

# Recent Developments on Deprivation of Nationality on Grounds of National Security and Terrorism Resulting in Statelessness

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## At a glance

A study of recent developments in deprivation of nationality resulting in statelessness. The focus is on the United Kingdom, but this is set within the context of developments in Norway, the Netherlands and the United States. Not only deprivation of citizenship but proposals for new measures to revoke passports are considered in the context of protection against statelessness under international law and other international obligations. It is argued that the UK's proposals to deprive persons of a passport while outside the country do not appear, on current information, to be compatible with its obligations under the 1961 Convention Relating to the Status of Stateless Persons. The implications of deprivation of citizenship and revocation of passports on national security grounds for broader work to eradicate statelessness, and for the interpretation of human rights norms and of duties of States to further the right to a nationality and to prevent statelessness, are considered.

## Conduct and statelessness

International conventions on statelessness are no strangers to the concept that an individual's conduct can put them beyond the pale of treaty protection. The 1954 Convention Relating to the Status of Stateless Persons (the 1954 Convention), like the 1951 Convention Relating to the Status of Refugees ('the 1951 Convention'), the material parts of which are in identical terms,<sup>1</sup> denies the dignity of the status of 'stateless person':

'[t]o persons with respect to whom there are serious reasons for considering that:

- (a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

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\* My work is informed not only by the papers presented at the seminar at Middlesex University on 14 February 2014 but by the briefings prepared, especially by Professor Goodwin Gill, for the debates on the Bill that became the UK's Immigration Act 2014 and discussions with colleagues at the UNHCR/Tilburg University First Global Forum on Statelessness in The Hague in September 2014 about the paper on deprivation that I presented there. Errors that remain are my own.

<sup>1</sup> Article 1F.

- (b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;
- (c) They have been guilty of acts contrary to the purposes and principles of the United Nations.<sup>2</sup>

The meanings of ‘acts contrary to the purposes and principles of the United Nations’ and ‘serious non-political crime’ have been contested, including in the courts, in the context of the 1951 Convention.<sup>3</sup>

Persons deprived of their nationality on national security grounds are unable to avail themselves of protection as refugees or to gain recognition as stateless persons because they are likely to fall foul of the exclusion clauses of the 1951 and 1954 Conventions. During any gap between deprivation and obtaining a new nationality they are likely to be devoid of any protected status under international law on statelessness. The provisions of those conventions and the jurisprudence can be contrasted with the reluctance to see a person cast into statelessness through deprivation of nationality, evidenced by the text of the 1961 UN Convention for the Reduction of Statelessness (‘the 1961 Convention’).

The provisions of the 1961 Convention already represent a reduction in aspirations for the protection of the stateless. On the table at the time of its negotiation was the International Law Commission’s Draft Convention on the Elimination of Future Statelessness of 1954, art 8 of which states:

‘A Party may not deprive its nationals of their nationality by way of penalty or on any other ground if such deprivation renders them stateless.’

By contrast, art 8(1) of the 1961 Convention prohibits deprivation of nationality where this would result in statelessness but this is subject to exceptions including, as set out in art 8(3): those specified at the time of signature, ratification or accession on grounds set out therein ‘being grounds existing in its 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 art 8(4) that a Contracting State shall not exercise this power except in accordance with law, which shall provide for the person concerned the right to a fair hearing

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2 Article 1(2)(iii).

3 See eg *Ramirez v Canada (Minister of Employment and Immigration)* [1992] 2 FC 306 (CA); *T v Immigration Officer* [1996] AC 742; *Aguirre-Aguirre v. Immigration and Naturalization Service (INS)*, 119 S.Ct. 1439 (1999); *Mugesera v. Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 100; *KJ (Sri Lanka) v SSHD* [2009] EWCA Civ 292; *Bundesrepublik Deutschland v B and D* (joined cases C-57/09, C-101/09) [2010]; *JS (Sri Lanka)* [2010] UKSC 15; *DD* [2010] EWCA Civ 1407; *AH (Algeria)* [2012] EWCA Civ 395; *SK (Zimbabwe)* [2012] EWCA Civ 807; *Yasser Al-Sirri v SSHD* [2012] UKSC 54; *Ezokola v Canada (Citizenship and Immigration)* [2013] SCC 40, [2013] 2 SCR. 678.

by a court or other independent body. The person deprived is thus expected to be recognised as a person before national laws.

On ratification of the 1961 Convention on 29 March 1966 the UK made a declaration under art 8(3) which reads:

‘The Government of the United Kingdom declares that 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.’

It is striking, when considering the declarations made, how few States have made a declaration under art 8(3).<sup>4</sup> Nor is reliance on declarations increasing.<sup>5</sup> One possible explanation is that the provisions on deprivation of citizenship are what have made States reluctant to sign or ratify the 1961 Convention at all, but given the breadth of art 8(3), this appears unlikely.

As foreshadowed by the debates in 1959 and 1961 between those States that drew up the 1961 Convention,<sup>6</sup> some States that have not made a declaration make no provision for deprivation of citizenship at all, whether resulting in statelessness or not.<sup>7</sup> Others are bound by obligations under regional instruments. Article 7 of the European Convention on Nationality of 1997 prohibits deprivation of nationality on grounds of character resulting in statelessness.<sup>8</sup> But this does not explain all the States that have not sought such powers, for example France which has signed but not ratified the 1997 European Convention on Nationality. Other regional instruments set out a right to a nationality<sup>9</sup> or a prohibition on arbitrary deprivation,<sup>10</sup> or both<sup>11</sup> rather than being phrased in terms of a prohibition on statelessness.

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4 Austria (22 September 1972), Belgium (1 July 2014), Brazil (25 October 2007), France (on signature n 1962, but France has not ratified), Georgia (1 July 2014), Ireland (18 January 1973), Jamaica (9 January 2013); Lithuania (22 July 2013), New Zealand (26 September 2006), Tunisia (12 May 2000), United Kingdom of Great Britain and Northern Ireland (29 March 1966). The Tunisian declaration was the subject of a number of objections as going beyond what is permitted by art 8(3).

5 States that have ratified the Convention within the last decade and have not made such a declaration are Benin (8 December 2011), Bulgaria (22 March 2012); Colombia (15 August 2014), Cote d’Ivoire (3 October 2013), Croatia (22 September 2011), Ecuador (22 October 2012), Finland (7 August 2008), Gambia (1 July 2014), Guinea (14 July 2014), Honduras (18 December 2012), Hungary (22 May 2009) Lesotho (24 September 2004), Liberia (22 September 2004), Lichenstein (25 September 2009), Montenegro (5 December 2013), Nicaragua (22 July 2013), Nigeria (20 September 2011), Panama (2 June 2011), Paraguay (6 June 2012), Portugal (1 October 2012), Moldova (19 April 2012), Romania (27 Jan 2006), Rwanda (4 October 2006), Senegal (21 September 2005), Serbia (7 December 2011) and Turkmenistan (27 August 2012).

6 See eg Mr. Tsao (China) UN doc. A/CONF.9/C.1/SR.16.

7 These include Germany under its Basic Law (art 16(1)).

8 States parties include Denmark, Bulgaria and the Netherlands.

9 Article 20 of the American Convention on Human Rights (22 November 1969). Similar 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.

10 Eg Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (1995), art 24.

11 ASEAN Declaration of Human Rights (18 November 2012).

## Recent developments in the UK

The UK abandoned reliance on its declaration in 2003<sup>12</sup> at the same time as it extended its powers of deprivation from the naturalised to all citizens. Ministerial statements made at the time of the passage of the Nationality, Immigration and Asylum Act 2002 indicate that the decision not to remove powers to make persons stateless was with a view to ratifying the 1997 European Convention on Nationality,<sup>13</sup> an aspiration subsequently abandoned.<sup>14</sup> The extension of powers of deprivation was a new departure. The UK's consistent position during the conference which prepared the text of the 1961 Convention had been that the natural-born should not face deprivation of nationality, whether resulting in statelessness or not.<sup>15</sup>

The UK Government argued before the Supreme Court in *Al Jedda v SSHD*<sup>16</sup> that deprivation of citizenship on grounds of character and conduct was permissible under UK law in circumstances where an individual would, at the point of deprivation, possess no nationality but would be able, subsequent to deprivation, to resume a former nationality as of right. Such an order, it was argued, would not fall foul of the prohibition in UK law on deprivation of nationality resulting in statelessness. The argument was rejected. The approach in the UNHCR 'Guidelines on Statelessness No. 1'<sup>17</sup> was preferred: that what mattered was whether, at the point of deprivation, the individual possessed another nationality.<sup>18</sup>

In November 2013 the UK Home Secretary announced<sup>19</sup> that she would invite parliament to change UK law so that in certain national security cases persons could be deprived of their nationality even though this would make them stateless. A draft amendment to the Immigration Bill before parliament to give effect to the Home Secretary's proposals was circulating by early December 2013 but the amendment was tabled at the eleventh hour.

The House of Commons' Report stage of the Immigration Bill was delayed by the Government. Nigel Mills MP<sup>20</sup> had tabled a controversial amendment, signed at one point by 71 Members of Parliament,<sup>21</sup> proposing to continue restrictions on access by Bulgarians and Romanians to the UK labour market beyond the legal limit under EU law of 1 January

12 Section 40 (4) of the British Nationality Act 1981 as substituted by the Nationality, Immigration and Asylum Act 2002, s 4, with effect from 1 April 2003, see the Nationality, Immigration and Asylum Act (Commencement No 4) Order 2003/754, Sch 1, art 2.

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

14 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.

15 See UN doc. A/CONF.9/C.1/SR.11, per Mr Ross, United Kingdom; UN doc A/CONF.9/C.1/SR.14 per Mr Harvey; UN doc. A/CONF.9/10, 9 June 1961; UN doc. A/CONF.9/SR.16, per Mr Ross, UN doc. A/CONF.9/SR.20, 11 October 1961, 2–3 (Twentieth Plenary Meeting 23 August 1961) per Mr Harvey.

16 [2013] UK SC 62.

17 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' UN doc HCR/GS/12/01. Now superseded by the UNHCR Handbook on the Protection of Stateless Persons, 31 June 2014.

18 *Al Jedda*, par 34, citing para 3.4 of the Home Office. Applications for leave to remain as a stateless person, 1 May 2013 which repeats verbatim para 43 of UN doc HCR/GS/12/01.

19 The story first broke in the Financial Times on 11 November 2013 'May bids to make terror suspects stateless' Helen Waddell and Jim Pickard see <http://www.ft.com/cms/s/0/1cf6beee-4afb-11e3-ac3d-00144feabdc0.html#axzz3DxD7z34i> (accessed 21 September 2014).

20 Amendment NC1.

21 As per the Notice of Amendments given up to and including 28 January 2014, 1609 Immigration Bill Session 2013–2014, available at <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0128/amend/psc1282801a.1609-1615.html> (accessed 21 September 2014). The number had fallen by the time 1649 Consideration of Bill Immigration Bill Session 2013–2014 was published on 30 January, see <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0128/amend/psc1283001m.1649-1655.html> (accessed 21 September 2014).

2014.<sup>22</sup> It was politic that Mr Mills MP's amendment was not debated until that date had passed, hence the delay. The statelessness amendment appeared on the order paper without warning on 30 January 2014,<sup>23</sup> the day before the House of Commons' Report stage of the Bill finally took place. The Government, it appeared from the debates, wanted something, anything, to talk about so that, in the time allotted for consideration of the Bill, it would not reach Mr Mills MP's amendment. Mention is made on the parliamentary record<sup>24</sup> of ILPA's having briefed through the night to inform that debate and the opposition tabled a manuscript amendment.<sup>25</sup>

The gravity of deprivation resulting in statelessness was acknowledged by the Home Secretary in introducing her amendment: 'Depriving people of their citizenship is a serious matter. It is one of the most serious sanctions a state can take against a person'.<sup>26</sup> She was pressed on questions of procedural protection and also on why there were no limitations on the proposed power given that her announcement,<sup>27</sup> following the decision of the Supreme Court in the *Al Jedda* case,<sup>28</sup> had focused on persons who were in a position to acquire another nationality or citizenship. There were also questions as to whether it was right that only those naturalised as British could be deprived of their citizenship in this manner.<sup>29</sup>

The question of procedural protection was of particular concern because in 2004, seemingly by accident,<sup>30</sup> UK had greatly reduced the procedural protection afforded to those deprived of their British citizenship. It had enacted laws<sup>31</sup> that ensured that, rather than take effect only after all rights of appeal against deprivation had been exhausted, deprivation of citizenship took effect at once, with citizenship to be restored in the event that the appeal was successful. These powers came into effect on 4 April 2005.<sup>32</sup> Prior to that date, an appellant had a British passport on which to return to the UK to exercise his/her in country right of appeal. After 2004, the person did not.<sup>33</sup>

If the original powers were taken by accident, the subsequent reliance upon them was deliberate. The UK proceeded to use the powers to effect summary exile, depriving persons

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22 See OJ L 157 of 25 April 2005 Accession Treaty, Annex VI Bulgaria, Annex VII Romania.

23 Notice of Amendments 1609, op cit. (published 30 January 2014).

24 HC report 30 Jan 2014: Column 1056 per Mr David Hanson MP.

25 House of Commons Immigration Bill Consideration, 30 January 2014, amendment in the name of Yvette Cooper MP and others, available at <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0128/amend/300114.pdf> (accessed 21 September 2014).

26 HC report 30 Jan 2014: Column 1038. Contrast the comments of the Minister James Brokenshire MP at House of Commons Consideration of Lords amendments on 7 May 2014 with his repeated references to the inability to deprive persons of their nationality where this would result in statelessness as a 'loophole', see eg HC Deb, 7 May 2014, col 192.

27 Op.cit.

28 *Al Jedda v SSHD* [2013] UKSC 62, para 34.

29 *ibid* cols 1038–1062.

30 See HL Deb, 4 May 2004, col 999 per Lord Falconer (the relevant amendment is Amendment 52) and HL Deb, 15 June 2004, col 720 per Lord Rooker: 'Although the earlier amendment was actually unintentional, having reviewed the position we believe that it would make considerable sense to be able to run the appeals – the deprivation appeal on citizenship and the deportation or certification appeal – together. We therefore propose to amend the relevant appeals procedure rules, subject to the approval of parliament to require the appeal against citizenship deprivation and any appeal against deportation or against certification under the 2001 Act, to be heard together.'

31 Repeal of s 40A(6) of the Nationality, Immigration and Asylum Act 2002 by the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, Sch 2, para 4.

32 SI 2005/565. See the Lord Rooker, HL 3rd reading of the Asylum and Immigration Treatment of Claimants Etc. Bill session 2003–2004, 06 07 04 cols 782–784 and *L1 v Secretary of State for the Home Department* SC/100/2010.

33 For the disadvantage to an appellant of such an appeal, regardless of the situation of danger in which they may find themselves in the country to which they are banished, see the comments of the judges in *R(Khemiri) v SSHD* [2010] EWHC 2363 Admin; *Secretary of State for the Home Department v MK (Tunisia)* [2011] EWCA Civ 333; *E1 v SSHD* [2012] EWCA Civ 357 (per Lord Justice Sullivan).

of their citizenship while they were outside the UK, as was the case for L1<sup>34</sup> and as is the case for Madhi Hashi, who was in Somalia at the time of his deprivation and was rendered from Djibouti to the United States, where he is now imprisoned.<sup>35</sup> Bilal al Berjawi was deprived of his citizenship in October 2010 while in Somalia. He was killed in a drone strike there in January 2012.<sup>36</sup> The report on Mohamed Sakr's death in a drone strike makes mention of 'an Egyptian commander.'<sup>37</sup> Yet, born in London a dual British and Egyptian national, he had never had an Egyptian passport but had travelled to Somalia on his British passport which was then cancelled. The Labour MP Diane Abbott, forced a debate on these matters just days after the debate on the new clause.<sup>38</sup>

The Secretary of State argued that she needed the powers to protect national security, that what she was doing was in line with international law and, moreover, that her amendment did no more than revert to the position the UK had held up until 2002. The terms of the amendment, she said, were designed to restore the powers the UK had preserved in the declaration on ratification of the 1961 Convention.<sup>39</sup>

The terms of the amendment to the Immigration Bill may have been circumscribed by the UK's 1966 declaration; they were not dictated by it: the amendment could have been more tightly drawn than the declaration.

There was a vote in the House of Commons on the amendment: the opposition abstained and the amendment was carried by an overwhelming majority.<sup>40</sup> The Bill then passed to the House of Lords.

## **The debates in UK parliament**

In the House of Lords, two of the UK parliament's most respected Committees, the Joint Committee on Human Rights and the Lords Committee on the Constitution, interrogated the Government on its proposals and produced reports.<sup>41</sup> Guy Goodwin Gill, Professor of International Refugee Law and fellow of All Souls College at the University of Oxford,

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34 *L1 v SSHD* [2010] SIAC (3 December 2010) per Mitting J: '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.' (para12(i)). See HC Deb., 30 January 2014, column 1043 and HC Deb 11 February 2014 cols. 261–2WH.

35 The case is discussed by Baroness Kennedy of the Shaws, who has represented Madhi Hashi, in the debates in the House of Lords, see eg HL Report, 7 Apr 2014 : co1180.

36 HC Deb, 11 February 2014, columns 260–261WH and see *Former British citizens killed by drone strikes after passports revoked*, Chris Woods and Alice K. Ross for the Bureau of Investigative Journalism, 27 February 2014, available at <http://www.thebureauinvestigates.com/2013/02/27/former-british-citizens-killed-by-drone-strikes-after-passports-revoked/> (accessed 21 September 2014).

37 HC Deb, 11 February 2014, cols 260–261WH.

38 Op. cit.

39 *ibid.* The Open Society Justice Initiative in its *Opinion on clause 60 of the UK Immigration Bill & Article 8 of the United Nations Convention on Reducing Statelessness*, 5 March 2014, argued that that the use of 'retain' and 'retention' in art 8(3) of the 1961 Convention meant that the UK could not revive the declaration on which it had ceased to rely. This argument was based not on any general rules about reservations and declarations to international treaties but the express language of art 8(3). The point is arguable but unlikely to be argued. It would be justiciable if another State took the UK to the International Court of Justice. Another possibility is that in an appropriate case it would be justiciable before the Court of Justice of the European Union in the context of arguments about the loss of EU citizenship following *Case C-135/08 Janko Rottmann v Freistaat Bayern*; *Case C-34/09 8 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*.

40 HC Report, 30 Jan 2014: col 1104, amendment carried 297 votes to 34.

41 Joint Committee on Human Rights Legislative Scrutiny: Immigration Bill Second Report, Twelfth Report of session 2013–2014, HL Paper 142, HC 1120, 26 February 2014; House of Lords Committee on the Constitution, Immigration Bill, Sixth Report of Session 2013–2014, HL Paper 148, 7 March 2014.



produced written evidence for the Joint Committee on Human Rights and three further briefings<sup>42</sup> for the House of Lords. These drew on international and national law, the Travaux Préparatoires for the 1961 Convention and the UK's actions in deprivation of citizenship cases to date. The peers laying amendments and leading the debates brought extensive experience of their own: Lord Brown of Eaton-Under-Heywood, a former justice of the Supreme Court; Lord Pannick QC, a leading public law barrister; Lord Lester QC, a leading human rights barrister and Baroness Kennedy of the Shaws QC, a leading criminal lawyer and counsel in the deprivation of citizenship case of Madhi Hashi.

Professor Goodwin Gill's explanations in his briefings<sup>43</sup> of a State's obligation toward other States to readmit its former citizens, were widely relied upon both in the debates<sup>44</sup> and by the Joint Committee on Human Rights.<sup>45</sup> Particularly pertinent given subsequent developments is his citation of Paul Weis's 1979 writing<sup>46</sup> on the potential illegality under international law 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.'

The Joint Committee on Human Rights emphasised that for deprivation to be lawful it would have to be a necessary and proportionate response to the threat posed, conditions that, it made clear, would not be easy to fulfil.<sup>47</sup> This goes to the question of when deprivation of nationality will be arbitrary, a question that has been considered by the Office of the High Commissioner for Human Rights.<sup>48</sup> The Joint Committee also emphasised that deprivation could not be viewed in isolation from other obligations under national and international law such as the obligations to respect the best interests of the child.<sup>49</sup>

The House of Lords did not dispute the Home Secretary's intention to limit use of the proposed provision to persons whose actions are 'seriously prejudicial to the vital interests of the UK'. However it questioned whether, even in such cases, statelessness could ever be an appropriate response. The debates are as memorable for the principled statements as for the detailed legal argument. The Lord Avebury invited the House to consider:

'... the appalling example we are setting...the rest of the world. Britain was in the forefront in promoting the 1961 UN Convention on the Reduction of Statelessness, and has since worked to reduce the pockets of statelessness that still exist all over the world, such as the Bidoon in the Gulf states, the Rohingya and the Palestinians. How can we now pretend to a share in the leadership of the UNHCR's continuing effort to eliminate statelessness when, at the same time, we are enacting domestic legislation to create more stateless people?'<sup>50</sup>

42 Mr Al-Jedda, Deprivation of Citizenship, and International Law Revised draft of a paper presented at a Seminar at Middlesex University, 14 February 2014, submitted to the Joint Committee on Human Rights and published by the Committee at <http://www.parliament.uk/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf> (accessed 21 September 2014); Deprivation of Citizenship resulting in Statelessness and its Implications in International Law Opinion 12 March 2014; Deprivation of Citizenship resulting in Statelessness and its Implications in International Law Further Comments, 5 April 2014; Deprivation of Citizenship, Statelessness, and International Law More Authority (if it were needed...) 5 May 2014.

43 Op.cit.

44 HL Deb, 17 Mar 2014: col 49; 7 Apr 2014: col 1189; 12 May 2014: col 1670.

45 HL Paper 142, HC 1120, op.cit., paras 34–38.

46 P Weis *Nationality and Statelessness in International Law* (2nd edn, Alphen aan den Rijn: Sijthoff & Noordhoff 1979).

47 *ibid*, pp 46, 62.

48 See Human Rights and Arbitrary Deprivation of nationality, report of the Secretary General, UN Doc A/HRC/25/28.

49 HL Paper 142, HC 1120, para 49.

50 HL Report, 19 March 2014, cols 211–212.

Lord Roberts of Llandudno reminded the House:

‘Let us not forget the judgment of Chief Justice Warren ruling in the United States Supreme Court case of *Trop v Dulles* in 1958. He said that, “use of denationalization as a punishment”, means, “the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture.”’<sup>51</sup>

Lord Deben said:

‘... the exemplars are not ones that are easily taken to the heart of the broad mass of the British people. That means that those people should be particularly able to call upon this House... We live in a world in which statelessness is one of the most terrible things that can befall anyone.’<sup>52</sup>

Lord Brown of Eaton-under-Heywood recalled that:

‘...Lord Wilson, in giving the *Al-Jedda* judgment, referred in paragraph 12 to ‘The evil of statelessness’ and spoke of the ‘terrible practical consequences’ that flow from it.’<sup>53</sup>

Lord Macdonald of River Glaven declared:

‘... statelessness deprives people of the “right to have rights”. It brings about a bleak, hopeless status, or rather a complete lack of status, that the British Government should have no role in encouraging, first, because of the positively terminal impact that the imposition of statelessness is bound to have on the ability of the rightless to function in a way that is even remotely human in the modern world and, secondly, because it is clear that such an imposition as a policy measure can have no sensible part in a co-ordinated international effort to combat security threats. ...’<sup>54</sup>

As that last extract suggests, the House refused to be cowed by dire warnings of the risk to national security. Debates about deprivation resulting in statelessness throw into sharp relief the question of why deprive at all? In a case where a person has two nationalities and the State of one nationality is hostile to the State of the other, the case for deprivation is grounded in divided loyalties. No such case can be made in statelessness cases.

The question of the reason for deprivation resulting in statelessness was a live one during the conference that produced the 1961 Convention. The Yugoslav delegate declared:

‘...that a person was living within the jurisdiction and power of the State in question meant that other forms of sanction were available to the State; hence there was in that case no justification for deprivation of a validly held nationality.’<sup>55</sup>

The Pakistani delegate expressed concern that deprivation resulting in statelessness would result in the worst offenders becoming the problem of other States. He said that he:

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51 HL Report, 17 March 2014, col 53, referring to *Trop v Dulles* (1958) 356 U.S. 86.

52 HL Report, 19 March 2014, col 212.

53 HL Report, 17 March 2014, col 54.

54 HL Report, 17 March 2014, col 53.

55 Mr Ilic, UN Doc A/C0NF.9/SR.20.



‘...would have found the position of other delegations, and in particular that of the United Kingdom, easier to understand if they had not made an exception in the case of criminals, the very case in which it was most necessary that a State should retain its responsibility. The effect of the United Kingdom amendment would be that the more notorious the criminal, the more readily he could be deprived of his nationality, and either become stateless or be foisted on some other country.’<sup>56</sup>

The House of Lords did not accept that a deprivation of citizenship would make the citizens of the UK, or indeed of other countries, safer. Peers conceived of security not as a national, but as a global, affair. They argued that rather than offshoring<sup>57</sup> a person who threatens security, such persons are the responsibility of all States, in the spirit, as Lord Macdonald of River Glaven put it, of ‘the comity of nations’ and ‘solidarity between free countries in the face of terrorism.’<sup>58</sup> The eloquent exposition of the late Lord Kingsland of the principle *aut dedere aut judicare*,<sup>59</sup> drawn to the attention of the House in ILPA briefings, was cited in the debates.<sup>60</sup>

On 7 April 2014 the UK House of Lords rejected<sup>61</sup> the changes made at Commons Report to the Bill to permit deprivation resulting in statelessness. It substituted a text which would have referred the question of whether the UK should take powers to deprive people of citizenship and make them stateless to a committee of parliamentarians and would then have required the Government to bring forth fresh legislation if it subsequently decided to proceed.<sup>62</sup> An amendment in the name of Lord Pannick was carried by 242 votes to 180 with a significant number of abstentions.<sup>63</sup> The Liberal Democrats, the second party in the coalition government, abstained and a number of Liberal Democrats and Conservatives, including a former Lord Chancellor<sup>64</sup> and former Ministers, spoke against the Government and joined the opposition in supporting the amendment.

One reason for the level of opposition is arguably that the Government had overplayed its hand in its reliance on national security arguments. It had refused to tell the Joint Committee on Human Rights, or the House, how many of the 25 persons deprived of their British citizenship since 2006 had been outside the UK at the time, citing ‘national security’.<sup>65</sup> Yet in 2010 it had responded to freedom of information requests on this very point.<sup>66</sup> The Bureau of Investigative Journalism has identified 18 of the persons deprived, 15 of whom were deprived of their citizenship while outside the UK.<sup>67</sup> What could answering the question have revealed that was not already known? The Government continued to advance in letters<sup>68</sup> the argument

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56 Mr Tyarji (Pakistan) UN doc. A/CONF.9/C.1/SR.14.

57 See J Urry *Offshoring* (Wiley April 2014).

58 *ibid.*

59 Extradite or prosecute, Lord Kingsland, 639 HL Deb, 9 October 2002, cols 277–8. ‘... 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... It cannot be a proper response...’

60 HC Deb, 9 October 2002; cols 277–78 per David Hanson MP and HC Report, 11 February 2014, col 255WH per Diane Abbott MP

61 HL Report, 7 April 2014, col 1195.

62 Immigration Bill, Second Marshallled list of amendments to be moved on report, amendment 56. Available at <http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0096/amend/ml096-II.htm> (accessed 21 September 2014).

63 Some of which can be identified by comparing the names of speakers in the debate with the lists of those who voted.

64 Lord Mackay of Clashfern.

65 See HL Paper 142, HC 1120, *op.cit.*, at para 20 and HL Report, 17 March 2014, col 49, per Baroness Lister.

66 Home Office 12 June 2012 to Ms Diane Taylor of The Guardian, ref 22433.

67 See *Secret justice: graphic detail How the UK has used its powers of banishment* Bureau of Investigative Journalism Sarah Leo 27 February 2013, updated 27 June 2013.

68 Lord Taylor of Holbeach to Baroness Smith of Basildon, 17 April 2014, DEP 2014–0639.

that deprivation of citizenship would allow it to stop people travelling, although it already possessed powers to deprive citizens a passport on national security grounds<sup>69</sup> as was pointed out<sup>70</sup> in the debates. The Home Secretary had described on 25 April 2013 the extent and use of these powers:

‘...passport facilities may be refused to or withdrawn from British nationals who may seek to harm the UK or its allies by travelling on a British passport to, for example, engage in terrorism-related activity or other serious or organized criminal activity.

This may include individuals who seek to engage in fighting, extremist activity or terrorist training outside the United Kingdom, for example, and then return to the UK with enhanced capabilities that they then use to conduct an attack on UK soil. The need to disrupt people who travel for these purposes has become increasingly apparent with developments in various parts of the world.’<sup>71</sup>

The Government referred several times in the debates to the likelihood that those who were deprived of their citizenship could rapidly acquire another nationality.<sup>72</sup> The possibility of the Secretary of State limiting her powers to those in a position to do so was raised, including by the Joint Committee on Human Rights.<sup>73</sup> The Government’s response to its defeat was formally to put this forward as a compromise position, together with an obligation to report on the use of the powers of deprivation resulting in statelessness, although not of deprivation more generally.<sup>74</sup> The compromise was accepted by both Houses of Parliament and the Bill was amended accordingly.<sup>75</sup> The provisions came into force on 28 July 2014.<sup>76</sup>

## **The current UK law on deprivation**

Under s 40 of the British Nationality Act 1981 as amended by s 66 of the Immigration Act 2014, the Secretary of State can only deprive someone of his/her nationality where this would leave them stateless if she reasonably believes 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, an outcome contemplated during the debates on the provision.<sup>77</sup>

Lord Deben set out the argument of principle against the approach taken:

‘...to take away someone’s citizenship, it is not reasonable to say that you assume that they can get another country’s citizenship. It is only reasonable to say that you know that they have another citizenship; anything less than that is wrong. It may not be convenient, but it is not right.’<sup>78</sup>

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69 See Written Ministerial Statement, Rt Hon Theresa May MP, 25 April 2013. The issuing, withdrawal of refusal of passports for an explanation of how these prerogative powers are used.

70 HL Deb, 7 April 2014, col 1169 per Lord Pannick.

71 Written Ministerial Statement 25 April 2013, op., cit.

72 Commons, 11/2/14; col 261WH Constitution Committee (letter to Lady Jay?) 17 March 2014, col 56.

73 Paragraph 33.

74 New s 40(4A)(c) and 40(4B) of the British Nationality Act 1981.

75 See HC Deb, 7 May 2014 : col 214 and HL Deb, 12 May 2014 : col 1692.

76 Immigration Act 2014 (Commencement No. 1, Transitory and Saving Provisions) Order 2014, SI 2014/1820, art 3(t).

77 See HC Deb, 7 May 2014: col 196 per James Brokenshire MP, Minister of State.

78 19 March 2014, col 213.

What appear at first sight to be entitlements may turn out not to be so. The Supreme Court had held in *Al Jedda* [2013] UKSC 62 that the approach taken by those who drafted s 40 of the British Nationality Act 1981 was to treat a person as stateless if deprivation of British citizenship resulted, at the point of deprivation, in their not being recognised as a national by any State under the operation of its law. As with definitions of conduct founding exclusion, jurisprudence under the 1951 UN Convention Relating to the Status of Refugees is relevant to this question. In *Williams v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 FCR 429 (FCA), 2005 FCA 126, the Federal Court of Appeal interpreted s 96(a) of the Canadian Immigration and Refugee Protection Act 2001 to mean that an entitlement to citizenship of a country in which a person had no well-founded fear of persecution meant that the person was not entitled to recognition as a refugee. Décarý, J. held that the test is whether it ‘is within the control of the applicant to acquire the citizenship of a country with respect to which he has no well-founded fear of persecution...’<sup>79</sup> The Canadian cases on the relevance of Israel’s right of return are also in point, with much of the focus on the lack of a clear cut entitlement under the law of return,<sup>80</sup> a conclusion also reached in the Australian case of *MZXLT & Anor v Minister for Immigration & Anor*.<sup>81</sup> In the *Hoge Raad* case the courts of the Netherlands held that Surinam’s interpretation of its own laws was ultimately what must govern the question of whether a person was stateless.<sup>82</sup> By contrast, the UK Court of Appeal in *B2 v Secretary of State for the Home Department* [2014] EWCA 616 concluded that it was the laws of a foreign State and not the way in which that State operated its laws in practice<sup>83</sup> that matters: ‘If ... it is clear that under the law of a foreign state an individual is a national of that state, then he is not *de jure* stateless. If the Government of the foreign state chooses to act contrary to its own law, it may render the individual *de facto* stateless. Our own courts, however, must respect the rule of law and cannot characterise the individual as *de jure* stateless.’ This surprising conclusion, which appears not to heed the words ‘under the operation of its laws’ in the definition of statelessness in art 1 nor to follow the approach set out in the UNHCR *UN Handbook on Protection of Stateless Persons*,<sup>84</sup> is being appealed to the Supreme Court.

During the debates in the UK, the Home Secretary did not inform either House of Parliament that she had sought at the eleventh hour to introduce evidence before the Supreme Court in the *Al Jedda* case that Mr Al Jedda was an Iraqi national after all, that, having been refused permission to do so, she had stripped him of his British citizenship a second time following the Supreme Court’s judgment in his favour and that second case was progressing through the courts.<sup>85</sup> Whether the late discovery is evidence of *mala fides* or incompetence,<sup>86</sup> it does not bode well for the operation of the new procedure.

79 Paragraph 22.

80 *Grygorian v Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm LR (2d) 52 (FCTD). *Katkova v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm LR (2d) 216 (FCTD)

81 [2007] FMCA799.

82 NJ 1989, 552 (7 April 1989).

83 Paragraph 92 of the judgment.

84 30 June 2014 para 24, see further below.

85 How one man was stripped of his UK citizenship—twice, Alice Ross and Olivia Rudgard, 11 July 2014, available at (accessed 25 September 2014) <http://phenose17.rssing.com/browser.php?indx=9717285&last=1&item=1>

86 *ibid* citing the comments of the Judge.

## **Statelessness light? Or just statelessness? Stripping persons of passports**

On 29 August 2014, about a month after s 66 of the Immigration Act 2014 came into force, the Prime Minister made a speech in which he said:<sup>87</sup>

‘We need to do more to stop people travelling, to stop those who do go from returning, and to deal decisively with those who are already here. I’ll be making a statement in the House of Commons on Monday. This will include further steps to stop people travelling with new legislation that will make it easier to take people’s passports away.’<sup>88</sup>

On 1 September 2014 the Prime Minister made an announcement<sup>89</sup> on *EU Council, Security, and the Middle East* to parliament:

‘First, on stopping people travelling in the first place, passports are not an automatic right. The Home Secretary already has the discretion to issue, revoke and refuse passports under the royal prerogative if there is reason to believe that people are planning to take part in terrorist-related activity. When police suspect a traveller at the border, however, they are not currently able to apply for the royal prerogative and so have only limited stop-and-search powers. To fill that gap, we will introduce specific and targeted legislation providing the police with a temporary power to seize a passport at the border, during which time they will be able to investigate the individual concerned. This power will include appropriate safeguards and, of course, oversight arrangements.

The House should also be aware that our current royal prerogative powers are being challenged in the courts. I want to be clear: if there is any judgment that threatens the operation of our existing powers, we will introduce primary legislation immediately so that Parliament, not the courts, can determine whether it is right that we have this power. I can announce today that we will start preparing the primary legislation and consult Parliament on the draft clauses.

As well as stopping people going, we must also keep out foreign fighters who would pose a threat to the UK. ... we legislated, in the Immigration Act 2014, to allow stronger powers to strip citizenship from naturalized Britons. But, of course, these powers do not apply to those who are solely British nationals, who could be rendered stateless if deprived of citizenship.

...what we need is a targeted, discretionary power to allow us to exclude British nationals from the UK.’

The reference to ‘solely British nationals’ makes sense only as a reference to persons who have only ever been British nationals. Had all naturalised citizens another nationality, s 66 of the Immigration Act 2014 would not have been necessary.

Under these proposals, citizenship would be retained; the right to return to one’s country would not.

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87 HC Deb, 1 September 2014: col 26.

88 Threat level from international terrorism raised: PM press statement, transcript of Prime Minister’s speech, 29 August 2014, available at <https://www.gov.uk/government/speeches/threat-level-from-international-terrorism-raised-pm-press-conference>

89 HC Deb, 1 September 2014: col 26.

*The international context*

The UK is not the only State making selections from a menu of options that range, according to the laws of the State and the declaration it made to the 1961 Convention, from deprivation of citizenship from ‘natural born’ citizens resulting in statelessness to withdrawal of a passport from a limited class. On the same date that the UK Prime Minister made his announcement, 29 August 2014, Dutch ministers announced plans to extend the grounds for withdrawing Dutch citizenship from dual nationals to encompass those who train in ‘terrorist’ camps or work in them as instructors.<sup>90</sup> Currently persons can lose their Dutch nationality if they join a terrorist organisation as defined or a foreign army which is involved in a war with the Netherlands or one of its allies.<sup>91</sup> The Dutch proposals also included a ‘passport’ option, that passports of persons suspected of plans to travel to a conflict zone to join a terrorist organisation as defined, may be declared invalid. This follows attempts to outlaw dual nationality in the Netherlands.<sup>92</sup>

Draft legislation was put before the Dutch Parliament in early September 2014. The Netherlands has made no declaration under art 8(3) of the 1961 Convention and has no provisions for withdrawing citizenship on character grounds in circumstances that would leave a person stateless. There is no proposal to deprive persons of their nationality where this would leave them stateless but, as with the UK, the proposals to deny passports merit closer examination through the prism of statelessness.

At almost the same time, on 8 September 2014, two bills were introduced before the US House of Representatives. Congresswoman Michele Bachmann introduced the Terrorist Denaturalization and Passport Revocation Act.<sup>93</sup> This contains proposals to authorise the revocation or denial of passports and passport cards to individuals affiliated with foreign terrorist organisations as defined. It would amend the Passport Act of 1926<sup>94</sup> to prohibit, with a discretionary exception for emergency or humanitarian reasons, the Secretary of State from issuing a passport or passport card to an individual who is a member of a foreign terrorist organisation engaged in hostilities against the United States or its allies<sup>95</sup> and would direct the Secretary to revoke a passport or passport card previously issued to any such individual.<sup>96</sup>

It provides for authorisation for the Secretary, before revocation, to limit a previously issued passport or passport card so that it can be used only for return travel to the United States, or to issue a limited passport or passport card that only permits return travel to the United States.<sup>97</sup> In addition it would amend the Immigration and Nationality Act<sup>98</sup> to include among the grounds for loss of US nationality by a native-born or naturalised citizen: taking an oath or making a declaration of allegiance to a foreign terrorist organisation after attaining the age of 18; entering

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90 Kabinet versterkt integrale aanpak jihadisme en radicalisering, Government of the Netherlands, 29 August 2014, available at <http://www.rijksoverheid.nl/ministeries/szw/nieuws/2014/08/29/kabinet-versterkt-integrale-aanpak-jihadisme-en-radicalisering.html> (accessed 30 September 2014) together with links to the open letter of Minister Opstelten (Onderwerp Integrale Aanpak jihadisme) and action plan Overzicht maatregelen en acties) of that date.

91 Netherlands Nationality Act, s (15(1)(e). See the discussion in *Loss of citizenship: trends and regulations in Europe*, G-R de Groot and M P Vink, June 2010 for the EUDO Citizenship Observatory

92 See OW Vonk *Dual Nationality in the European Union: A study on changing norms in public and private international law and in the municipal law of four EU member States* (Leiden, Martinus Nijhoff 2012) at 237–246.

93 HR 5408, 113th Congress 2d Session (2013–2014).

94 22 USC 211a

95 *ibid* s 4(a)(1). Exceptions are in s 4(b).

96 *ibid* s 4(a)(2).

97 Section 4(b)(2)(A) and (B).

98 8 USC 1189.

or serving in the armed forces of a foreign state that harbors a foreign terrorist organisation; accepting, serving in, or performing the duties of any office, post, or employment in a foreign terrorist organisation after attaining the age of 18; accepting, serving in, or performing the duties of any office, post, or employment in a foreign terrorist organisation after attaining the age of 18 for which an oath or declaration of allegiance is required; or accepting, serving in, or performing the duties of any office, post, or employment in a foreign terrorist organisation after attaining the age of 18 if the position requires knowing engagement in hostilities against US military or civilian personnel.<sup>99</sup>

The US Immigration and Nationality Act<sup>100</sup> frames the offending conduct leading to loss of citizenship as a voluntary act of relinquishing nationality:

‘(a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality–

... (7) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States...’

This is in line with the leading case of *Trop v Dulles*<sup>101</sup> (356 US 86), March 31, 1958 per Chief Justice Earl Warren:

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

Under s 219 of the Immigration and Nationality Act, the voluntary nature of the act is a rebuttable presumption but the voluntariness in question is that of doing the act. The intention to relinquish nationality is inferred from that voluntary act.<sup>102</sup> There is no provision that would allow a person to argue that while they had done the act in question, they had not done it with the intention of relinquishing their US nationality.

The F.T.O. Passport Revocation Act<sup>103</sup> introduced by Congressman ‘Ted’ Poe of Texas, is concerned only with the denial and revocation of passports. It is a proposal ‘...[t]o authorize the revocation or denial of passports and passport cards to individuals affiliated with foreign terrorist organizations, and for other purposes’ and the provisions on revocation are similar, but not identical, to those set out in Congresswoman Bachmann’s Bill. The Bill has been referred to the House Committee on Foreign Affairs.<sup>104</sup>

In Congressman Poe’s Bill, it is proposed that the Secretary:

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99 HR 5408, s 2(6).

100 8 USC 1481 (a).

101 (356 US 86), March 31, 1958.

102 See s 219 (b) ...Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

103 HR 5406, 113th Congress 2d Session (2013–2014).

104 8 September 2014.



‘...may not issue a passport or passport card to any individual whom the Secretary has determined is a member of or is otherwise affiliated with, or is aiding, assisting, abetting, or is otherwise helping an organization the Secretary has designated as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act...’<sup>105</sup>

The Bill makes provision for revocation of a passport or passport card previously issued to such an individual.<sup>106</sup> Exceptions are provided for emergency and humanitarian situations<sup>107</sup> and for emergency return travel to the United States.<sup>108</sup>

In the same period, Norway trailed in the media<sup>109</sup> plans to revoke the citizenship of people who take part in terrorist activities or wars abroad. Norwegian Minister of Children and Equality, Solveig Horne, is reported as saying to the media:

‘This is a strong signal to people wanting to take part in terror operations and wars... We will turn over every stone to find the necessary measures to prevent radicalization and extremism. We will begin discussion about introducing regulations on revocation for any citizen causing serious damage to vital government interests or who has volunteered to serve in foreign military services.’<sup>110</sup>

The Minister uses the language of prevention but speaks of those losing their citizenship as those who have already caused harm, perhaps pointing to a deterrent element. Norway made no declaration or reservation under art 8(3) on acceding to the 1961 Convention and there does not appear to be a suggestion that attempts would be made to make persons stateless.<sup>111</sup>

The US options take a very different approach from that proposed by the UK Prime Minister. Both US options envisage that a document can be issued facilitating return to the United States. The US would ground its nationals, the UK cut them loose. The statements made by Dutch and Norwegian Ministers are framed in terms more akin to the US approach but a close examination of the text of the draft legislation is required to determine whether this is presentational or a restriction on the use of the powers.

There already exist powers to require persons to surrender passports to prevent travel abroad (including in the UK).<sup>112</sup> The UK proposal thus appears the more radical one.

### *The implications of stripping persons of passports*

Is the passport option ‘deprivation (and with it, potentially, statelessness) light’? It looks very close to deprivation of citizenship: whatever other rights and entitlements as a citizen are left intact, there is no prospect of enjoying them.

As to consular protection, a passport is evidence that consular protection will be extended to a person but it is not the be-all and end-all of this as evidenced by the consular assistance

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105 Section 4(a)(1).

106 Section 2.

107 Section 2(b)(1).

108 Section 2(1)(c).

109 See *The Local*, 25 August 2014, *Terrorists may lose Norwegian citizenship*, available at <http://www.thelocal.no/20140825/norway-to-revoke-citizenship-of-terror-warriors-fighting-abroad> (accessed 30 September 2014).

110 *ibid.*

111 The article Norway ‘to Make Citizens Fighting for Isis Stateless’ from the *International Business Times* of 27 August 2014 republished by UNHCR *Refugees Daily* <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=463ef21123&id=53fed0b70> appears to infer statelessness from the Minister’s statement rather than to read it in it.

112 *Football Disorder Act 2000*, s 1(1)(c); *Criminal Justice and Police Act 2001*, ss 33–37, see the *Travel Restriction Order (Prescribed Removal Powers) Order 2002 (SI 2002/313)*.

given to those whose passports are lost or stolen. The UK has 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 been deprived of his British nationality in Somalia. He was handed to the US authorities and rendered to the United States.<sup>113</sup>

The question of statelessness arises.<sup>114</sup> The UK has long taken the view that holders of British passports other than British citizens and British Overseas Territories Citizens, whose nationality status gives them no right of entry to the UK, or indeed any other country, are not stateless.<sup>115</sup> It did however, in 2002<sup>116</sup> and 2009,<sup>117</sup> make provision for such nationals who hold no other nationality or citizenship to be entitled to ‘upgrade’ to British citizenship, without having to fulfil a requirement almost ubiquitous elsewhere in British nationality law save in statelessness cases, a good character test.<sup>118</sup>

The UK’s view as to the status of British nationals other than British citizens is contentious, but will those denied a passport while outside the UK even enjoy that element of consular protection from which British nationals other than British citizens benefit? The Prime Minister’s statements to date do not address the matter.

While nothing in the Prime Minister’s proposals would appear to prevent a person deprived of their passport transmitting British citizenship to their children, it is suggested that a person who holds only UK nationality, who is stripped of his/her passport while outside the UK and who is unable to return to the UK arguably satisfies the definition of a stateless person set out in art 1(1) of the 1954 because such a person is not considered by the UK as a national ‘by operation of its law.’ The UNHCR *Handbook on Protection of Stateless Persons*, provides:<sup>119</sup>

‘24... A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to “law” in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.’

The question is less stark where those within the country are concerned, as in the US, Norwegian and Dutch proposals. UNHCR takes the view in its Prato Conclusions<sup>120</sup> that a ‘de facto’ stateless person must be outside the country of his /her nationality, a highly question-begging definition.<sup>121</sup> Denial of a passport may lead to practical difficulties in accessing rights and entitlements as a citizen but in and of itself it does not make a person stateless or even ‘not really stateless’ in the specific way described as ‘de facto statelessness’ in the Prato conclusions. Under the definition of de facto statelessness in the Prato conclusions a person deprived of his/her passport whilst in the country of his/her nationality can never be de facto stateless. However, the privations imposed upon a particular individual in concert with the deprivation

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113 HL Deb 7 Apr 2014: col 1180 per Baroness Kennedy of the Shaws.

114 De jure.

115 See eg Sch 2 to the British Nationality Act 1981 which proposes conferring such nationalities on the stateless.

116 Nationality Immigration and Asylum Act 2002, s 12 inserting s 4B into the British Nationality Act 1981.

117 Borders, Citizenship and Immigration Act 1981 amending s 4B of the British Nationality Act 1981.

118 British Nationality Act 1981, s 4B.

119 Op. cit 30 June 2014, para 24.

120 UN High Commissioner for Refugees (UNHCR), ‘Expert Meeting – The Concept of Stateless Persons under International Law (“Prato Conclusions”)’ May 2010, available at: <http://www.refworld.org/docid/4ca1ae002.html> [accessed 1 October 2014] at II A 2.

121 A Harvey, ‘The de facto statelessness debate’ (2010) 24 IANL 257.

of passport may, in the specific circumstances of an individual case raise the question whether the person is recognised as a national by any State under operation of its law and thus stateless as a matter of international law

Deprivation of nationality or withdrawal of a passport while a person is outside his/her country engages other obligations under international law.<sup>122</sup> While a number of instruments are couched in cautious terms focusing on arbitrary acts<sup>123</sup> also very much engaged are the right to recognition ‘everywhere’ as a person before the law<sup>124</sup> and to the equal protection of the law.<sup>125</sup> The UK approach, banishing those who may have a case to challenge the deprivation, also offends against arts 8, 9 and 13 of the Universal Declaration on Human Rights, the right to an effective remedy by the competent national tribunals for acts violating fundamental rights, the prohibition on arbitrary exile and the right to return to one’s own country respectively.

Norway and the Netherlands have ratified Protocol 4 to the European Convention on Human Rights. The UK has signed but not ratified it and thus should not be making changes to its law that move it further from the possibility of ratification.<sup>126</sup> Article 3 of the Protocol provides:

**‘Article 3 – Prohibition of expulsion of nationals**

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the state of which he is a national.’

The UK Government produced an explanatory memorandum when it put its proposals to deprive a person of citizenship before the UK parliament.<sup>127</sup> This said that when a person is not within the UK’s jurisdiction for the purposes of the European Convention on Human Rights, that person’s article 8 rights will not be engaged by a deprivation decision.<sup>128</sup>

There was correspondence between the Government and the Joint Committee on Human Rights,<sup>129</sup> the latter briefed by Professor Goodwin Gill, and subsequently the Government responded directly to Professor Goodwin Gill’s further briefings. The Government<sup>130</sup> relied on the decision of the Special Immigration Appeals Commission in *S1*.<sup>131</sup> Professor Goodwin Gill suggests that the Commission has erred in focusing its attention on exceptions to general rules on jurisdiction<sup>132</sup> when there is nothing exceptional about the case; deprivation of nationality is

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122 Universal Declaration on Human Rights, art 15(2); International Covenant on Civil and Political Rights, art 12(4) See the International Law Commission.

123 Universal Declaration on Human Rights, art 15(2), International Covenant on Civil Political rights; International Law Commission Draft Articles on the Expulsion of Aliens, with commentary, Article 8, 66th Session , 2014 A/69/10.

124 Universal Declaration on Human Rights, art 6; International Covenant on Civil and Political Rights, art 16.

125 Universal Declaration on Human Rights, art 7.

126 Vienna Convention on the Law of Treaties, 1969, art 18.

127 Immigration Bill. European Convention on Human Rights. Supplementary Memorandum by the Home Office, 29 January 2014

128 Paragraph 13.

129 HL Paper 142, HC 1120, *op.cit.* para 45 and Government response to the Joint Committee on Human Rights (Second Report) Twelfth Report of Session 2013–14, undated, available at [http://www.parliament.uk/documents/joint-committees/human-rights/Govt\\_reponse\\_to\\_JCHR\\_2nd\\_Report\\_Immigration\\_Bill.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Govt_reponse_to_JCHR_2nd_Report_Immigration_Bill.pdf) (accessed 29 September 2014). See <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2013-14/immigration-bill/> (accessed 29 September 2014) for an overview of the correspondence. See Government response to Professor Guy Goodwin-Gill’s paper, *Mr Al-Jedda, Deprivation of Citizenship and International Law*, Foreign and Commonwealth Office, Home Office, 9 May 2014, Parliamentary Deposit reference DEP2014-0722.

130 *Op.cit.*

131 *S1, T1, U1 and V1 v SSHD* SC/106/107/108/109/2012, 21 December 2012.

132 SC/106/107/108/109/2012, para 23.

clearly a matter where a State's jurisdiction is engaged and this is not a matter of exceptions to a territoriality principle but of the nature of the act of deprivation.<sup>133</sup>

His arguments are relevant to denial of a passport and the resulting inability to return. Like deprivation of citizenship, this is not a matter of exceptions to a territoriality principle. Only the State of which a person is a national can deny that person a passport. Rights under the European Convention on Human Rights are engaged.

As with deprivation of citizenship, so denial of a passport can be viewed as a punitive or a protective measure, raising the same questions as in deprivation of citizenship cases as to the relative benefits of stranding a person within or outside a State. The aim in depriving a person of a passport may be to protect those within the borders of the depriving State, that State's own citizens wherever they may be found, or to make the world 'a safer place' for all in accordance with the principle *aut dedere aut judicare* and with the international instruments requiring States to make 'terrorism', as defined, a crime.<sup>134</sup>

The proposals before the US Senate refer to the definition of terrorism that is found in s 219 *Designation of foreign terrorist organisation* of the US's Immigration and Nationality Act.<sup>135</sup> That section authorises the Secretary to designate an organisation as a foreign terrorist organisation if certain conditions are met. Under s 212 of the Act those engaging in terrorist activities are ineligible for a visa.

First, the definition requires that the organisation is 'foreign',<sup>136</sup> trite in context but of significance as terrorism, insofar as addressed in the Immigration and Nationality Act, is conceived as being located in that space occupied by the alien. There is no necessary reason why a person under immigration control, the subject of the Act, could not manifest hostile characteristics through allegiance to a national organisation.

The significance of that element of the definition is amplified by its being adopted in Bills concerned with persons who hold US nationality, as grounds for deprivation of a passport. Although there would be no need at all for the Bills if the threat to national security did not come from within the citizenry, reference to a foreign terrorist organisation is adopted unquestioningly.

The Act is clear as to who must be threatened by a terrorist organisation as defined:

'219(a)(1)(C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States'.

Those US nationals could be anywhere in the world. The 'terrorist' threat is thus both global and parochial. The Bills before the US Senate propose to tackle a threat to US citizens in the US and throughout the world by grounding those deprived of passports within the territory of the United States. The terrorist as defined shall be permitted to return to the US, presumably the better to conduct surveillance of him/her and take the necessary steps to constrain his/her activity.

In contrast, one reading of the UK approach is as a counsel of despair. Push the 'terrorist' off the island in the hope that thus fewer UK nationals will be harmed by the activities s/he

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133 Deprivation of Citizenship resulting in Statelessness and its Implications in International Law Further Comments, Guy Goodwin Gill, 6 April 2014. Consider also *Al-Skeini and others v Secretary of State for Defence* [2007] UKHL 26, *Smith et ors v Ministry of Defence* [2013] UKSC 41.

134 See for example, the International Convention against the taking of hostages. Adopted by the General Assembly of the United Nations on 17 December 1979, UNTS 21931, into effect 3 June 1983, and the International Convention for the Suppression of Terrorist Bombings 15 December 1997, UNTS 37517.

135 8 USC 1189.

136 Section 219(a)(1)(A).

may undertake. But might it be that the UK, against the backdrop of decisions of the Supreme Court and House of Lords in cases such as *AP v Secretary of State for the Home Department*<sup>137</sup> considers that its powers to deal with threats to national security are too weak and it had rather leave its 'terrorists' to the mercy of States less scrupulous beyond its borders?

## **Conclusion**

States have made significant progress in reducing statelessness in recent years as described in the keynote address of Volker Türk, UNHCR Director of International Protection, to the First Global forum on Statelessness organised by UNHCR and Tilburg University in The Hague in September 2014.<sup>138</sup> National security considerations threaten to derail the current consensus that stateless is an evil to be eradicated and to slow that progress. There are two possible approaches to this risk. One is to treat those who violate national security as a case apart, quietly mapping the exclusion clauses of the 1954 Convention onto art 8(3) of the 1961 Convention. The other is to make a case, as was done so powerfully by peers in the debates in the House of Lords, that statelessness, like torture, is something to which no one shall be made subject, whatever their conduct.

The tightly framed argument drawn by the Secretary of State before the Supreme Court in *Al Jeddah* has become the much broader power to deprive persons of citizenship set out in s 66 of the Immigration Act 2014. The proposals for deprivation of passports will allow banishment of natural born citizens, whom the UK strove to protect from statelessness in the negotiations that resulted in the 1961 Convention. States such as the Netherlands, who have turned their faces against deprivation of citizenship resulting in statelessness, are reaching for the proposals for deprivation of passports. Those framing the proposals currently before the United States' Senate have seen no need to couch deprivation of passports as the result of a voluntary act.

There is a high risk that alongside the current positive developments we shall see an increasing number of cases of statelessness that are not described as such and escape scrutiny and the protection of international law on statelessness. The tide of international condemnation of statelessness, taken at its height, could be used to strengthen the principle that everyone has a right to nationality. Alternatively, it could become one of the reasons why steps that leave persons unprotected by any State gain increasing acceptance. The arguments that informed the drafting of the 1961 Convention militate in favour of the former approach.

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137 [2010] UKSC 24.

138 Ending Statelessness: An Imperative for the 21st Century, 15 September 2014, available at <http://www.unhcr.org/5416d1619.html> (accessed 1 October 2014).