convention prohibits deprivation of nationality on the grounds of character where this would result in statelessness but this is subject to exceptions, as set out in Article 8(3): such exceptions as are specified at the time of signature, ratification or accession on

⁷ UN Doc A/CONF.9/C.1/SR.14.

⁸ *ibid* 3.

⁹ UN Doc A/CONF.9/C.1/SR.11, 7-8.

¹⁰ UN Doc A/CONF.9/C.1/SR.14, 3.

¹¹ UN Doc A/CONF.9/SR.20, 4.

¹² Adopted 30 August 1961, entered into force 13 December 1975, 989 UNTS 175, art 8.

¹³ UN Doc A/CONF.9/C.1/SR.1, 14.



grounds set out therein ‘being grounds existing in [the State’s] national law at that time’. These grounds include:

‘8(3)(a) that, inconsistently with his duty of loyalty to the Contracting State, the person

- (i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or
- (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State;

(b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.’

It is further specified in Article 8(4) that a Contracting State shall not exercise the power of deprivation except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

Given the debates on the 1961 Convention, it is no surprise that the right to a nationality did not make it into the 1966 International Covenant on Civil and Political Rights.¹⁴ It is more surprising that the prohibition on arbitrary deprivation did not so, especially given the frequency with which reference is made to ‘arbitrary’ conduct in the text.

Article 12(4) of the Covenant provides that ‘No one shall be arbitrarily deprived of the right to enter his own country’, but subsequent to a deprivation the question of whether a country is their own country is moot, a nice distinction which current UK law exploits as detailed below. The question of deprivation of citizenship while the person is outside the country of that citizenship raises its own problems. Professor Goodwin Gill¹⁵ has drawn attention to Paul Weis’s 1979 writing on the potential illegality to which deprivation of citizenship may give rise, particularly where, ‘it affects the right of other States to demand from the

¹⁴ Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

¹⁵ G S Goodwin-Gill, ‘Mr Al-Jedda, Deprivation of Citizenship, and International Law’, revised draft of a paper presented at a Seminar at Middlesex University on 14 February 2014, published by the Joint Committee on Human Rights in the course of its examination of the Immigration Bill session 2013-2014 (later the Immigration Act 2014).



State of nationality the readmission of its nationals'.¹⁶ This is of relevance when a person is deprived of their nationality when they are outside the State of that nationality, a matter which has loomed large in recent UK practice and debates on deprivation.¹⁷

The UN, rather than develop new treaty obligations, has used declaratory statements to build on Article 15 of the Universal Declaration of Human Rights. General Comments No 16¹⁸ and 27¹⁹ of the UN Human Rights Committee both inform the UN Human Rights Council's 'Human rights and arbitrary deprivation of nationality: report of the Secretary-General', which says of arbitrary deprivation of nationality:

'25. Thus, while international law allows for the deprivation of nationality in certain circumstances, it must be in conformity with domestic law and comply with specific procedural and substantive standards, in particular the principle of proportionality ... The notion of arbitrariness could be interpreted to include not only acts that are against the law but, more broadly, elements of inappropriateness, injustice and lack of predictability also.'

It continues:

'43. Procedural safeguards are essential to prevent abuse of the law. States are thus expected to observe minimum procedural standards in order to ensure that decisions on nationality matters do not contain any element of arbitrariness. For example, according to article 17 of the International Law Commission's draft articles on the nationality of natural persons, decisions relating to acquisition, retention or renunciation of nationality should be issued in writing and be open to effective administrative or judicial review. These elements, according to the Commission, "represent minimum requirements in this respect."

¹⁶ P Weis, *Nationality and Statelessness in International Law* (2nd edn, Sijthoff & Noordhoff 1979) 125, 126.

¹⁷ See below and see the debates on what became s 66 of the Immigration Act 2014.

¹⁸ Human Rights Committee, 'CCPR General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) available at <www.refworld.org/docid/453883f922.html>.

¹⁹ Human Rights Committee, 'CCPR General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 available at: <www.refworld.org/docid/45139c394.html>.



44. The International Law Commission ... clarified that the term “effective” was intended to stress the fact that an opportunity had to be provided to permit meaningful review of relevant substantive issues; it could thus be understood in the same sense as in article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights, where the same word is used.’²⁰

Meanwhile, the strong statements of the Universal Declaration of Human Rights have however found their echo in regional human rights instruments, both justiciable and declaratory. Article 20 of the 1969 American Convention on Human Rights provides:

- ‘1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.’

Similarly strong provision is found in the 1994 version of the Arab Charter, but this never came into force and it is missing from the 2004 Charter.²¹ Echoes of it can be felt in the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms of 1995, which provides at Article 24:

- ‘(1) Everyone shall have the right to citizenship.
- (2) No one shall be arbitrarily deprived of his citizenship or of the right to change it.’²²

²⁰ *ibid* paras 43-44. Cf Yearbook of the International Law Commission, 1999, vol II (2) at 38. The question of when deprivation of nationality will be arbitrary has been considered by the Office of the High Commissioner for Human Rights, see ‘Human Rights and Arbitrary Deprivation of Nationality, Report of the Secretary General’ (19 December 2013) UN Doc A/HRC/25/28.

²¹ See League of Arab States, ‘Arab Charter on Human Rights’ (adopted 15 September 1994) available at <www.refworld.org/docid/3ae6b38540.html>; Revised Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008).

²² Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (adopted 26 May 1995) available at <www.refworld.org/docid/49997ae32c.html>.



While Article 18 of the ASEAN Human Rights Declaration of 18 November 2012 provides:

‘Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.’²³

The European Convention on Nationality of 1997²⁴ contains the most developed attempt to put limits on the deprivation of nationality on grounds of character resulting in statelessness:

‘Article 7 – Loss of nationality *ex lege* or at the initiative of a State Party

1. A State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except in the following cases:
 - a. voluntary acquisition of another nationality;
 - b. acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;
 - c. voluntary service in a foreign military force;
 - d. conduct seriously prejudicial to the vital interests of the State Party;
 - e. lack of a genuine link between the State Party and a national habitually residing abroad;
 - f. where it is established during the minority of a child that the pre-conditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled;
 - g. adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.
2. A State Party may not provide for the loss of its nationality by children whose parents lose that nationality except in cases covered by sub-paragraphs c and d of paragraph 1. However, children shall not lose that nationality if one of their parents retains it.
3. A State Party may not provide in its internal law for the loss of its nationality under paragraphs 1 and 2 of this article if the person con-

²³ ASEAN Human Rights Declaration (adopted 18 November 2012) available at <<http://aichr.org/documents>>.

²⁴ Council of Europe, European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) ETS No 166.



cerned would thereby become stateless, with the exception of the cases mentioned in paragraph 1, sub-paragraph b, of this article.’

The Convention also prohibits an individual’s renouncing his or her nationality where this would result in statelessness.

It was however from the European Union, the then European Court of Justice, that there came the first suggestion that human rights law might place limits on deprivation of citizenship, at least where this could result in statelessness. In *Rottmann v Freistaat Bayern*²⁵ the European Court of Justice considered deprivation of nationality of a member State of the EU, obtained by deception, where this would result in statelessness. Mr Rottmann had used deception to naturalize, but as a result of the naturalization he had lost his nationality of birth (also that of a member State of the EU).

The European Court of Justice’s decision concerns the loss of European Union citizenship, a nationality citizens of the European Union derive from their nationality of a member State. Mr Rottmann had exercised rights of free movement and there are suggestions that this, rather than the sole fact of loss of EU citizenship, is what brings the case within the scope of EU law.²⁶

Principles of EU law had to be used,²⁷ although it was left to the national court to apply that test and it was open to the national court to conclude that the deprivation was proportionate.²⁸ The *ratio* of the case is applicable in all cases where Union citizenship would be lost, regardless of whether statelessness would result, although consequent statelessness could be relevant to the test of proportionality, for the court held that the consequences for the person and for family members affected had to be taken into account. Proportionality also required that Mr Rottmann be given time to pursue the possibility of recovering his original nationality.²⁹

The UK courts have questioned whether the Court of Justice is indeed competent in matters of nationality. In *Pham v Secretary of State*

²⁵ Case C-135/08 *Janko Rottman v Freistaat Bayern* [2010] ECR I-01449.

²⁶ *ibid* paras 42 and 49 and see the Opinion of the Advocate-General in the case at paras 10 and 11.

²⁷ *ibid* para 48.

²⁸ *ibid* para 59.

²⁹ *ibid* paras 56 to 58.



for the Home Department the Supreme Court raised but did not decide the question.³⁰ In *R (G1) v Secretary of State for the Home Department*, the Court of Appeal similarly reached no decision on the applicability of general principles of EU law such as proportionality and the avoidance of arbitrary decision-making³¹ but it did hold that *Rottmann* should be approached with caution³² and that the case could not be relied upon to require that a deprivation of nationality should accord with provisions of EU law such as Article 18 of the Treaty on the Functioning of the European Union, Article 21 of the Charter of Rights and Freedoms and Article 31(4) of Directive 2004/38/EC.³³ What these judgments do not do is attempt to copy the approach of the European Court of Justice in *Rottmann* outside the European law context or to look to human rights law to set limits on deprivation of citizenship over and above those which have informed the decision of the legislature in devising the applicable laws.

3. *Deprivation of nationality in the UK: Is it in conformity with international law?*

Section 40 of the British Nationality Act permits privation of citizenship where such citizenship was acquired by means of fraud, false representation or concealment of a material fact, irrespective of whether the acquisition of the citizenship status resulted from registration or naturalisation before or after commencement of the British Nationality Act 1981 and regardless of whether this would leave the individual so deprived stateless. As described above, this is potentially vulnerable to a *Rottmann*-style challenge, which may be one reason for the preference of declarations of nullity in such cases.

³⁰ [2015] UKSC 19, Lord Carnwath at para 58, Lord Mance at paras 68 to 90 and 99, Lord Sumption at para 111.

³¹ [2012] EWCA Civ 867, para 40.

³² *ibid* para 41.

³³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.



The very timing of UK legislation on deprivation is instructive: 2002,³⁴ the first immigration legislation after the New York bombings of 11 September 2001; 2006³⁵ after the 7 July 2005 bomb attacks in London and in 2012,³⁶ following two leading national security cases which had caused the Government considerable embarrassment.

In 2002 the UK Parliament removed the distinction between the naturalized and ‘natural born’ in matters of deprivation and introduced deprivation of the citizenship of persons born British. Section 40(3) of the British Nationality Act 1981 had been amended by section 4(2) of the Nationality, Immigration and Asylum Act 2002 to allow the Secretary of State to deprive a naturalized or a ‘natural born’ British citizen of their citizenship if satisfied that they had done anything ‘seriously prejudicial to the vital interests’ of the United Kingdom. This adopted the language of Article 8(3)(ii) of the 1961 Convention, which the UK ratified in 1966, and Article 7(1)(d) of the 1997 European Convention on Nationality, which the Government at the time stated that it intended to ratify.³⁷

It was argued during the debates on the amendments to the provisions on deprivation made in 2002, echoing the debates during the conferences on what become the 1961 UN Convention on the Reduction of Statelessness, that banishment did not serve national security well, for it put the person beyond the reach of the State. Lord Kingsland for the opposition in 2002 powerfully made the case that reaching for deprivation of citizenship risked violating the principle of *aut dedere aut iudicare*, saying:

‘I hope that the Minister will at least be able to reassure noble Lords – indeed, to undertake – that the proposals in this clause will not be used so as to evade the obligation to prosecute terrorists and others who commit serious crimes against the United Kingdom under any of our criminal laws.

³⁴ Nationality, Immigration and Asylum Act 2002.

³⁵ Immigration, Asylum and Nationality Act 2006.

³⁶ Immigration Act 2014.

³⁷ Nationality, Immigration and Asylum Bill, HC Standing Committee 30 April 2002 cols 55-61 per Angela Eagle MP, Parliamentary Under-Secretary of State for the Home Department.



I conclude with this point. Clause 4³⁸ must be against the rules of comity in international law. If we identify someone as a person proposing to commit a serious terrorist offence, for example, surely the obligation is on us to deal with that person. If we simply deport him, we shall be handing on – in my submission, irresponsibly – this terrorist problem to another state which may not have the same capability of dealing with it as we do. It cannot be a proper response to the terrorist threat to refuse to deal with it ourselves if the act involved occurs in our jurisdiction or in another jurisdiction from which we can gain extradition. That would be irresponsible of us.³⁹

In 2006 the Government abandoned the ‘vital interests’ test, preferring ‘conducive to the public good’, the standard used in the deportation of non-nationals. It was stated that the ‘vital interests’ test was ‘too high and the hurdles too great’.⁴⁰ The Government confirmed that it had abandoned its aspiration to ratify the European Convention on Nationality.⁴¹

The current UK Prime Minister, the Rt Hon Theresa May MP, spent a decade fighting to deport Mr Abu Hamza. It was pleaded against her that to deprive him of his British citizenship would leave him stateless. In *Hamza v Secretary of State for the Home Department*⁴² the Special Immigration Appeals Commission had to determine whether the proposed deprivation order would leave Mr Abu Hamza ‘stateless’ within the meaning of the statutory provision prohibiting deprivation of nationality resulting in statelessness⁴³. On the facts the determinative question was whether the appellant had been deprived by Egypt of his Egyptian nationality. The Commission considered the UK’s obligations under the UN Convention Relating to the Status of Stateless Persons of 1954⁴⁴ and the UN Convention on the Reduction of Statelessness of 1961. It held that Parliament intended that the Secretary of State should not make an order for deprivation if satisfied that the ef-

³⁸ Now s 4 of the Nationality, Immigration and Asylum Act 2002.

³⁹ HL Deb 9 October 2002 cols 277-278.

⁴⁰ Baroness Ashton of Upholland, HL Deb 14 March 2006 col 1190.

⁴¹ Immigration, Asylum and Nationality Bill, HC Standing Committee E, 7th sitting, 27 October 2005 am col 272 per Tony McNulty MP, Minister of State, Home Office; HL Deb 14 March 2006 col 1190 per the Baroness Ashton of Upholland.

⁴² SC/23/2003 (5 November 2010).

⁴³ British Nationality Act 1981 s 40.

⁴⁴ Adopted 28 September 1954, entered into force 6 June 1960, 360 UNTS 117.



fect would be that a person was not considered to be a national by any State under the operation of its law, following the definition in Article 1(1) of the 1954 Convention.⁴⁵ It further held that it ‘is not concerned with the reasonableness of the laws of a foreign state or of decisions made under them to deprive a person of his nationality, but with their effect’.⁴⁶

Statelessness was again pleaded against the Government’s attempts to deprive Mr Al Jedda of his British nationality. The UK Government argued before the Supreme Court in *Al Jedda v SSHD*⁴⁷ that deprivation of citizenship resulting in statelessness was permissible under UK law in circumstances where a person would be able, subsequent to deprivation, to resume a former nationality as of right, but did not chose to do so. The argument was rejected. The approach in the UNHCR ‘Guidelines on Statelessness’⁴⁸ was preferred:

‘An individual’s nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures are yet to be completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention. Similarly, where requirements or procedures for loss, deprivation or renunciation of nationality have only been partially fulfilled or completed, the individual is still a national for the purposes of the stateless person definition.’⁴⁹

Following this the UK controversially reintroduced deprivation of citizenship resulting in statelessness into its law on 28 January 2014, amend-

⁴⁵ Art 1(1) ‘For the purposes 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’.

⁴⁶ Para 6.

⁴⁷ [2013] UK SC 62.

⁴⁸ See now the UN High Commissioner for Refugees (UNHCR), *Handbook on Protection of Stateless Persons* (30 June 2014).

⁴⁹ UNHCR, ‘Guidelines on Statelessness, No 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons’ Doc HRC/GS/12/01 (20 February 2012) para 43. See now the UNHCR, *Handbook on Protection of Stateless Persons* (n 48).



ing section 40, *Deprivation of citizenship*, of the British Nationality Act 1981. In so doing, it was restricted by the terms of its declaration made on ratification of the 1961 Convention. That declaration has preserved only a right to deprive naturalized citizens, not the 'natural born' and on the grounds that they had done something prejudicial to the vital interests of the State. Thus it could only reintroduce provisions relating to naturalized citizens.

Faced with resistance in the UK House of Lords the final form of the Immigration Act 2014 reflected the compromise the Government had proposed in *Al Jeddah*: the Secretary of State could only deprive someone of his/her nationality where this would leave them stateless if she reasonably believed that they would be able to acquire another nationality or citizenship. Actual acquisition is not required, neither is timely acquisition and no provision is made for a situation where a person's best efforts to acquire another nationality are unsuccessful.⁵⁰

It is doubted that the UK procedure is in accordance with Article 8(4) of the 1961 UN Convention on the Reduction of Statelessness, that a Contracting State shall not exercise the power of deprivation except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body. Since the 1997 Special Immigration Appeals Commission Act, representation in national security cases of those subject to immigration controls has been both by lawyers of the appellant's own choosing and by a special advocate, whose role is defined in section 6 as to represent the interests of the appellant in any proceedings before the Commission from which the appellant or his legal representative is excluded. This procedure is one by which the State can keep secret from an individual and his or her legal representative oral or written evidence, on which the State intends to rely against that individual. A special advocate is permitted to see such material but may not speak to the individual or legal representative after doing so, unless granted permission to do so by the State, which requires the advocate to tell the State the reasons why he or she wants to speak to the individual or legal representative and therefore permission is infrequently requested. If permitted to speak to the individual or legal representative the special advocate, may not disclose the content of the secret material.

⁵⁰ Immigration Act 2014 s 66.



The use of a closed material procedure before the Special Immigration Appeals Commission was reviewed by the European Court of Human Rights in *A. and Others v the United Kingdom*⁵¹ and has recently been examined in *Sher and others v UK*.⁵² The European Court of Human Rights concluded that the procedure before the Special Immigration Appeals Commission can operate fairly, although whether it had done so in an individual case necessitated a careful examination of the facts and the person before the Commission needed to know the gist of the case against him or her.

Another feature of the UK procedure, which has changed, is that persons can now be deprived of their nationality whilst outside the UK. The Asylum and Immigration Act 2004 Schedule 2 repealed section 40A(6) of the British Nationality Act 1981 which had provided that an order depriving a person of his/her British nationality could not be made in respect of a person during the period in which an appeal against a notice of a decision to deprive that person of citizenship could be brought or was pending. The repeal came into effect on 4 April 2005.⁵³ Subsequent to that date, a person deprived of their British citizenship does not continue to hold that citizenship during their appeal. If their appeal is successful, their British citizenship is reinstated. Article 3(2) of Protocol No 4 to the European Convention on Human Rights, which the UK has not ratified, prohibits denying a person entry to the territory of a State of which they are a national. Consideration of how a case might be treated under the Protocol, before and after the change to the procedure, illustrates the significance of the change.

The case of Mr L1 illustrates the effect of the change. Mr L1⁵⁴ was a refugee from Sudan who had come to the UK in 1991 and naturalised as a British citizen in 2003. On 3 July 2010 he left with his family for a summer holiday with relatives in Sudan. Mr Justice Mitting, sitting in the Special Immigration Appeals Commission, recorded:

⁵¹ *A. and Others v The United Kingdom* App no 3455/05 (ECtHR [GC], 19 February 2009).

⁵² *Sher and Others v The United Kingdom* App no 5201/11 (ECtHR, 14 March 2016).

⁵³ SI 2005/565.

⁵⁴ *L1 v Secretary of State for the Home Department* SC/100/2010 available at <www.siac.tribunals.gov.uk/Documents/L1_StrikeOutJudgment_031210.pdf>.



‘12 ... (i) The Secretary of State’s decision to deprive the Appellant of his citizenship was one which had clearly been contemplated before it was taken. The natural inference, which we draw, from the events described, is that she waited until he had left the United Kingdom before setting the process in train.’

He referred to a ‘planned and specially choreographed set of steps’. On 7 July 2010 a notice under section 40(5) of the British Nationality Act 1981 signed personally by the Secretary of State informed Mr L1 of the Secretary of State’s intention to deprive him of his British citizenship. His address in Sudan not being known, this was sent, in accordance with regulation 10 of the British Nationality (General) Regulations 2003,⁵⁵ to his UK address. On 12 July 2010, a Home Office official signed an order depriving Mr L1 of his British citizenship. On that same day, the Secretary of State, acting in person, decided that Mr L1 should be excluded from the United Kingdom because his presence was not considered conducive to the public good. Mr L1 was effectively banished to Sudan, a country he had fled nearly 20 years before.

The exclusion barred Mr L1 from appearing in person at his appeal, raising the question of whether the UK procedure is compatible with Article 8(4) of the 1961 UN Convention on the Reduction of Statelessness: that a Contracting State shall not exercise the power of deprivation except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body. It thus raises the question of whether the deprivation should be regarded as arbitrary.

The case of *G1 v Secretary of State for the Home Department*⁵⁶ was not a case where it was pleaded that the deprivation had resulted in statelessness but in it the difficulties of pursuing an appeal from abroad were weighed by the Tribunal and the Court of Appeal. It was argued that to give evidence from overseas would put Mr G1 at risk from the Sudanese security service and that his lawyers could not fulfil their professional obligations toward him. Mr Justice Mitting however held that a solution was for Mr G1 to travel to a safe third country and that the onus was on him to demonstrate that he was unable to do so,

⁵⁵ SI 2003/548.

⁵⁶ [2012] EWCA Civ 867.



including that he was unable to obtain the required documentation from Sudan.

The UK has since denied its consular protection to those whom it has deprived of its citizenship while outside the country including at the moment of deprivation: most notoriously in the case of Madhi Hashi who approached the UK authorities in Djibouti having being deprived of his British nationality in Somalia. He was handed to the US authorities and rendered to the United States.⁵⁷

The test under UK law for deprivation is broad and vague and thus provides scope for argument that the selection of individuals for deprivation of citizenship is arbitrary. The lack of procedural protection is another basis for a challenge to the deprivation as arbitrary and, in cases where the person would be left stateless, for arguing that the procedure breaches the requirement in Article 8(4) of the UN Convention on the Reduction of Statelessness that deprivation be in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body. Where it can be shown that the timing of the deprivation was designed to prevent the person from returning to the UK and participating in the hearing, this too goes to the question of the fairness of the proceedings.

4. *Conclusion*

Cases of statelessness resulting from deprivation on national security grounds threaten to undermine broader work to eradicate statelessness. They encourage restrictive interpretations of human rights norms and of duties of States to further the right to a nationality and to prevent statelessness. Human rights standards are, as per the title of the 1948 Declaration, ‘universal’.

An increasing willingness to contemplate deprivation of citizenship resulting in stateless, against the backdrop of UNHCR’s campaign to eradicate statelessness within a decade, should give new impetus to challenges to deprivation of citizenship as arbitrary and un-

⁵⁷ See HL Deb 7 April 2014 col 1180 per Baroness Kennedy of the Shaws, Madhi Hashi’s lawyer.

lawful. In the words of Lord Brown of Eaton-under-Heywood in the debates on the Immigration Act 2014:

‘I am in the fullest measure in agreement with others who have spoken that the proposal would in fact involve the United Kingdom taking a serious retrograde step, deeply damaging to our international reputation. It is a shocking example to other states, which ordinarily are readier than we are to make such a radical departure from the consensus as to proper international human rights conduct.’⁵⁸

⁵⁸ HL Deb 17 March 2014 cols 53-54.

