

Deprivation of Citizenship resulting in Statelessness and its  
Implications in International Law

Opinion

by

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## Executive Summary

The proposal to allow the Secretary of State for the Home Department to deprive a naturalised individual of his or her citizenship risks not only damaging the United Kingdom's international relations, but also leading to breaches of international obligations and engaging the UK's international responsibility. Moreover, deprivation of citizenship is not a viable alternative to the responsible prosecution of alleged criminal conduct. Citizenship is not a 'privilege', but a protected legal status. Deprivation, with all its consequences in the modern world, is equivalent to a penal sanction of the most serious kind, but imposed without a criminal trial, without a conviction, without close and open examination of the evidence, and without an effective opportunity of defence, contrary to the requirements of due process.

From the perspective of international law, in particular,

- the re-introduction of previously repealed statutory provisions on deprivation resulting in statelessness is arguably inconsistent with Article 8(3) of the 1961 Convention (§§8-9);
- deprivation of citizenship resulting in statelessness will engage the United Kingdom's international responsibility where it violates the rights of other States, or is inconsistent with the United Kingdom's other international obligations (§16);
- as a matter of international law, the United Kingdom has no right, (1) to deport a person whom it has made stateless to any State which has not expressly agreed to admit the individual (§§17-20); (2) to refuse to readmit a former British citizen who has been deprived of his or her citizenship while present in another country (§§21-24);
- deprivation of citizenship may engage a variety of European Convention rights, and a person deprived of their British citizenship does not cease to be within the jurisdiction of the United Kingdom for those purposes (§§25-28);
- deprivation of citizenship is potentially inconsistent with obligations accepted by the United Kingdom under treaties dealing with 'terrorist acts', in particular, the obligations of investigation and prosecution, in the fulfilment of which every other State party has a legal interest (§§29-36);
- deprivation of citizenship will likely expose the conduct of the United Kingdom to close and critical scrutiny whenever a 'former British citizen' seeks international protection from the United Nations High Commissioner for Refugees, or as a stateless person or Convention refugee (§§37-45).

# 1. Deprivation of citizenship and the 1961 Convention on the Reduction of Statelessness<sup>1</sup>

1. Article 8 of the 1961 Convention establishes the basic principle that there should be no deprivation of nationality if it results in statelessness, but recognises a number of limited exceptions.

## *'Article 8*

1. A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.
2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State:
  - (a) In the circumstances in which, under paragraphs 4 and 5 of Article 7, it is permissible that a person should lose his nationality;
  - (b) Where the nationality has been obtained by misrepresentation or fraud.
3. Notwithstanding the provisions of paragraph 1 of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:
  - (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.
4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article

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<sup>1</sup> This Opinion develops the international law aspects of a paper given at a Seminar held at Middlesex University on 14 January 2014. A revised version of that paper, is available at <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf>.

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.'

2. The United Kingdom made the following declaration under article 8(3):

'... in accordance with paragraph 3 (a) of Article 8 of the Convention, notwithstanding the provisions of paragraph 1 of Article 8, the United Kingdom retains the right to deprive a naturalised person of his nationality on the following grounds, being grounds existing in United Kingdom law at the present time: that, inconsistently with his duty of loyalty to Her Britannic Majesty, the person (i) Has, in disregard of an express prohibition of Her Britannic Majesty, 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 Her Britannic Majesty.'

3. As the UK representative, Mr Harvey, noted during negotiations, 'The effect of the article was to "freeze" the grounds of deprivation at the date on which the State acceded to the Convention, and to limit them to certain specified types.'<sup>2</sup>

4. In 1966, when the United Kingdom ratified the 1961 Convention on the Reduction of Statelessness, deprivation of citizenship was governed by section 20 of the British Nationality Act 1948. This provided for deprivation in the case of fraud (section 20(2))<sup>3</sup>, and also that,

'(3) ... the Secretary of State may by order deprive any citizen of the United Kingdom and Colonies who is a naturalised person of that citizenship if he is satisfied that that citizen-

- (a) has shown himself by act or speech to be disloyal or disaffected towards His Majesty ; or
- (b) has, during any war in which His Majesty was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist an enemy in that war ; or

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<sup>2</sup> UN doc. A/CONF.9/SR.20, 11 October 1961, 2-3.

<sup>3</sup> The fact that 'deprivation' of citizenship by reason of fraud may permissibly lead to statelessness is often mentioned at the same time as deprivation on 'seriously prejudicial' grounds, as if it provided some sort of equivalent justification. However, fraud is not comparable; if one accepts the principle that 'fraud vitiates everything', then citizenship obtained by fraud was never valid, but void ab initio, and the language of 'deprivation' is inappropriate. This is clearly not the case with deprivation by reason of subsequent conduct.

- (c) has within five years after becoming naturalised been sentenced in any country to imprisonment for a term of not less than twelve months...

'(5) The Secretary of State shall not deprive a person of citizenship under this section unless he is satisfied that it is not conducive to the public good that that person should continue to be a citizen of the United Kingdom and Colonies.'

## 2. Legislative reforms

5. Section 40(3) of the British Nationality Act 1981 largely reproduced the 1948 grounds for deprivation. In 2002, the Government introduced a radical change in British law, under which even the 'natural-born', and not just the naturalised, could lose their citizenship. Section 40(3) of the British Nationality Act was amended by section 4(2) of the Nationality, Immigration and Asylum Act 2002 to allow the Secretary of State to deprive someone of their citizenship if satisfied that he or she had done anything 'seriously prejudicial to the vital interests' of the United Kingdom. In that regard, it adopted the language of Article 8(3)(ii) of the 1961 Convention, 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.<sup>4</sup> In the 2002 debate, the notion of 'vital interests' was discussed at several points, but the Government indicated that it saw the concept as 'an evolving one'. States had a margin of appreciation in applying it to situations arising within their own jurisdictions that they might not previously have conceived were possible, and the Government did not consider that the term would benefit from an attempt at further definition.<sup>5</sup>
6. The new provisions on deprivation, now applicable to natural-born and naturalised citizens, were balanced by specific incorporation of the basic principle laid down in Article 8(1) of the 1961 Convention, namely, that a person should not be deprived of their nationality if that would result in statelessness.
7. In 2006, the deprivation provisions were amended again, and 'conducive to the public good' language was substituted for that of serious prejudice to vital interests,

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<sup>4</sup> H.L. Deb., 9 October 2002, vol. 639, Lord Falconer at col. 537.

<sup>5</sup> Nationality, Immigration and Asylum Bill, H.L. Deb., 9 October 2002, vol 639, Lord Filkin, cols. 535-6.

avowedly because the latter threshold was considered too high.<sup>6</sup> Once again, however, in no case could the Secretary of State make an order of deprivation, if 'satisfied that the order would make a person stateless' (section 40(4), as amended). The Government no longer stated that it intended to ratify the European Convention, and it is reasonable to infer that it understood the revised 2006 legislation, and specifically the grounds on which citizenship might be revoked, to be inconsistent with Article 7 of that treaty; it is also inconsistent with Article 8 of the 1961 Convention, and inconsistent with the United Kingdom's declaration on ratification.

### 3. Current proposals

8. It is now proposed to change the law once more, so as to permit the deprivation of citizenship, even if it results in statelessness. This option will be limited to those who have obtained their citizenship by naturalisation, and the grounds for deprivation will be 'adjusted' to contain elements of both the 'conducive' and the 'seriously prejudicial' tests. Unless further amended, the Secretary of State will be enabled to make an order of deprivation if,

'... satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him- or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom..'

9. Given the United Kingdom's declaration under Article 8(3)(a) and its non-ratification of the 1997 European Convention, the United Kingdom might not appear to be in breach of its international obligations, merely by virtue of the fact that the law was changed to permit deprivation of citizenship resulting in statelessness.<sup>7</sup> The fact that the UK had elected over many years not to legislate in this regard would doubtless be seen as a matter for regret, particularly given its past practice in seeking to reduce statelessness and its support in 1959/1961 for Article 13 of the

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<sup>6</sup> In the words of Baroness Ashton of Upholland, the 'vital interests' test was 'too high and the hurdles too great': H.L. Deb., 14 March 2006, col. 1190.

<sup>7</sup> However, the UN Secretary-General's December 2013 Report, 'Human rights and arbitrary deprivation of nationality' notes that, 'A clear majority of States parties to the 1961 Convention have not invoked this option and do not deprive a person of nationality on this ground if this leads to statelessness. As an exception to the general rule that statelessness is to be avoided, the terms should also be construed narrowly..': UN doc. A/HRC/25/28, 19 December 2013, para. 12.

Convention on the Reduction of Statelessness.<sup>8</sup> It could be argued, however, that once having ‘legislated away’ the right to make a citizen stateless, as in 2002 and again in 2006, the United Kingdom no longer falls within the category of States which, in the sense of Article 8(3) of the 1961 Convention, ‘retain the right’ to deprive a person of his or her nationality, even if it results in statelessness.

10. Whatever the correct position on the question of treaty of interpretation, the focus on formal legality leaves unanswered a number of questions raising issues of international law, some of which were touched on in the debate in the House of Commons on 30 January 2014 and in the Westminster Hall debate on 11 February 2014. On the first occasion, the Home Secretary said: ‘One of our aims in seeking to deprive might be to remove the individual from the United Kingdom... It might not always be possible to do that, especially when the individual is stateless.’<sup>9</sup> In reply to a question from Mr Julian Brazier, asking whether the measure of deprivation can be applied to somebody abroad at the time, Mrs May said: ‘The measure would apply to somebody who was abroad. One of the points that I have tried to make is that the measure is not just about people in the United Kingdom, but people outside it.’<sup>10</sup> This was further elaborated on by Mr James Brokenshire in the Westminster Hall debate:

‘It is true that people have been deprived while outside the UK, but I do not accept that it is a particular tactic. It is simply an operational reality that in some cases the information comes to light when the person is outside the UK or that it is the final piece of the picture, confirming what has been suspected. In other cases, we may determine that the most appropriate response to the actions of an individual is to deprive that person while they are outside the UK.... [T]he Home Secretary takes deprivation action only when she considers it is appropriate and that may mean doing so when

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<sup>8</sup> Article 13: ‘This Convention shall not be construed as affecting any provisions more conducive to the reduction of statelessness which may be contained in the law of any Contracting State now or hereafter in force, or may be contained in any other convention, treaty or agreement now or hereafter in force between two or more Contracting States.’ See Summary Records, Meeting of the Committee of the Whole, 10 April 1959: UN doc. A/CONF.9/C.1/SR.13, 8 (Mr Ross, United Kingdom, supporting the proposal of the Chairman); Summary Records, Plenary, 24 August 1961, 10 (Mr Harvey, United Kingdom, ‘stressed that paragraph 3 of article 8 related to grounds for deprivation of nationality already existing in the national law, and that, moreover, the Geneva Conference in 1959 had adopted an article stipulating that the Convention should not be construed as affecting any provisions more conducive to the reduction of statelessness which might be contained in the law of any Contracting State now or hereafter in force or in any convention, treaty or agreement between two or more Contracting States...’)

<sup>9</sup> H.C. Deb., 30 Jan. 2014, col. 1043.

<sup>10</sup> Ibid., col. 1046.

an individual is abroad, which prevents their return and reduces the risk to the UK.<sup>11</sup>

11. A number of pertinent issues appear to have been ignored, however. As Mr Vaz said: ‘... once she has taken away citizenship from someone in this country and they are stateless, how will she get them out of this country?... How will she get such people out once she has taken away their British passport and they have no travel documents?’<sup>12</sup> He added later: ‘The Secretary of State told the House today that she will take away citizenship, leaving people stateless without a way out of the country... She did not tell the House how she would get a stateless person to leave the country. They would require a passport from another country or a travelling document and neither are on offer when citizenship has been taken away.’<sup>13</sup> In Mr Wishart’s somewhat more direct language, the Home Secretary,

‘... could not start to answer the simple question... of what happens to someone who is stripped of their UK citizenship but is not taken by any other country... Who is going to take these people? Are we going to launch them into orbit and leave them circling round the Earth as stateless people without any sort of citizenship?... Where will those people go? This is the big question that the Home Secretary has been unable to answer: what will happen to those people once they have been deprived of their citizenship? What will happen to their children, or the people who depend on them?’<sup>14</sup>

12. During the House of Commons debate, the Home Secretary also said: ‘The important point is that the process applies in cases where the individual could access the citizenship of another country, and it would be open to them to apply for such citizenship. That is the whole point.’<sup>15</sup> This is not to be a matter of *law*, however. In *Secretary of State for the Home Department v Al-Jedda*,<sup>16</sup> the Supreme Court

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<sup>11</sup> Mr James Brokenshire, Minister for Security and Immigration, H.C. Deb., 11 Feb. 2014, cols. 261WH, 262WH. In *L1 v Secretary of State for the Home Department* [2013] EWCA Civ 906, Mitting J. at first instance remarked: ‘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.’ Quoted by Lord Justice Laws at §5.

<sup>12</sup> H.C. Deb., 30 Jan. 2014, col. 1044-5.

<sup>13</sup> *Ibid.*, col. 1099.

<sup>14</sup> *Ibid.*, col. 1081.

<sup>15</sup> *Ibid.*, col. 1045.

<sup>16</sup> [2013] UKSC 62.



made it abundantly clear that being stateless meant just that, not being regarded as a citizen by any State under operation of its law. Statelessness is not about options or eligibility, but about the facts here and now. Nothing in the legislation as proposed indicates any intention to condition deprivation of British citizenship on the acquisition of or prospective entitlement to, another, and any expectations in that regard appear to be wishful thinking. Mr Brokenshire was a little clearer:

‘It is not true that all those deprived under the clause will be stateless. Some may be able to acquire or reacquire another nationality. In those cases, where the individual has been deprived while in the UK, we would seek to remove that individual from the UK once they had acquired another nationality. However, the clause is not limited to those cases and can be applicable to those who cannot acquire another nationality. In that event, it is open to them to make an application to stay in the UK as a stateless person.’<sup>17</sup>

13. In none of the debates so far, however, does any consideration appear to have been given to the United Kingdom’s other obligations in international law, and particularly to those which may be engaged by depositing its unwanted ‘former’ citizens onto the territory of other States.

#### 4. International law implications of citizenship deprivation

14. Deprivation of citizenship resulting in statelessness has both internal and external, or extraterritorial, dimensions.

##### 4.1 Deprivation of citizenship as an ‘internal act’

15. Notwithstanding developments in the law relating to statelessness and generally in the field of human rights, it appears still to remain within the competence of States to deprive individuals of their citizenship, at least so far as the act in question operates within the territory of the State.<sup>18</sup> In this sense, and bearing in mind the

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<sup>17</sup> H.C. Deb., 11 Feb. 2014, cols. 261WH.

<sup>18</sup> ‘In general, it matters not, as far as international law is concerned, that a state’s internal laws may distinguish between different kinds of nationals – for instance, those who enjoy full political rights, and are on that account named citizens, and those who are less favoured, and are on that account not named citizens’: R. Jennings & A. Watts, eds., *Oppenheim’s International Law*, London: Longman, 9<sup>th</sup> edn., 1992, vol. 1, 856-7; J. Crawford, *Brownlie’s Principles of Public International Law*, Oxford: Oxford University Press, 8<sup>th</sup> edn., 518-9.

evolving boundaries of human rights law, deprivation of citizenship may be permissible, and may result, for example, in the loss of social and political rights and in the treatment of the individual concerned as any other non-citizen, liable in principle to conditions on residence and, in theory, to expulsion. The right not to be arbitrarily deprived of one's nationality may be of limited assistance, for example, if deprivation is prescribed according to law, shown to be reasonably necessary in a democratic society, proportionate, and consistent with the State's other obligations under international law. That leaves many justiciable issues open and liable to legal challenge, including whether the criminal law or administrative measures would constitute a more proportionate response.

#### **4.2 Deprivation of citizenship as an 'external act'**

16. International law is by no means so accommodating, however, with regard to deprivation of citizenship resulting in statelessness, particularly when it has an impact on the rights and interests of other States, or when it otherwise touches on international obligations. This may occur in a number of contexts, including deportation, refusal of re-admission, human rights, the obligations of the United Kingdom with regard to the prosecution of international crimes, and applications for protection abroad.

##### *4.2.1 Deportation*

17. The issue of removal or deportation was raised in the House of Commons on 30 January 2014, but no clear answers were given. On the one hand, it was said that the United Kingdom 'would continue to comply with the provisions of the 1961 UN convention on the reduction of statelessness, regarding the rights of stateless persons. Where appropriate we could regularise a person's position in the UK by granting limited leave – possibly with conditions relating to access to public funds and their right to work and study.'<sup>19</sup> On the other hand, the Government's clear intention appears to be removal.
18. As a matter of international law, the correct position was set out in the House of Commons in 1959, in discussion of the case of the convicted 'atom spy', Klaus

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<sup>19</sup> James Brokenshire, H.C. Deb., 11 Feb. 2014, cols. 261WH. These matters are not in fact dealt with in the 1961 Convention, and presumably the Minister was referring to the 1954 Convention relating to the Status of Stateless Persons, as Mrs May did on 30 January 2014: H.C. Deb., 30 January 2014, col. 1043.

Fuchs. Replying to questions relating to his status and removal, the Home Secretary, Mr R. A. Butler, said:

'If Fuchs wishes to leave the country he could, in theory, as an alien be refused leave to embark under the Aliens Order... [A]s a matter of policy, it seems wrong in principle to attempt to use that power to prevent a man whom we have deprived of British nationality leaving the United Kingdom if he so desires... *In law, Fuchs could be deported but no other country can be required to accept a stateless deportee. Therefore, the power of deportation is not effectively available in this case.*'<sup>20</sup>

19. Article 9 of the draft articles on the expulsion of aliens recently adopted by the International Law Commission (ILC) on first reading provides as follows:

'Article 9

*Deprivation of nationality for the sole purpose of expulsion*

A State shall not make its national an alien, by deprivation of nationality, for the sole purpose of expelling him or her.'<sup>21</sup>

20. In its Commentary, the ILC notes that, while this article does not seek to limit the 'normal operation of legislation relating to the grant or loss of nationality', 'deprivation of nationality, insofar as it has no other justification than the State's desire to expel the individual, would be abusive, indeed arbitrary within the meaning of article 15, paragraph 2, of the Universal Declaration of Human Rights.'<sup>22</sup> Some recent statements by the Government may lead to the inference that expulsion is indeed the purpose of deprivation of citizenship.

#### 4.2.2 *Refusal of readmission*

21. The Government has stated its intention of employing the power to deprive of citizenship when the person concerned is outside the United Kingdom, and admits

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<sup>20</sup> 606 H.C. Deb., 11 June 1959, cols. 1175-6 (emphasis supplied).

<sup>21</sup> Report of the 64<sup>th</sup> Session: UN doc. A/67/10 (2012), Chapter IV, 'Expulsion of aliens', 9, 13, 32-3.

<sup>22</sup> *Ibid.*, 32. In its General Comment on Article 12 of the 1966 International Covenant on Civil and Political Rights, the Human Rights Committee referred to a person's right to enter 'his own country' as being broader than the concept of 'country of nationality'. In its view, when individuals have been deprived of their nationality in violation of international law, that person will continue to hold the right to enter and reside in that country, as his or her 'own country': Human Rights Committee, General Comment No. 27 on Freedom of Movement, para. 20.

to having done so on many occasions to date, although not yet in circumstances leading to statelessness.<sup>23</sup>

22. In 1979, Paul Weis pointed out the potential illegality to which deprivation of citizenship may give rise, particularly where, 'it affects the right of other States to demand from the State of nationality the readmission of its nationals... [I]ts extraterritorial effect would be denied as regards the duty of admission.'<sup>24</sup> He distinguishes between denationalisation before leaving and denationalisation after leaving the State of nationality, but is of the view that in both cases, the duty to permit residence or to readmit the former national persists; moreover, in the latter case,

'The good faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalisation this duty were to be extinguished.'<sup>25</sup>

23. These propositions are unexceptional as a matter of international law. As Judge Read remarked in the *Nottebohm* case in the International Court of Justice, when a non-citizen appears at the border, the State has a right to refuse admission.<sup>26</sup> If, however, it allows the non-citizen to enter, then it brings into being a series of legal relationships with the State of which he or she is a national, which status will be commonly evidenced by production of a passport. This relative relationship of rights and duties is the source of the receiving State's right to terminate the non-citizen's stay by deporting him or her to the State which issued the passport ('returnability' being central to the passport regime), and of the State of nationality's obligation to admit its citizens expelled from other States.

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<sup>23</sup> Mrs May, H.C. Deb., 30 January 2014, cols. 1045, 1046.

<sup>24</sup> P. Weis, *Nationality and Statelessness in International Law*, Alphen aan den Rijn: Sijthoff & Noordhoff, 2<sup>nd</sup> edn., 1979, 125, 126 (emphasis supplied). Paul Weis was himself a naturalised British subject, legal adviser in the International Refugee Organisation, and then in the Office of the United Nations High Commissioner for Refugees; in the last-mentioned capacity, he participated in the Conference which led to the adoption of the 1961 Convention. For many years following his retirement, he was the United Kingdom Representative in the Council of Europe Ad Hoc Committee on Refugees and Stateless Persons (CAHAR).

<sup>25</sup> *Ibid.*, 55. See also at 57: 'In the case of denationalisation, the doctrine of the survival of the duty of readmission after the loss of nationality follows, in fact, from the principle of territorial supremacy: this supremacy might be infringed by such unilateral action in so far as that action would deprive other States of the possibility of enforcing their recognised right to expel aliens supposing that no third State, acting in pursuance of its legitimate discretion, was prepared to receive them.'

<sup>26</sup> *Nottebohm Case (Liechtenstein v Guatemala)*, [1955] ICJ Reports 4, 34ff.

24. *Any* State which admitted an individual on the basis of his or her British passport would be fully entitled to ignore any purported deprivation of citizenship and, as a matter of right, to return that person to the United Kingdom.<sup>27</sup> If the United Kingdom were to refuse re-admission, and if no other country had expressed its willingness to receive that person, the United Kingdom would be in breach of its obligations towards the receiving State.<sup>28</sup>

#### 4.2.3 *Human rights*

25. Even if the right to nationality is not expressly protected by the European Convention on Human Rights (ECHR), deprivation of citizenship may clearly have an impact in related areas, such as private and family life under Article 8. The Home Office Memorandum in justification and defence of the proposed amendment attempts to deal with some of these ECHR implications.<sup>29</sup> It accepts the above proposition, but insists that deprivation of citizenship can still be carried out compatibly with the Convention.<sup>30</sup>
26. The Memorandum then ventures into the field of jurisdiction, noting that, 'where an individual is not in the UK's jurisdiction for the purposes of the ECHR, that person's article 8 rights will not be engaged by a deprivation decision.'<sup>31</sup> No authority is given for this proposition, which begs precisely the jurisdictional question. It is certainly wishful legal thinking to suppose that a person's ECHR rights can be annihilated simply by depriving that person of citizenship while he or she is abroad. Even a little logic suffices to show that the act of deprivation only has meaning if it is directed at someone who is *within* the jurisdiction of the State. A citizen is manifestly someone subject to and within the jurisdiction of the State, and the purported act of deprivation is intended precisely to affect his or rights. The link

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<sup>27</sup> In principle, given the bilateral nature of the relationship between 'sending' and 'receiving' States, it would not matter whether the individual were then stateless or possessed of another nationality. The sending State's obligation of readmission derives from the receiving State's good faith reliance on documented citizenship.

<sup>28</sup> Mr Brokenshore's response to Question 11 in his letter of 20 February 2014 to Dr Hywel Francis MP, Chair, Joint Committee on Human Rights, is therefore manifestly incorrect as a matter of international law.

<sup>29</sup> 'Immigration Bill. European Convention on Human Rights. Supplementary Memorandum by the Home Office', 29 January 2014, paras. 9-17.

<sup>30</sup> *Ibid.*, paras. 10-12.

<sup>31</sup> *Ibid.*, para. 13.

to the protection of the Convention is therefore solid enough for the purposes of supervisory review, with regard not only to private life considerations, but also to questions of inhuman or degrading treatment, among others.

27. The same opacity concerning jurisdiction appears in paragraph 16 of the Memorandum. As already noted above, if the Home Secretary purported to deprive a British citizen of his or her citizenship while that person was physically present in another State, thereby rendering them stateless, this would potentially render the United Kingdom liable for having infringed that State's rights. Having admitted the individual on the strength of his or her passport or other documentation attesting to British citizenship, that State would be fully entitled to require the United Kingdom to readmit the person.
28. Also, as noted above, the individual targeted by a deprivation order would not cease to be within the jurisdiction of the United Kingdom, and therefore within the supervisory competence of the European Court of Human Rights, for the purpose of determining whether there had been any violation of their rights incidental to or consequential upon such a measure. Leaving individuals 'in orbit' – not allowed to remain in any other State but refused admission to their State of 'former' nationality – is certainly capable of raising Convention issues, as various admissibility decisions of the former European Commission on Human Rights showed, when dealing with applications by United Kingdom citizens from East Africa during the 1970s.<sup>32</sup>

#### 4.2.4 *Obligation to investigate and to prosecute international crimes*

29. It has been said in support of the proposed power to deprive of citizenship that it, 'will be used sparingly against very dangerous individuals who have brought such action upon themselves through terrorist-related acts'.<sup>33</sup>
30. The United Kingdom is party to many treaties dealing with 'terrorist acts', such as the 1979 International Convention against the Taking of Hostages, the 1997 International Convention for the Suppression of Terrorist Bombings, and the 2000 International Convention for the Suppression of the Financing of Terrorism.<sup>34</sup> In

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<sup>32</sup> See, for example, *Patel et al v United Kingdom*, Application Nos. 4403/70, 4486/70, 4501/70 and others, Decision of the Commission as to Admissibility, 10 October 1970: 13 *Yearbook* 928.

<sup>33</sup> Mrs May, H.C. Deb., 30 Jan. 2014, col. 1050. Also, James Brokenshire, H.C. Deb., 11 Feb. 2014, col. 258WH: '... the issue concerns national security and our attempts to remove dangerous individuals from the UK.'

<sup>34</sup> The United Kingdom is also party to the 1998 Statute of the International Criminal Court, the Preamble to which affirms that, 'the most serious crimes of concern to the international community as a

each of these conventions, the United Kingdom undertakes to criminalize the conduct in question, to make it punishable by appropriate penalties, and to establish jurisdiction over the crimes defined, for example, when the alleged offender is a UK national.<sup>35</sup>

31. The United Kingdom's obligations go much farther, however. In particular, on receiving relevant information, the UK is obliged to take 'such measures as may be necessary under its domestic law to investigate the facts...'<sup>36</sup> If the circumstances so warrant, it is also required to take 'appropriate measures' to ensure the presence of the offender or alleged offender for the purpose of prosecution or extradition.<sup>37</sup> Thereafter, if the alleged offender is in its territory, the United Kingdom is obliged, if it does not extradite that person, 'without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution...'<sup>38</sup>
32. The wording of the provisions just cited is paralleled in the 1984 United Nations Convention against Torture, to which the United Kingdom is also party. Article 5 requires jurisdiction to be established, among others, when the alleged offender is a national; article 6(1) obliges the State party, 'Upon being satisfied, after examination of information available to it, that the circumstances so warrant...,' to take the alleged offender into custody or to take 'other legal measures to ensure his presence'; and article 6(2) requires the State immediately to make a preliminary inquiry into the facts. Article 7(1) provides as follows:

'The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.'

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whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation', and recalls that, 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes...'

<sup>35</sup> See, for example, articles 2, 5, 1979 Hostages Convention; articles 4, 6, 1997 Terrorist Bombings Convention; articles 2, 4, 7, 2000 Terrorism Financing Convention.

<sup>36</sup> Article 9(1), 2000 Terrorism Financing Convention; article 7(1), 1997 Terrorist Bombings Convention. Article 6(1), 1979 Hostages Convention, provides that a State party in which an alleged offender is present, 'shall immediately make a preliminary inquiry into the facts'.

<sup>37</sup> Article 9(2), 2000 Terrorism Financing Convention; article 7(2), 1997 Terrorist Bombings Convention; article 6(1), 1979 Hostages Convention.

<sup>38</sup> Article 10, 2000 Terrorism Financing Convention; article 8, 1997 Terrorist Bombings Convention; article 8(1), 1979 Hostages Convention.

33. These provisions of the 1984 Convention against Torture were recently considered by the International Court of Justice in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.<sup>39</sup> The Court referred expressly to, ‘the common interest in compliance’ with the Convention, which entitles each State party to make a claim concerning alleged breaches by another State party,<sup>40</sup> and emphasised the ‘preventive and deterrent character’ of the obligation to criminalize and establish jurisdiction.<sup>41</sup>
34. Article 6(2) of the Convention against Torture requires that steps must be taken to make a preliminary inquiry, ‘as soon as the suspect is identified in the territory...’<sup>42</sup> Article 7(1) leaves competent State authorities responsible for deciding whether to initiate a prosecution, in the light of the evidence,<sup>43</sup> but the State’s obligations, ‘taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven.’<sup>44</sup> Moreover, article 7(1), ‘requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, *irrespective* of a prior request for the extradition of the suspect.’<sup>45</sup> The Court added:
- ‘Extradition is an option offered to the State by the Convention, whereas *prosecution is an international obligation* under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.’<sup>46</sup>
35. The Court found that, having failed to comply with its obligations under articles 6(2) and 7(1) of the Convention against Torture, Senegal had engaged its international responsibility.

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<sup>39</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* [2012] ICJ Reports.

<sup>40</sup> *Ibid.*, para. 69 (specifically with reference to articles 6(2) and 7(1) of the Convention).

<sup>41</sup> *Ibid.*, para. 75.

<sup>42</sup> *Ibid.*, para. 86.

<sup>43</sup> *Ibid.*, para. 90.

<sup>44</sup> *Ibid.*, para. 91.

<sup>45</sup> *Ibid.*, para. 94 (emphasis supplied).

<sup>46</sup> *Ibid.*, para. 95 (emphasis supplied). See also para. 120: ‘The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party.’ Clearly, each of the other conventions mentioned above has a similar purpose.



36. It appears that the United Kingdom intends to ignore or avoid many of its obligations in relation to those who may be alleged to have committed, or otherwise been involved in, terrorist-related acts, and to seek to off-load them unilaterally.<sup>47</sup> Such action will be in breach of the United Kingdom's obligations, besides adding to the wrong done to any individual State which finds itself hosting a former UK citizen.<sup>48</sup>

#### 4.2.5 *Applications for protection abroad*

37. Those deprived of their British citizenship and rendered stateless while abroad will lose any claim to British consular or diplomatic services. Having no State of their own to which to turn, they will therefore need to seek protection elsewhere, for example, under the 1954 Convention relating to the Status of Stateless Persons, or under the 1951 Convention/1967 Protocol relating to the Status of Refugees. In either case, the person concerned may also seek the protection of the Office of the United Nations High Commissioner for Refugees (UNHCR).

##### 4.2.5.1 *Protection by UNHCR*

38. UNHCR has international protection responsibilities for both refugees and stateless persons. Responsibility for stateless *refugees* is implicit in its mandate,<sup>49</sup> while the UN General Assembly has accorded UNHCR special responsibilities for stateless persons, under Articles 11 and 20 of the 1961 Convention.<sup>50</sup> The UNHCR Executive Committee has recognized the general responsibilities of the Office for stateless persons in Conclusion No. 78 and again in Conclusion No. 106.<sup>51</sup>
39. In seeking durable solutions, UNHCR will first likely turn to the authority responsible for the statelessness, and intervene with the United Kingdom with a

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<sup>47</sup> To what extent the disinclination to prosecute those whom the Government has described as having brought deprivation of citizenship upon themselves 'through terrorist-related acts' is due to the numbing effect of section 17 of the Regulation of Investigatory Powers Act 2000 may be an appropriate matter for debate.

<sup>48</sup> On the conduct to be expected of a responsible member of the international community, see the views of the former Lord Chancellor, Lord Kingsland, 639 H.L. Deb., 9 October 2002, cols. 277-8, cited by Ms Diane Abbott, H.C., 11 February 2014, col. 255WH.

<sup>49</sup> See UNHCR Statute, paragraph 6A(ii) and 1951 Convention relating to the Status of Refugees, Article 1A(2).

<sup>50</sup> UNGA resolutions 3274 (XXIX), 10 December 1974, and 31/36, 30 November 1976.

<sup>51</sup> See also UNGA resolutions 50/152, 21 December 1995 and 61/137, 19 December 2006.

view to the individual being readmitted and no longer remaining a burden on another State. As indicated above, the international responsibility to admit former nationals continues. UNHCR can be expected to record such interventions and to report accordingly to its Executive Committee and to the United Nations General Assembly, where the United Kingdom's conduct may be exposed to close scrutiny.

#### 4.2.5.2 *Protection as a stateless person*

40. Eighty States are now party to the 1954 Convention on the Status of Stateless Persons, including the United Kingdom. With encouragement from UNHCR, a number of States, again including the United Kingdom, have introduced procedures to determine eligibility for protection under the Convention. Part 14 of the Statement of Changes in Immigration Rules came into operation in April 2013,<sup>52</sup> and new rule 401 provides that a stateless person is a person who, 'satisfies the requirements of Article 1(1) of the 1954 United Nations Convention relating to the Status of Stateless Persons, as a person who is not considered as a national by any State under the operation of its law...' A person who satisfies this criterion and who cannot reside in their country of former habitual residence or any other country may be granted leave to remain.<sup>53</sup>
41. Other States party to the 1954 Convention may operate a similar procedure. Faced with an applicant who appears to have been rendered stateless by act of the United Kingdom government, such other State will need to decide, first, whether to accept the act of deprivation as valid, and then move to consider eligibility for protection; or second, whether to reject its 'international validity', or at least its 'opposability' to itself, the putative State of refuge. In the latter case, that State would be within its rights to insist that the United Kingdom continue to accept its international responsibilities towards the person concerned.<sup>54</sup>

#### 4.2.5.3 *Protection as a refugee*

42. A person rendered stateless by the United Kingdom may seek protection as a recognized refugee in one of the other 146 States party to either the 1951 Convention or the 1967 Protocol relating to the Status of Refugees.

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<sup>52</sup> Statement of Changes in Immigration Rules, HC 1039, 14 March 2013.

<sup>53</sup> On the requirements for limited to leave to remain as a stateless person, see Immigration Rule 403.

<sup>54</sup> See above.

43. Whether or not the act of deprivation is 'internationally valid' or 'opposable' to another State, the Convention/Protocol refugee definition also covers stateless persons, that is, those who, being outside their country of former habitual residence, are unable or, owing to well-founded fear of persecution, unwilling to return there.<sup>55</sup> In principle, any other State party to the 1951 Convention, including in this case any other EU Member State,<sup>56</sup> may find itself called on to review the conduct of the United Kingdom in order to determine whether its former citizen should be recognized as a refugee.
44. It might be argued that the claimant, having been deprived of citizenship on 'security' grounds, should therefore be excluded from the protection of the Refugee Convention under Article 1F. This applies, for example, where there are serious reasons to consider that the person concerned has committed war crimes or crimes against humanity, or a serious non-political crime, or is guilty of acts contrary to the purposes and principles of the United Nations.<sup>57</sup> 'Terrorist-related acts' may well suffice, but refugee status determining authorities tend to apply this provision carefully, requiring some evidence and more than suspicion. Whether notice of deprivation alone would suffice is a moot point, and more might well be required if the status determining body is to be satisfied that there are 'serious reasons for considering' that the person concerned has committed an excludable act. If the United Kingdom were asked, but was unwilling, to divulge the reasons for deprivation, the decision-making authority might well draw negative inferences and turn to examine more closely the United Kingdom's conduct vis-à-vis the claimant, given also that the grounds for exclusion are more narrowly drawn than the UK's proposed grounds for deprivation of citizenship. There is only limited practice on

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<sup>55</sup> Article 1A(2), 1951 Convention relating to the Status of Refugees, as 'amended' by the 1967 Protocol. This provision also confirms that, as a matter of international law and practice, stateless persons are considered the responsibility of, and therefore returnable to, their country of habitual residence.

<sup>56</sup> The *inter se* exclusion of asylum applications is limited to the 'nationals' of EU Member States. Article 2 of the (recast) Dublin Regulation, for example, defines a 'third-country national' to mean, 'any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU and who is not national of a State which participates in this Regulation by virtue of an agreement with the European Union...' (Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013: 29.6.2013 *Official Journal* L 180/31). Article 20(1) of the Treaty on the Functioning of the European Union (26.10.2012, *Official Journal*, C 326/47) provides as follows: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.' Clearly, a person deprived of their British citizenship will fall within the class of 'third-country national' eligible to claim refugee and/or subsidiary protection status in the EU.

<sup>57</sup> Similar provisions are found in Article 1(2)(iii) of the 1954 Convention relating to the Status of Stateless Persons.

the question, whether deprivation of citizenship itself can constitute persecution, and the decision-making authority would likely consider also the impact in fact of deprivation, whether and to what extent it violated the individual's human rights, and whether the measure in question was linked to the Convention grounds of race, religion, nationality, membership of a particular social group, or political opinion.

45. While giving all due weight to the possibility of 'exclusion', one can certainly not rule out the possibility that a person deprived of their citizenship and rendered stateless by the United Kingdom would be recognized as a Convention refugee; and the United Kingdom, therefore, as a persecuting country.

## 5. Conclusions

46. The proposal to allow the Home Secretary to deprive citizens of their status, even if it renders them stateless, is ill-considered. Recent experience suggests that considerable wastage of public money is likely to result from attempts to defend the indefensible, for deprivation itself touches on just too many legal issues; considered as an 'internal act', it is by no means clear what deprivation can achieve, that the criminal law cannot.
47. In addition, considerable harm will be caused to the United Kingdom's international relations. The United Kingdom has no right and no power to require any other State to accept its outcasts and, as a matter of international law, it will be obliged to readmit them if no other State is prepared to allow them to remain. Likewise, and in so far as the UK seeks to export those who are alleged to have committed 'terrorist-acts', it will likely be in breach of many of those obligations which it has not only voluntarily undertaken, but which it has actively promoted, up to now, for dealing with international criminal conduct.
48. Although the current state of international law may permit the deprivation of citizenship resulting in statelessness, at least in its 'internal form', certain limitations on this competence nonetheless follow when the act of deprivation takes on an external or extra-territorial dimension. In light of the above considerations, this implies, among others, that:
- No order of deprivation, and no cancellation of passports or documents attesting to citizenship should be permitted with regard to any person not physically present in the United Kingdom;
  - No person deprived of their British citizenship should be removed or threatened with removal unless another State has

formally agreed to admit that person,<sup>58</sup> and the person concerned is willing to go to that State;

- No order of deprivation should be made unless full account has been taken of family considerations, including the best interests of any children and their status in the United Kingdom;
  - Due process requires an effective remedy and meaningful review of any order of deprivation. In particular, this requires that an appeal or review have suspensive effect, particularly in view of the concerns which courts have expressed regarding out of country appeals.<sup>59</sup>
49. If the power to deprive of citizenship is to be retained, then it should be limited to those cases in which the individual in question already possesses another effective nationality.
50. The better solution, in the view of the undersigned, is that deprivation of citizenship is an entirely inappropriate response to alleged criminality or threats to security, given its considerable international law implications.

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<sup>58</sup> It goes without saying that the State in question must itself pose no risk to the person concerned, and that the person will be able to live a normal life there.

<sup>59</sup> *BA (Nigeria) v Secretary of State for the Home Department* [2009] EWCA Civ 119, per Lord Justice Sedley at §21; *E1/(OS Russia) v Secretary of State for the Home Department* [2012] EWCA Civ 357, per Lord Justice Sullivan at §43 (regarding out of country SIAC appeals). See also 'Report of the Secretary-General. 'Human rights and arbitrary deprivation of nationality': UN doc. A/HRC/25/28, 19 December 2013, paras. 31-4.