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The legality under international human rights law of citizenship deprivation as a security measure in the UK

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Contents

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As a Scottish-British citizen, in the space of two years I took part in two national referendums. Both had the chance to fundamentally alter rights I had received just by virtue of being born. When I moved to Sweden at the start of this Masters degree I was an EU citizen and now at the end of it I am not. I will feel the impact of this for the rest of my life. I am a bit preoccupied with this fact and undoubtedly it is what spurred my interest in this topic.

I believe most people take their nationality for granted, but I also believe that you *should* be able to take your nationality for granted. I hope this comes across in my thesis.

Summary

This thesis will examine the question of whether the UK's use of nationality deprivation as a security measure is in accordance with its obligations under international human rights law. As the UK has defended its use of such measures through reference to the traditional reservation of nationality matters to the sovereign preserve of states, a short history of the extent to which international law has regulated nationality will first be provided to place this assertion in context. This will be followed by a discussion of relevant international human rights law relating to the human right to nationality, that will prove that state discretion in laws pertaining to nationality laws is in fact limited by international obligations. An in-depth analysis will be made of the development of domestic law on nationality deprivation as a security measure in the UK, with a focus on the period from 2002 to the present day. Finally, the UK system will be analysed through the application of the above examined international legal regimes, as well as relevant obligations under European instruments. This thesis will conclude that the use by the UK of nationality deprivation as a security measure is illegal under international human rights law.

INTRODUCTION

Preface

The right to nationality as a human right occupies a specific place in the transition from state-centric international law to individual-centric international human rights law. Originally conceived as a response to rising incidences of statelessness in the aftermath of the Second World War, the human right to nationality has developed into a substantial constraint on state practice in an otherwise traditionally sovereign domain. In the wake of the increasing use by the UK of deprivation as a security measure over the last two decades, the right to nationality and the right not to be arbitrarily deprived of nationality have been the subject of renewed interest. On the face of it, the deprivation system in the UK is unjust. This thesis will examine whether it is illegal.

The idea of nationality is a relatively new concept, and over the last century it has developed from a strict legal-technical construction, that links an individual to a sovereign state, to a status that forms part of a person's social and cultural identity.

The global abhorrence of the mass denationalisations of the Second World War ensured strong international prohibitions against statelessness, a status famously referred to as "a form of punishment more primitive than torture"[1]. In 1951, Hannah Arendt even suggested measuring the degree of totalitarianism in a state by the number of times it exercised its sovereign right of denationalisation[2]. In a world where the protective power of human rights was nascent and untested, the link to the state of nationality provided the only protection against the abuses of (foreign) state power.

Over time, the language of human rights empowered individuals to protect their livelihoods and identities on the international stage. The terminology of loyalty and subjecthood to state sovereigns disappeared to be replaced with notions of citizenship and national community. The expectations between state and individual changed from one of the subjugation and fealty to a reciprocal relationship of rights and duties. Naturalisation and multiple nationality, once abhorred for disrupting the international legal order, became openly accepted as a necessary consequence of globalisation and increased migration. The question became not "*whether* to include immigrants, but rather *how* integration ought to be pursued"[3]. Acceptance of foreigners into national communities and became expected and diverse local communities encouraged.

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[1] Trop v. Dulles, 86 356 (U.S. Supreme Court 1958). Para 101
[2] Hannah Arendt, *The Origins of Totalitarianism* (Penguin Books, 2017). 364
[3] M.J. Gibney, '"A Very Transcendental Power": Denaturalisation and the Liberalisation of Citizenship in the United Kingdom', *Political Studies* 61, no. 3 (2013): 637–55, https://doi.org/10.1111/j.1467-9248.2012.00980.x. 639

Citizenship (or nationality) deprivation is a type of denationalisation that can be defined as "administrative and judicial acts of competent national authorities invoking a stipulation of nationality law to withdraw nationality"[4]. This can be distinguished from the loss of nationality, for example through the automatic operation of law upon marriage or naturalisation in another state, as well as the voluntary withdrawal of nationality at the initiative of the individual. Within the UK, the power of the executive to deprive its citizens of their nationality has existed for over a century. The right to nationality has existed through the Universal Declaration of Human Rights ("UDHR")[5] for almost as long. Against the backdrop of the increasing liberalisation of attitudes toward citizenship acquisition throughout the latter part of the 20th Century, both remained relatively dormant, receiving little legal consideration.

But with the turn of the millennium, attitudes towards nationality began to shift in Europe. The collapse of the Soviet Union forced European states to consider nationality acquisition in the context of state succession, and the attacks on New York on 11 September 2001 spurred a wave of xenophobia and national reconsideration of how national security agendas should be implemented. Both events caused European states to reassess the role of citizenship. The UK was caught between the normative push towards the liberalisation of nationality acquisition as a result of events to the East, and the preoccupation with national security and fear of foreigners as a result of events to the West. As a European state, the UK was subject to the most developed human rights enforcement system in the world, but saw itself as a target on par with the United States on the threat likelihood for terrorist attacks. Creating a human rights compliant counter-terrorism agenda is the ultimate test of the interests of liberty versus security[6].

The right to nationality is the ultimate test of the power struggle between international law and international human rights law. Hannah Arendt has stated that:

> "Theoretically, in the sphere of international law, it has always been true that sovereignty is nowhere more absolute than in matters of 'emigration, naturalisation, nationality, and expulsion'; the point, however, is that practical consideration and silent acknowledgement of common interests restrained national sovereignty until the rise of totalitarian regimes."[7]

Arendt was writing in 1951, in the nascent period of international human rights law. In the wake of the increased threat of terrorism in the early 21st Century, the interest of the UK has shifted from restraint towards increased denationalisation. This thesis will demonstrate the

[4] Secretary General and Human Rights Council, 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary General' (United Nations General Assembly, 19 December 2013), https://www.refworld.org/docid/52f8d19a4.html. para 3
[5] 'Universal Declaration of Human Rights' (1948).
[6] Adam Tomkins, 'National Security and the Due Process of Law', *Current Legal Problems* 64, no. 1 (1 January 2011): 215–53, https://doi.org/10.1093/clp/cur001. 215
[7] Arendt, *The Origins of Totalitarianism*. 364

extent to which the development of international human rights law provides a legal restraint the UK's sovereignty in this regard.

Research question and objective

The main research question of this thesis is as follows: is the use by the UK of citizenship deprivation as a security measure legal under international human rights law?

To answer this question, several subquestions must also be asked:

- How are nationality and the deprivation of nationality understood in international and international human rights law?
- How are nationality and deprivation of nationality understood in UK national law?
- What international obligations does the UK have in relation to the regulation of its nationality deprivation system, and
- Does the UK comply with these obligations in the exercise of nationality deprivation power?

Chapter 1 discusses the position of nationality within international law. Chapter 2 examines the development of the right to nationality within international human rights law. Chapter 3 provides a history and analysis of the major developments in the national citizenship deprivation system in the UK since 2002. Chapter 4 applies the international human rights framework on the right to nationality to the UK system to determine its legality. Question (a) will be answered in Chapters 1 and 2. Question (b) will be answered in Chapter 3. Questions (c) and (d) will be answered in Chapter 4.

At the core of this thesis is the assertion that the UK is employing its powers of nationality deprivation as a security-based measure in a manner that in fact pursues political objectives without any tangible benefit to national security, and at the expense of the rule of law and the protection of minority ethnic groups. The objective of this thesis will be to show that to employ deprivation measures in this way is not only unjust, but illegal.

Methodology

In order to understand whether the UK's deprivation system is legal, it was necessary to understand how it was being used and why. I aimed to do this by adopting a contextual approach, through which I could explain the development of the current legal framework within its historic and political context. This approach influenced my discussion of both the content of the right to nationality, and the nationality deprivation system in the UK.

Examination of the right to nationality required therefore an analysis of not only the current legal framework of national, international and international human rights law, but the manner in which those frameworks had developed and interacted over time. The law of nationality is

complex in that it has one foot in international law and one foot in international human rights law. Understanding this relationship is key to understanding the relative lack of development in the human right to nationality and accordingly its application to national systems that allow for deprivation as a security measure. I examined international human rights conventions and the guidance provided by their governing and interpretive bodies alongside academic commentary to place the right to nationality in context.

For my discussion of the UK deprivation system, I intended to supplement my legal analysis of the major developments in the nationality deprivation system with a discussion of the political motivations behind them. This dual approach was crucial in order to develop the core assertion behind my thesis, but also to answer my research question, as the subsequent discussion of the application of international human rights law was dependent on a substantive review of the domestic system that took into account legitimate aims, necessity, and proportionality. I relied upon a variety of domestic sources, including primary and secondary legislation, domestic caselaw, government publications, parliamentary reports, parliamentary statements, and news articles. I also consulted academic articles and reports from non-governmental organisations.

Within this thesis, I cut across a wide array of substantive topics, such as citizenship, statelessness, the right to nationality, and counter-terrorism each of which comes with its own distinct and extensive legal literature. My thesis necessarily also engaged with UK-specific political issues. Therefore, as a guiding principle, I aimed to limit myself to material on the particular human rights issues and national obligations that impacted the use of security-based deprivation measures in the UK nationality deprivation system. The development of the right not to be arbitrarily deprived of nationality inevitably required discussion of the right to nationality; I limited myself in my discussion of this area to developments that indicated the overall trends of nationality law.

Within the field of counter-terrorism, there is a wealth of national and international regulation and literature. Where my thesis addressed counter-terrorism issues, there was a risk of straying too far from my research question. I limited myself to direct engagement with the primary UN Security Council Resolutions on these issues. Where I engaged with legal analysis of national legislation on counter-terrorism, it was through the medium of material that discussed counter-terrorism in the specific context of the UK nationality deprivation system. This was through academic articles, Special Rapporteur and Human Rights Council reports, and expert evidence from national security experts to legislative scrutiny proceedings for deprivation legislation. General counter-terrorism material was referred to for its factual and statistical content regarding foreign terrorist fighters only.

Delimitations

Nationality is a vast topic, and not every issue relating to deprivation let alone the nuances of the determination, use, and purpose of nationality could be covered or acknowledged within this thesis. Furthermore, the full legal and political history of the UK's historical and current relationship to nationality as well as its counter-terrorism agenda were beyond the scope of this work.

I consciously did not cover potentially relevant topics such as: deprivation on non-security based grounds (such as fraud), citizenship acquisition, 'citizenships for sale', EU law and Brexit, the UK's relationship with its colonial legacy, general counter-terrorism measures, migration and refugee law, wider issues of statelessness, humanitarian law, international criminal law. There was also scope for a greater philosophical discussion on competing theories of the relative roles in the relationship between individual and state.

Terminology

The words citizenship and nationality will be used interchangeably.

The terms ‘deprivation’, ‘deprivation of nationality/citizenship’, ‘revocation of nationality/citizenship’, ‘removal of nationality/citizenship’ will be used interchangeably.

The meaning of deprivation of nationality is as follows: “administrative and judicial acts of competent national authorities invoking a stipulation of nationality law to withdraw nationality”[8].
This is distinct from nationality that has been removed:

- At the initiative of the individual concerned
- Automatically, for example through:
  - Acquisition of another nationality
  - Marriage

Within the context of this thesis, the interpretation of deprivation shall be further limited so as not to include the deprivation of nationality on the basis of fraudulent or misrepresentative acquisition.

[8] Secretary General and Human Rights Council, ‘Human Rights and Arbitrary Deprivation of Nationality’. para 3

Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AITCA2004	Asylum and Immigration (Treatment of Claimants) Act 2004
BNA1948	British Nationality Act of 1948
BNA1981	British Nationality Act 1981
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women 1979
CERD	UN Committee on the Elimination of Racial Discrimination
CNMW	Convention on the Nationality of Married Women 1957
CMPs	Closed material proceedings
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECN	European Convention on Nationality 1997
FTFs	Foreign terrorist fighters
Hague Convention	Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930
Harvard Draft Convention	1929 Harvard Law School Draft Convention
HRC	Human Rights Council
IA2014	Immigration Act 2014
IACtHR	International American Court of Human Rights
IANA2006	Immigration Asylum and Nationality Act 2006
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ILC	International Law Commission
NBB2021	Nationality and Borders Bill
NIA2002	Nationality, Immigration and Asylum Act of 2002
PACE	Parliamentary Assembly of the Council of Europe
PCIJ	Permanent Court of International Justice
SIAC	Special Immigration Appeals Commission
SIAC1997	Special Immigration Appeals Commission Act 1997
UDHR	Universal Declaration of Human Rights
UKSC	United Kingdom Supreme Court
UNSC	United Nations Security Council
1954 Convention	Convention relating to the Status of Stateless Persons 1954
1961 Convention	Convention on the Reduction of Statelessness 1961

1 CHAPTER 1 – Nationality and International Law

In order to understand the barriers facing the implementation of international human rights standards on the right to nationality, it is first necessary to examine the historical place of nationality within international law. Nationality in the early 20th Century was regarded in law, in commentary, and in practice as within the exclusive sovereign domain of states. The determination of statehood is fundamental to the operation of international law, but "[i]f States are territorial entities, they are also aggregates of individuals"[9]. Territory and population are the two closely linked physical markers of statehood within the Montevideo Convention[10]. The assertion by states of the composition of their population is as much as part of the concept of sovereignty under international law as the assertion of its territorial borders.

Through the development of the state-centric international system, nationality therefore "became an indispensable legal concept"[11]. However, while "statehood is contingent on the existence of at least some permanent population, nationality is contingent on decisions of the State"[12]. A claim by one state to determine the nationality of an individual was felt to be an extension of its sovereignty under international law. This received judicial consideration in the 1923 *Tunis* case, where the Permanent Court of International Justice ("PCIJ") considered that the determination of the jurisdiction of the states was "an essentially relative question [that] depends on the development of international relations"[13]. With this in mind, the PCIJ held that "in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within [the] reserved domain"[14]. Being born on the territory of a particular state or to parents who held the nationality of a particular state did not itself guarantee the nationality of a child. Generally, states would claim nationality of individuals through links such as birth on their territory (jus soli) or birth to one of their nationals (jus sanguinis), or else some combination of the two[15]. The general rule was that states were free to determine the composition of their membership through any means they chose.

Where exceptions existed within international law these were limited in character and framed in terms of the rights of states, rather than individuals, with the purpose of avoiding situations

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[9] James R. Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Oxford University Press, 2007), https://doi.org/10.1093/acprof:oso/9780199228423.001.0001. 40

[10] 'Montevideo Convention on the Rights and Duties of States' (1933). art1(a)-(b)

[11] Robert D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality', *Harvard International Law Journal* 50, no. 1 (2009): 1–60. 1

[12] United Nations, 'State Succession and Its Impact on Nationality of Natural and Legal Persons [Agenda Item 7]', in *Yearbook of the International Law Commission 1995, Vol. II, Part 1*, by United Nations, Yearbook of the International Law Commission (UN, 2007), 157–76, https://doi.org/10.18356/14bc0d14-en. para 35

[13] Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco, No. 4 (Permanent Court of International Justice 7 February 1923). 24

[14] *Tunis and Morocco Advisory Opinion*. 24.

[15] Diane Orentlicher, 'Citizenship and National Identity', in *International Law and Ethnic Conflict*, ed. David Wippman (Cornell University Press, 1998), 296–325. 312

where a state would infringe upon the sovereign rights of another state. One of these exceptions came generally through the international legal rule that international treaties voluntarily entered into would restrict the exercise of states' sovereign rights[16]. The PCIJ in *Tunis* applied this rule to the determination of nationality, stating that "the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states"[17]. Despite the reservation of nationality questions to the domain of states, a dispute regarding nationality could thus fall under the jurisdiction of international courts when it related to an international treaty on the matter. The PCIJ was sure to reaffirm state sovereignty principles, stating: "[t]o hold that a State has not exclusive jurisdiction does not in any way prejudice the final decision as to whether that State has a right to adopt such measures"[18]. Inevitably, there would be situations where national laws would conflict, with the effect that multiple states could assert that they have a legitimate claim to the nationality of a child, or else that no state could assert a claim. However, there was no overarching global agreement on how to deal with such conflicts of nationality claims. The resolution of such issues was thus dependent on the existence of bilateral or multilateral treaties between the specific states concerned.

When it came to non-treaty regulation of nationality law, international law acknowledged that there were boundaries to the state's power, but statements to this effect were vague on the actual limitations[19]. The main intrusion by international law into the nationality laws of states was a prohibition towards a state imposing its nationality on an individual through involuntary naturalisation. Unless an individual was previously stateless, a claim to the nationality of the individual by the state potentially implied an infringement of the sovereignty of another state[20], to the extent that one commentator in 1956 stated that involuntary naturalisation was "an unfriendly or even hostile act against the State of nationality comparable to the violation of the State's territorial jurisdiction: it constitutes a threat to peaceful relations and is as such illegal"[21]. The policy reason behind the rule is clear, if states could assert their sovereignty by the simple imposition of nationality there would be chaos as states attempted to rapidly expand through mass and likely conflicting nationalisations. Furthermore, in an era with widespread military conscription, a permissive approach to involuntary naturalisation would allow states to attempt to build armies through mass naturalisation.

In addition to the acquisition of nationality, international law allowed states the right to determine the loss of nationality. As with acquisition, the exercise of this right was also subject

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[16] The case of the S.S. 'Lotus' (France v Turkey), Ser. A No.10 P.C.I.J. (Permanent Court of International Justice 1927).
[17] *Tunis and Morocco Advisory Opinion*.
[18] *Tunis and Morocco Advisory Opinion*.
[19] Sloane, 'Breaking the Genuine Link'. 2 See, for example: 'The Law of Nationality', *The American Journal of International Law* 23, no. 2 (1929): 1–129, https://doi.org/10.2307/2212861. art.2
[20] Peter J. Spiro, 'A New International Law of Citizenship', *American Journal of International Law* 105, no. 4 (2011): 694–746. 698.
[21] Orentlicher, 'Citizenship and National Identity'. 313.

to general principles of respect for state sovereignty and any governing treaties. In a 1952 report, the International Law Commission ("ILC") stressed the need for distinguishing between "the power of States to withdraw nationality and the effect of withdrawal on the duty of a State to grant its nationals a right of residence and to receive them back in its territory" [22]. The report suggested that where denationalisation occurred for political reasons, it could be inconsistent with international law. Such denationalisation could be seen as an attempt by states "to evade the duty of receiving back their nationals, and would thus cast a burden on other States" [23]. It was suggested that in such situations, the duty on the state to receive its own nationals persisted after the denationalisation as between the state of former nationality and the state of residence of the individual in question, in the event that the denationalisation had occurred after the individual had entered the foreign territory and had not acquired any other nationality. A Special Protocol to this effect was suggested but not entered into force[24].

It was accepted by the ILC report that some states had deprivation powers within their domestic law that were wider with regard to those who were naturalised citizens. While states remained free to determine the conditions of naturalisation, the effect of this limitation on international law is that naturalisation necessitates some sort of action on the initiative of the individual. For example, international law permitted situations where a woman gained foreign nationality automatically on account of her marriage to a foreign national, as the marriage was presumed to be consent to the change[25]. Consent to naturalisation reflects the liberal conception of nationality as a contract between individual and state[26]. However, under international law, such a relationship was inherently unequal to the extent that the State had discretion to determine the terms of the contract on whatever terms it liked, no matter how broad. States would deprive individuals of nationality on grounds such as disaffection or disloyalty, implying a violation of the expectation that comes with a contractual notion of nationality. Where denationalisation occurred as a response to an individual committing a crime, the ILC noted a conflation by states between what it referred to as 'nationality' rights, versus 'citizenship' rights. While the removal of citizenship rights, such as voting rights, would seem justified, the removal of nationality would only serve to burden other sovereign states where it resulted in statelessness. On the question of denaturalisation, the ILC saw no reason to distinguish between the two modes of acquisition for the purposes of removal of nationality. It came to this conclusion on the basis that: "naturalisation usually takes place after thorough screening of the applicant only, while acquisition of nationality by birth may be purely accidental and does not provide any greater guarantee of loyalty"[27]. This highlights the essential problem with a contractual notion of

[22] O. Hudson Manley, 'Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur', Yearbook of the International Law Commission Vol. II, 21 February 1952. 10
[23] Manley. 10
[24] Manley. 10
[25] Orentlicher, 'Citizenship and National Identity'. 313
[26] Gibney, '"A Very Transcendental Power"'. 641
[27] Manley, 'Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur'. 21

nationality, that it necessarily concerns only nationality by naturalisation. To abide by such a notion cannot permit the deprivation of nationality on disloyalty grounds without necessarily discriminating between born and naturalised nationals. Prior to an era of acceptance of multiple nationalities, distinguishing between born and naturalised nationals was problematic under international law where the result of deliberate statelessness impacted on the sovereign rights of other states.

States that allow nationality acquisition through naturalisation often use a territorial/civic model of nationality. Under the territorial/civic model, it is participation in the shared political community that is central to nationality, while in the ethnic model of nationality acquisition it is descent and culture that take precedence in determining the boundaries of the political community[28]. State employment of jus sanguinis is not directly equivalent to the ethnic model seen in naturalisation regimes, although an extreme nationality regime based purely on jus sanguinis could be an ethnic model. Regardless, in the face of increasing global migration throughout the 20th Century, states were forced to liberalise their naturalisation regimes or face an influx of stateless person upon their territory. The ILC noted that statelessness was a status to be "considered as undesirable, both from the interests of States and from the aspect of the interests of the individual"[29]. The combination of jus sanguinis, jus soli, and increasingly available access to naturalisation led to the inevitable outcome of a proliferation of multiple nationality holders.

1.1 Nationality conventions

In the early 20th Century, the very existence of dual or multiple nationalities were considered to be not just a problem but a threat to the international order[30]. There were "wide divergencies" in nationality laws[31] in general, causing a contemporary commentator to describe the "confusion" on the topic to be "so great, so universal, and so embarrassing, not to say exasperating"[32] that an international treaty was required. In the 1920s, nationality was the priority in a League of Nations list on "the subjects of International Law the regulation of which would seem to be the most desirable and realisable at the present moment"[33]. At this time, states were essentially able to do as they pleased to their own nationals, but were restricted in what they could do to citizens of other states through the general principle that individuals were an extension of the sovereignty of their state of nationality. Military conscription and frequent

[28] Orentlicher, 'Citizenship and National Identity'. 317
[29] Manley, 'Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur'. 19
[30] Spiro, 'A New International Law of Citizenship'. 706
[31] 'The Law of Nationality'. 21
[32] Spiro, 'A New International Law of Citizenship'. 700-701
[33] L. van Waas, 'Article 15: The Right to a Nationality', in *Contemporary Human Rights Challenges: The Universal Declaration of Human Rights and Its Continuing Relevance*, 2018, 126–36, https://doi.org/10.4324/9781351107136. 127

warfare ensure that notions of loyalty to one particular state were strong. As such multiple nationality holders were "universally decried" and considered not just a minor legal issue but "an abomination, an offense to nature, a sin on the order of bigamy"[34], with US President Theodore Roosevelt describing the state of dual nationality as a "self-evident absurdity"[35]. In the interwar period, two conventions into nationality were written, the first a Draft Convention written in 1929 by academics at Harvard Law School ("Harvard Draft Convention") and the second a Convention on Certain Questions Relating to the Conflict of Nationality Laws ("The Hague Convention"), written by diplomats as a result of the 1930 League of Nations Codification Conference. Both were intended to deal with the problems of multiple nationality and to attempt to reconcile the conflicts of nationality laws.

The academics writing the Harvard Draft Convention found that most of the treaties recently concluded on the area of conflicting claims of nationality related to military services obligations[36]. Migrants would go to visit briefly their countries of origin and find themselves subject to enforced military service. The United States was reliant on migrant communities and had historically been aggressive when intervening in these kind of cases, creating international disputes[37]. Harvard Law School thus published the Harvard Draft Convention as an academic exercise that had the aim of assisting in the progressive codification of the law of nationality. It acknowledged that, given the present incoherent state of international law on the subject, a mere codification would be "meager and of little practical value"[38]. Harvard Law School called upon states to co-operate with the view that the lack of international legal rules on nationality was a threat to the international order. The Harvard Draft Convention was thus written:

> "upon the assumption that states, while retaining the power to shape their own nationality laws to fit their peculiar situations and needs, will be willing to make certain changes and concessions, with a view to removing some of the existing conflicts and to preventing, so far as possible, cases of double nationality and of no nationality"[39].

The Harvard Draft Convention was therefore predicated on the idea that compromise would be necessary to create international order.

Article 1 of the Harvard Draft Convention states that "'nationality' is the status of a natural person who is attached to the state by the tie of allegiance"[40]. This is reminiscent of perpetual allegiance, a natural law concept predominant in Europe until the 19th Century, under which

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[34] Spiro, 'A New International Law of Citizenship'. 706
[35] David A. Martin, 'Dual Nationality: TR's "Self-Evident Absurdity"', *University of Virginia School of Law* (blog), accessed 14 March 2022, https://www.law.virginia.edu/static/uvalawyer/html/alumni/uvalawyer/sp05/martin_lecture.htm.
[36] 'The Law of Nationality'. 21
[37] Spiro, 'A New International Law of Citizenship'. 706
[38] 'The Law of Nationality'. 21
[39] 'The Law of Nationality'. 21
[40] 'The Law of Nationality'. 22

the subject owed lifelong loyalty to the state territory in which they were born. Any removal of nationality under perpetual allegiance was considered to be impossible[41]. Article 2, which states that "each state may determine by law who are its nationals", provides a vague disclaimer that "the power of a state to confer nationality is not unlimited"[42]. On the question of multinationals, the Harvard Draft Convention dealt with the problem by attempting to remove their existence all together. Article 12 determines that a holder of two or more nationalities will retain only the nationality of their state of habitual residence after the age of 23, or, if they do not have habitual residence in one of those states, the state of which they are a national within which they last had habitual residence[43]. Article 13 ensures that upon naturalisation in another state, the individual would lose their prior nationality[44]. The Convention also deals with the specific issue of military service: Article 11 states that an individual with multiple nationalities will not be subject to the military service of another state while holding habitual residence in one of their states of nationality[45].

The Harvard Draft Convention laid the foundation for the second interwar nationality convention, the Hague Convention. Similarly to the Harvard Draft Convention, the Preamble to the Hague Convention aimed for a "progressive codification", proclaiming that "the ideal towards which the efforts of humanity should be directed in this domain is the *abolition* of all cases both of statelessness and of double nationality"[46]. Despite the strong assertion of the complete abolition of multinationals, the provisions of the Hague Convention, when confronted with diplomats rather than academics[47], ended up being a watered down version of the Harvard Draft Convention that generally maintained the status quo of unfettered sovereign state discretion. For example, there was no provision equivalent to the Harvard Convention Article 12 on mandatory election of a single nationality upon maturity. Article 1 follows the already mentioned *Tunis* case, stating that: "it is for each state to determine under its own law who are its nationals" which "shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality"**.** The Hague Convention was significant for being the first international legal limitation accepted by States to the power to determine their own nationality laws[48]. And while it certainly regarded nationality issues in a technical sense from the point of view of states[49], it was also the first statement resembling an individual right to have a

[41] Peter J. Spiro, *Citizenship: What Everyone Needs to Know*® (Oxford, UNITED STATES: Oxford University Press, Incorporated, 2019). 113
[42] 'The Law of Nationality'. 24
[43] 'The Law of Nationality'. 14
[44] 'The Law of Nationality'. 14
[45] 'The Law of Nationality'. 14
[46] 'Convention on Certain Questions Relating to the Conflict of Nationality Laws' (1930). Emphasis added.
[47] Martin, 'Dual Nationality'.
[48] van Waas, 'Article 15'. 127
[49] van Waas. 127

nationality[50], with its Preamble declaring: "it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality". However, this was still framed in terms of the stability of the international order as opposed to the rights of individuals, and it came with the proviso that persons "should have one nationality only"[51]. The Hague Convention came into force in 1937[52]. It ultimately only received twelve ratifications, showing the limited extent to which States were willing to make slight concessions to regulation of their nationality laws, even where they did not create strict legal obligations. However, Spiro argues that the Hague Convention provided considerable indirect influence on nationality norms[53]. This can be seen through the early drafts of Article 15 of the Universal Declaration on Human Rights, which will be discussed in Chapter 2.

1.2 Judicial consideration - *Nottebohm*

It is through the 1955 *Nottebohm*[54] case, decided by the International Court of Justice ("ICJ"), that international law came the closest to a substantive pronouncement on the content of nationality. The case concerned an attempt by Lichtenstein to enforce its diplomatic protection rights against Guatemala over property that Guatemala had confiscated from a naturalised Lichtenstein national. Diplomatic protection is part of "the defence of the rights of the State"[55], making it a core aspect of state sovereignty. The ICJ, in its consideration of *Nottebohm*, endorsed the view of the PCIJ in *Panevezys-Saldutiskis*[56] that:

> "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."[57]

The ICJ considered whether Nottebohm's naturalisation within Lichtenstein created sufficient title for Lichtenstein to exercise diplomatic protection against Guatemala[58]. As the foremost declaration on the position of nationality under the jurisdiction of international law, this case will be examined in detail.

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[50] M. Adjami and J. Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights', *Refugee Survey Quarterly* 27, no. 3 (01 2008): 93–109, https://doi.org/10.1093/rsq/hdn047. 95

[51] Convention on Certain Questions Relating to the Conflict of Nationality Laws. Preamble.

[52] Chittharanjan F. Amerasinghe, 'The Relevance of Nationality', in *Diplomatic Protection* (Oxford: Oxford University Press, 2008), https://doi.org/10.1093/acprof:oso/9780199212385.003.0010. 107

[53] Spiro, 'A New International Law of Citizenship'. 703

[54] Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase) Judgment of 6th April 1955, I.C.J. Reports (1955) 4 (1955).

[55] The Panevezys-Saldutiskis Railway Case, Estonia v. Lithuania, P.C.I.J. (ser. A/B) No. 76 (Permanent Court of International Justice 1939). para 65

[56] The Panevezys-Saldutiskis Railway Case, Estonia v. Lithuania, P.C.I.J. (ser. A/B) No. 76. para 65

[57] *Nottebohm Case*, I.C.J. Reports (1955). 24

[58] *Nottebohm Case*, I.C.J. Reports (1955). 16-17

The facts of the case are as follows: Friedrich Nottebohm was born in 1881 and was a German national by birth. Nottebohm moved to Guatemala in 1905 to set up his residence and business. He had friends and relatives in Guatemala, which remained both his fixed abode and the centre of his business activities until 1943. In the intervening period, Nottebohm conducted occasional business ventures and visits to friends and family who lived in Germany. He also several times visited Liechtenstein to see a brother who had lived there since 1931. In 1939, Nottebohm provided for a power of attorney for his Guatemalan firm then left Guatemala at a time between the end of March and the start of April. He travelled to Germany, during which time he made several visits to Liechtenstein. In October 1939, around a month after the invasion of Poland by Germany marked the outbreak of the Second World War, Nottebohm was present in Lichtenstein. On 9th October 1939, Nottebohm's attorney submitted an application for Nottebohm's naturalisation in Liechtenstein[59]. Under the nationality law in force at the time, Lichtenstein mandated a certain period of residency within the territory in order to gain naturalisation status, although this requirement could be waived subject to governmental discretion in individual cases[60]. Nottebohm was naturalised on 13th October 1939, received his Lichtenstein passport on 1st December 1939, and returned to Guatemala at the beginning of 1940[61]. Through the operation of German nationality law, Nottebohm automatically lost German nationality upon his naturalisation to Lichtenstein[62]. After Guatemala formally allied itself against Germany, it deported Nottebohm to the USA for internment. Nottebohm was interned for 2 years, and upon his release in 1946 was refused entry into Guatemala. Nottebohm then moved to Lichtenstein, where he resided as his permanent address until his death in the early 1960s[63]. In 1949, Guatemala seized Nottebohm's assets within their territory as enemy alien property, and it is this property that was the subject of the legal action by Lichtenstein against Guatemala in the ICJ. Proceedings were initiated in the ICJ in 1951, by which time Nottebohm had been domiciled in Liechtenstein for 5 years[64].

Counsel for Liechtenstein phrased the question before the court as "whether Mr Nottebohm, having acquired the nationality of Lichtenstein, that acquisition of nationality is one which must be recognised by other States". The Court agreed with this summation only with the additional reservations that the recognition was not for all purposes but just for the question of admissibility, and not recognition by all states but only by Guatemala[65]. The Court further emphasised that it was not deciding on the validity of the naturalisation procedure in Lichtenstein, an area beyond the jurisdiction of international law, as "municipal laws are

[59] *Nottebohm Case*, I.C.J. Reports (1955). 12
[60] *Nottebohm Case*, I.C.J. Reports (1955). 14
[61] *Nottebohm Case*, I.C.J. Reports (1955). 16
[62] Audrey Macklin, 'Is It Time to Retire Nottebohm Symposium on Framing Global Migration Law - Part III', *AJIL Unbound* 111 (2018 2017): 492–97. 493
[63] Macklin. 493
[64] Josef L. Kunz, 'The Nottebohm Judgment', *The American Journal of International Law* 54, no. 3 (1960): 536–71, https://doi.org/10.2307/2195307. 536
[65] *Nottebohm Case*, I.C.J. Reports (1955). 17

merely facts which express the will and constitute the activities of States"[66]. But, by exercising its protection rights, Lichtenstein had "[placed itself] on the plane of international law"[67]. In this way, the ICJ established its jurisdiction but also delimited the application and effect of its judgment to very specific circumstances. The question before the court was thus phrased: "whether, in the circumstances of this case and vis-à-vis Guatemala, Liechtenstein is entitled, under the rules of international law, to afford diplomatic protection" [68] to Nottebohm. In its ultimate findings, the ICJ declared that to answer this question in the positive, there must be a necessary factual connection between the individual and the state of purported nationality. The resulting dictum on the position of nationality under international law is as follows:

> "[…] nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by law or as the result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than that of any other State."[69]

From the moment of its release, this now famous judgment has not been without controversy and criticism, despite recognition of its significance and far-reaching effect[70]. The key feature with regard to the development on nationality law is the 'genuine link' test quoted above, which recognises the identity and conduct of the individual as part of a legal determination of nationality. While the court claims this is limited to the purposes of the exercise of diplomatic protection regime, the new legal test of 'a social fact of attachment, a genuine condition of existence, interests and sentiments' has the effect of "demoting formal citizenship from a sufficient condition for espousal of diplomatic protection to a necessary but insufficient condition" [71]. Until this point international law had contained no rule that made "the effectiveness of nationality dependent upon a sentimental bond between the naturalising State and the naturalised individual" [72]. The ICJ bifurcates nationality legally acquired under domestic law, distinguishing nationality that is effective for the purposes of diplomatic protection from that which lacks a social fact of attachment. This conclusion incorrectly interprets the relationship between nationality and diplomatic protection.

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[66] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955) 4 (1955). 36
[67] *Nottebohm Case*, I.C.J. Reports (1955). 20-21
[68] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955). 35
[69] *Nottebohm Case*, I.C.J. Reports (1955). 23
[70] Kunz, 'The Nottebohm Judgment'. 537-9
[71] Macklin, 'Is It Time to Retire Nottebohm Symposium on Framing Global Migration Law - Part III'. 493
[72] Nottebohm, Judgment - Second Phase, Dissenting Opinion of M. Guggenheim, Judge « ad hoc », I.C.J. Reports (1955) 4 (1955). 57

In an era prior to human rights protection, diplomatic protection was traditionally the only method by which a state could assert its sovereignty over another state with respect to an individual[73]. While a state could do in effect whatever it liked to its own nationals on its own territory, its behaviour towards foreign nationals upon its territory was constrained by diplomatic protection[74], which was an invention of public international law[75]. The logical reverse of this incursion on the state's own territory, was that it in turn could assert its sovereignty over another state's territory with respect to its own nationals. It is generally understood in international law that nationality gives rise to diplomatic protection[76]. The receiving state has a duty of reasonable and fair treatment towards a non-national on their territory as well as a right to deport that individual. The corollary of which is the right of the protecting state to assert diplomatic protection over its national and the duty to receive that national onto their territory in the event of deportation[77]. When a non-national approaches the border of a state, their entry into that state is accepted in the knowledge that another state (the state of that individual's nationality) is under an obligation to re-admit that individual if the receiving state decides to deport them. From that point of entry, a series of legal relationships opens up between the receiving and protecting states, including diplomatic protection as posited by international law. The underlying justification for diplomatic protection is thus based on the right of nationals to be admitted to their state of nationality. Under a modern formulation, the relationship between the right to enter and exit the state of nationality and diplomatic protection could be understood from the point of view of the protective duty of states towards their nationals. The state protects its nationals best through its "laws, institutions, and officials, whose jurisdiction is primarily territorial"[78] and so the national's right to enter, along with its corollary, is the best method of fulfilling this duty to protect. Diplomatic protection is merely another (lesser) method of protection. It follows that "if one is a national for the purposes of admission to a state, one should be a national for the purposes of diplomatic protection by that state"[79]. This fact demonstrates the logical inconsistency in the outcome of the *Nottebohm* judgement. It also highlights the importance of a uniform status of nationality for the purposes of certainty in international legal relations. As has been established, part of the package of legal rights a state is granted upon allowing the entry of a non-national is the right to deport that non-national, a right that cannot be guaranteed if the relative security of an individual's nationality vis-à-vis international relations is in doubt. International law requires certainty of nationality status.

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[73] Spiro, 'A New International Law of Citizenship'. 704
[74] Spiro. 706
[75] José-Miguel Bello y Villarino, 'If Mr Nottebohm Had a Golden Passport: A Study of the Obligations for Third Countries under International Law Regarding Citizenships-for-Sale', *Cambridge International Law Journal* 9, no. 1 (1 June 2020): 76–95, https://doi.org/10.4337/cilj.2020.01.04. 84
[76] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955).46
[77] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955). 47
[78] Macklin, 'Is It Time to Retire Nottebohm Symposium on Framing Global Migration Law - Part III'. 495
[79] Macklin. 496

In their submissions, Guatemala admitted that there existed "no system of customary rules" that supported the genuine link test[80]. They sought to rely on Article 3(2) of the Statute of the ICJ[81] which reads: "a person for whose membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights". While this provision reflects the genuine link test through the emphasis on the conduct of the individual, through the exercise of civil and political rights, the context from which it was taken is irrelevant to the issue of diplomatic protection and is furthermore irrelevant to Nottebohm, who at the time of his naturalisation to Liechtenstein lost his German nationality, leaving him a mononational. The transposition of a criteria designed to be a tie breaker between two legally acquired nationalities for administrative purposes to a context where it is the positive determinant of the validity of *any* nationality under international law is a significant and unfounded leap. Even if this leap were to be taken and the test from the judicial appointments section of the ICJ Statute applied to the facts of *Nottebohm*, out of the four states in which Mr Nottebohm had been linked throughout his life (Germany, Guatemala, the USA, and Liechtenstein), it is Liechtenstein alone in which he both was able to and did in fact exercise both his civil and political rights[82]. Nottebohm is a mononational, and yet the ICJ in its majority judgment relies upon analogies with various tie-breaker rules, drawing comparisons with international arbitration[83] and citing Article 5 of The Hague Convention[84], both of which pertained to multinationals in private international law. This theory of 'effective' or 'active' nationality was developed in private international law to solve disputes by determining which out of more than one legally acquired nationality should be considered dominant. This determination was made through the provisions of the relevant legal systems but was confirmed by elements of fact such as domicile, participation in political life, and the centre of family and business life[85]. By applying the factual aspect of this reasoning to single nationality holders, the ICJ denies Nottebohm a state through which he can assert diplomatic protection. In his dissent, Judge Guggenheim states that finding Liechtenstein's claim inadmissible is "a dissociation of nationality from diplomatic protection [that] is not supported by any customary rule nor by any general principle of law recognised by civilised nations, within the meaning of Article 38 (I) (b) and (c) of the Statute [of the ICJ]"[86]. As Macklin points out, Guatemala's claim to seizing Nottebohm's property is predicated on Nottebohm being an 'enemy national' by virtue of his link to Germany, and that "only if the ICJ is willing to impute German nationality to Nottebohm for the purposes of the laws of war would it make sense to

[80] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955). 40
[81] 'Statute of the International Court of Justice' (1945).
[82] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955).41
[83] *Nottebohm Case*, I.C.J. Reports (1955). 22
[84] *Nottebohm Case*, I.C.J. Reports (1955). 23
[85] United State ex rel Flegenheimer v Italy Decision No. 182, 53 A.J.I.L. 944 (United-States Italian Conciliation Commission 1958). 376
[86] Nottebohm, Judgment - Second Phase, Dissenting Opinion of M. Guggenheim, Judge « ad hoc », I.C.J. Reports (1955). 60

insist that he is not a national of Liechtenstein for purposes of diplomatic protection"[87]. However, the ICJ does not address this and uses the genuine link test only in the negative, to deny Nottebohm of his Liechtenstein nationality without granting him diplomatic protection elsewhere, leaving him stateless in the sphere of diplomatic protection.

The relevance of *Nottebohm* is in how it encapsulates issues that are recurring in nationality laws. Namely, the attempts to differentiate between born and naturalised nationals, and the transposition of considerations that are relevant for determining dominant nationality in the case of multinationals to the determination of the validity of any nationality. Additionally, *Nottebohm* shows how nationality is instrumentalised as part of wider political agendas.

The relevant context to the majority judgment is that the ICJ suspected that Nottebohm had in effect purchased Liechtenstein citizenship to avoid any negative personal or commercial fallout from his German nationality against the backdrop of the burgeoning Second World War[88]. In their dissenting opinions, the minority judges acknowledged that "there can be little doubt" that this avoidance of legal consequence was one of Nottebohm's motives, though "whether it was his sole motive is a matter of speculation"[89]. In his dissenting opinion, Judge Read points to the assertion that the naturalisation of Nottebohm in Liechtenstein

> "did not lead to any alteration in his manner of life; and that it was acquired, not for the purpose of obtaining legal recognition of his membership in fact of the population of Liechtenstein, but for the purpose of obtaining neutral status and the diplomatic protection of a neutral State"[90].

However, the minority dissent decried the examination of such motives as irrelevant in determining the effects of naturalisation[91] or the existence of diplomatic protection[92] under international law. Judge Guggenheim pointed out that:

> "there is no rational principle or judicial decision in either private or public international law to justify the view that a new nationality which has been acquired for the purpose of avoiding in the future, certain effects of a former nationality should be regarded as invalid"[93].

At the point of naturalisation, Nottebohm was not an enemy national of Guatemala, which at this time was a neutral state, and any argument that his naturalisation could have been fraudulent due to having the sole purpose of aiding enemy nationals in Guatemala would need

[87] Macklin, 'Is It Time to Retire Nottebohm Symposium on Framing Global Migration Law - Part III'. 494
[88] Macklin.493
[89] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955). 48
[90] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955). 38
[91] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955). 42
[92] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955). 49
[93] Nottebohm, Judgment - Second Phase, Dissenting Opinion of M. Guggenheim, Judge « ad hoc », I.C.J. Reports (1955). 64

an examination of the merits[94]. Furthermore, Judge Read refused to accept that Nottebohm's naturalisation, which allowed him to establish permanent residency in a state within which he had not previously resided, had for this reason not altered Nottebohm's manner of life[95]. But the conclusion reached by the majority was undoubtedly politically appealing. The effect of the selective recognition by the ICJ of Nottebohm's naturalisation would supposedly prevent conflict between international law and state sovereignty "while simultaneously disciplining states for putatively opportunistic exploitation of the nationality regime"[96]. The result in *Nottebohm* is thus very much a product of the political mood at the time of the judgment, and that context is crucial in understanding its outcome.

To dismiss *Nottebohm* is not to dismiss any international legal limitation on state sovereignty in questions of nationality. While, for the reasons above, *Nottebohm* does not ultimately create a coherent legal basis for a genuine link test of nationality that takes into account more than just a legal-technical relationship, it reasserts that nationality has more than just internal effects, and that the general principle of respect for the sovereignty of other states is a strong limitation requires certainty on what at first glance can seem like a completely discretionary power of conferral of nationality. As the ILC report states: "conferment of nationality can only be considered fruitful if it confers the functions which are inherent in its concept"[97], a principle that applies regardless of the mode of acquisition of nationality. In its 2004 Draft Articles on Diplomatic Protection, the ILC attempted to progressively codify the rules on diplomatic protection for multinationals as between the states of nationality[98]. For the purpose of diplomatic protection, nationality was determined to have been granted if it was done in accordance with the law of the state of nationality in a manner not inconsistent with international law[99], which would include diplomatic protection principles. It is far from settled that the genuine link test is accepted as a customary rule of law, and the attitude of the ILC towards the genuine link test has been described as "non-committal"[100]. The prohibition against one state enforcing its diplomatic protection in respect of one its nationals against another state of which that individual is a national is one of the fundamental limitations in the law of diplomatic protection[101]. The 2004 Draft Articles permit such action, provided it is exercised by the individual's "predominant" state[102]. This also does not echo the genuine link test but

[94] Nottebohm, Judgment - Second Phase, Dissenting Opinion of M. Guggenheim, Judge « ad hoc », I.C.J. Reports (1955). 64-5
[95] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955). 45
[96] Macklin, 'Is It Time to Retire Nottebohm Symposium on Framing Global Migration Law - Part III'. 493
[97] Manley, 'Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur'. 20
[98] International Law Commission, 'International Law Commission Draft Articles on Diplomatic Protection 2006' (2006). art.7
[99] International Law Commission. art.4
[100] Amerasinghe, 'The Relevance of Nationality'. 94-5
[101] Eileen Denza, 'Nationality and Diplomatic Protection', *Netherlands International Law Review* 65, no. 3 (1 October 2018): 463–80, https://doi.org/10.1007/s40802-018-0119-4.
[102] International Law Commission, International Law Commission Draft Articles on Diplomatic Protection 2006. Art.7

reflects that, where there must be some sort of tie-breaker factor between states of nationality, "a social fact of attachment, a genuine connection of existence, interests and sentiments" is not the appropriate test.

The *Nottebohm* judgment has gained a, perhaps undeserved, enduring relevance as a point of departure for examining nationality under international law[103]. The application of an identity and conduct rooted understanding of nationality that can invalidate nationality acquired by naturalisation is prescient of the justifications that would be used decades later for the deprivation of legally conferred nationality in the UK, even in cases where the individual was a mononational. The problems with such a justification will be discussed in detail in Chapters 3 and 4. This shows the normative force of the genuine link test as the precursor to a concept of two-tiered nationality within a single state. As has been stated, diplomatic protection was, at the point of the judgment, the only method by which individuals could make claims against states. However, Judge Guggenheim highlights the emerging regime of human rights in his dissent, acknowledging not only that the removal of nationality would be relevant even if considered only in terms of the effect on the life of individual, as opposed to the effect on inter-state relations, but that nationality itself provides the key to presenting a claim on the international level. He describes the situation of a mononational whose nationality is disputed and has been denied diplomatic protection following *Nottebohm*: in such a situation the individual is incapable of calling upon the protection of another state, and so must necessarily abandon any claim. Guggenheim considers that removing diplomatic protection thus not only lessens the already "precarious" protection individuals have under international law but he also sees such a move as contrary to the newly adopted right to nationality under Article 15(1) of the Universal Declaration of Human Rights. He states that the legal finding that Liechtenstein was not capable of exercising its diplomatic protection with regards one of its nationals would go against the current trend

> "to prevent the increase in the number of cases of stateless persons and to provide protection against acts violating the fundamental human rights recognised by international law as a minimum standard, without distinction as to nationality, religion or race."[104]

This position supports the recognition of nationality as a human right regardless of the mode of acquisition of nationality. Whatever criteria states choose in determining their membership, once acquired, that nationality should be protected to its full effectiveness by the right to nationality under international human rights law, not through a failure to fulfil a genuine link test.

[103] Macklin, 'Is It Time to Retire Nottebohm Symposium on Framing Global Migration Law - Part III'. 497
[104] Nottebohm, Judgment - Second Phase, Dissenting Opinion of M. Guggenheim, Judge « ad hoc », I.C.J. Reports (1955). 63-4

The *Nottebohm* judgment occupies a crucial turning point in legal history, as international human rights was emerging from the outcome of the Second World War. It encompasses issues that would remain relevant in discussions of nationality law and citizenship deprivation, such as an identity or conduct based validation of nationality, the right of admission to the state of nationality, the conflation of regimes surrounding mono- and multinationals, the difference between born and naturalised individuals, and the instrumentalisation of nationality as a political tool. The specific legacy of the judgment suffers from being inapplicable in its narrow sense to situations of recognition of diplomatic protection due to the possibility of 'paradoxical consequences'[105]. The judgment separates the domestic law of nationality determination from its international effects, ignoring the fact that nationality remains in the reserved domain by virtue of the competence afforded to states by themselves under international law, and so the conferral of nationality is itself an international act. The dualistic approach of the ICJ, distinguishing the municipal effects of Nottebohm's naturalisation from the international effects, is thus "theoretically untenable and apt to lead to the denial of international law as law"[106]. In a wider sense, the judgment is inoperable as a decisive legal basis from which we can determine nationality under international human rights law. The issue under international law lies not necessarily with the genuine link as a basis for nationality acquisition, but with the inconsistent application of rights that flow from the nationality status. Under the human rights project, the effectiveness of all rights is intended to flow from the individual as a human being, rather than any particular status. An identity-based understanding of nationality could thus be an effective means of upholding human rights in the international system; where human rights are equally accessible for all and do not flow from nationality, a national community could have its membership defined not by a legal-technical concept, such as nationality, but through a shared 'social fact of attachment' that would allow for more democratic self-governance. But this reasoning should be applied to the conditions of naturalisation, not the continuing effectiveness of nationality already attained. The *Nottebohm* judgment, while employing human rights language, upholds the importance of nationality status as key to enforcing rights, with both nationality status and the genuine link test being necessary but insufficient conditions for realising the benefits that flow from nationality. *Nottebohm* itself is therefore not an appropriate legal basis for the sort of rights-centric international system where the genuine link test could be relevant in the definition of nationality.

Subsequent international decisions have not necessarily taken up the torch from *Nottebohm*. The 1955 case of *Florence Strunsky-Mergé* in the United States-Italian Conciliation Commission notes *Nottebohm* for its statements on dual nationality in the arbitration context, which was relevant for *Strunsky-Mergé*, while acknowledging that this is despite the fact the

[105] Kunz, 'The Nottebohm Judgment'. 540
[106] Kunz. 551

Nottebohm does not itself concern dual nationality[107]. A 1958 decision by the same Commission also acknowledged *Nottebohm*, refusing to endorse its application beyond the remit of dual nationality, stating that the private international law concept of effective nationality cannot be applied to mononationals "without the risk of causing confusion" and that "there does not in fact exist any criterion of proven effectiveness for disclosing the effectiveness of a bond with a political collectivity"[108]. Modern international law commentators have suggested limiting the genuine link test, such through applying it only to diplomatic protection where the individual clearly has a stronger connection with the respondent state than the claimant state, despite only holding nationality from the latter[109]. However, as a norm generating case, *Nottebohm* remerges within discussions of both mono- and multinationals throughout the latter half of the 20th Century in the context of defining nationality itself. For example, the 2014 UNHCR Handbook for Parliamentarians on Nationality and Statelessness states that the right to a nationality under Article 15 of the Universal Declaration on Human Rights "is founded on the existence of a relevant link between an individual and State", citing the *Nottebohm* genuine link test as illustrative[110]. As access to nationality has liberalised over the course of the 20th Century, the genuine link test, more suitable for determination of sufficient grounds for naturalisation under domestic law, has been transposed to become a definition of nationality itself. Nationality becomes more than a legal-technical assignment, but a continuing relationship between individual and state. The negative effect of this will be examined in the context of nationality deprivation in Chapter 3, where an equivalent to the identity and conduct based genuine link test, the concept of the 'good citizen', seemingly becomes a sufficient normative basis for deprivation of both mono- and multinationals.

1.3 Chapter conclusion

The need for certainty in the attribution of nationality under international law cannot be understated. In the early 20th Century, nationality provided the key for unhindered entry into sovereign states, political and civil rights, as well as being a statement of military allegiance and the basis for accusations of treason. The principle is that nationality law lies within the reserved domain of states. But in practice, this principle is limited by the 'compétence de la compétence' of general international law, where states can choose to limit their sovereignty in this area through global treaties on nationality. What is clear is that despite multivarious domestic regimes of nationality acquisition, be they based on jus sanguinis, jus soli or any other principle, what these regimes have in common is that there exists "between the state granting its nationality and the person to which it is granted, *some* connection which present-day

[107] Florence Strunsky-Mergé Decision No. 55, 50 A.J.I.L. 154 (United-States Italian Conciliation Commission 1955). 244
[108] United State ex rel Flegenheimer v Italy Decision No. 182, 53 A.J.I.L. 376
[109] Amerasinghe, 'The Relevance of Nationality'. 116
[110] United Nations High Commissioner for Refugees, 'Nationality and Statelessness: Handbook for Parliamentarians N° 22', July 2014, https://www.refworld.org/docid/53d0a0974.html. 8-9

international law considers sufficient"[111]. Given the absence of convincing objective tests offered for the determination of the existence and recognition of nationality, it is unsurprising that States cling to their unfettered sovereign power to determine their own membership[112]. The international human rights law regime proves that states are capable of surrendering aspects of their sovereignty in the pursuit of "freedom, justice and peace in the world"[113]. But these goals will only be achieved if that sovereign right to determine a state's own membership is replaced with a robust nationality regime recognised by global consensus. The question remains as to whether a conduct or identity-based test could ever be objective enough to be suitable in such a regime.

To state that questions of nationality are purely within the reserved domain of states does not capture the limitations international law places upon state discretion on this area, both through treaties voluntarily entered into and through general principles of respect for sovereign states as significantly limiting considerations. Furthermore, to convey an image of unfettered state discretion is an idealistic statement that fails to reflect the practical realities of migratory patterns. Unlike territorial borders, people can for the most part move fluidly and freely throughout the world, forming complex international relationships through residence in foreign countries or marriage to foreign nationals. The impact of this on international law was recognised through the intention to create international treaties on nationality. This was done despite the discretionary power of states, in recognition that practical problems can arise from isolationist nationality regimes, and co-operation and compromise in domestic laws are necessary for the maintenance of international order.

[111] Kunz, 'The Nottebohm Judgment'. 546
[112] Nottebohm, Judgment - Second Phase, Dissenting Opinion by Judge Read, I.C.J. Reports (1955). 46
[113] Universal Declaration of Human Rights. Preamble

2 CHAPTER 2 – Nationality and International Human Rights Law

The mass denationalisation programmes and subsequent birth of international human rights regimes after the events of the Second World War created a new forum for discussion of nationality that was individual rather than state-centric. Human rights norms have had the effect of 'internationalising' aspects of internal nationality law that touch upon statelessness and discrimination[114]. Additionally, the newly adopted Universal Declaration of Human Rights provided standalone rights both to nationality and to be not arbitrarily deprived of nationality by virtue of Article 15[115]. The international human rights regime thus placed additional limitations on the regulation of nationality law. Under international law, states' discretion is now subject not only to the general respect for the sovereignty of other states, but to the obligations undertaken through international human rights law, violation of which leads to international responsibility[116].

The statelessness narrative in particular has dominated discussions of the right to nationality and the potential for deprivation of nationality. The work by the international community in pursuit of the reduction of statelessness provided the "conceptual bridge between the state-sovereignty paradigm of older law and the human rights paradigm that prevails in contemporary legal discourse"[117]. But the result of statelessness is the extreme end of nationality deprivation. While statelessness is a relevant consideration for nationality deprivation of mononationals, the above discussion of *Nottebohm* makes clear that care should be taken to avoid conflating mono- and multinationals. When formulating a statement on what constitutes the right to nationality and the right not to be arbitrarily deprived of nationality, focussing on statelessness only provides a definition that fails to fully capture the various ways in which individuals relate to states. Therefore, the norms regarding statelessness should be considered only as the floor of the right to nationality under international human rights law.

Where diplomatic protection was the primary means by which an individual could be defended against a state, within human rights law, there is a greater form of protection now expressed through the individual as an individual, less reliant on the connection that nationality provides to a protecting state. The strengthening across the world of access to human rights may remove many of the obstacles that nationality was intended to overcome. It is a fair argument to state that the value of nationality as the means of accessing rights is diluted as a result[118]. Gerard-Rene de Groot describes nationality as a "legal-technical coupling notion […] without an

[114] United Nations, 'State Succession and Its Impact on Nationality of Natural and Legal Persons [Agenda Item 7]'. para 64
[115] Universal Declaration of Human Rights. art.15
[116] United Nations, 'State Succession and Its Impact on Nationality of Natural and Legal Persons [Agenda Item 7]'. Para 66
[117] Orentlicher, 'Citizenship and National Identity'. 314
[118] *Immigration and Asylum : From 1900 to the Present* (ABC-CLIO, 2005). 89

essential content" and states that its inclusion as a human right in the UDHR in effect is a "guarantee of a surprise package" [119]. Some commentators even consider that while statelessness remains a disadvantaged condition, this disadvantage is now "more a matter of degree than of kind"[120]. One might then ask, if the objective of the human rights project is to denationalise rights through recognising them as inherent to the human person, then what is the point of a human right to nationality if it is not the key to access to human rights? There are several responses to this.

The first is that nationality still carries with it significant human rights by virtue of a guaranteed link to a state of residence and the internal effects that nationality provides within that state[121]. Nationality is generally required for voting and marriage, and often even for access to basic needs such as education, medical care, and employment[122]. In practice, lack of nationality therefore still places individuals outside the system of rights purportedly inherent to the person. There are also rights under international law that attach to nationality in addition to human rights, the cornerstone of which is the right to enter and leave the state of nationality.

The second response is that when the right to nationality is considered in the negative, through the lens of nationality removed at the initiative of the state, the exercise of the right not to be arbitrarily deprived of nationality becomes the means through which an individual can prevent the removal of a bundle of human rights. Where a state is in a position to remove a bundle of human rights through the medium of the removal of nationality, nationality as a human right itself becomes more potent. The right to nationality becomes the only way by which individuals can protect themselves from exercise of state power that attempts to subvert human rights through recourse to a traditionally sovereign power.

The third response is a pragmatic one regarding the relative power dynamics of states. It can be expressed through the words of Hannah Arendt:

> "No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights, which are enjoyed only by citizens of the most prosperous and civilised countries, and the situation of the rightless themselves."[123]

In other words, barring the instantaneous implementation of all human rights for everyone everywhere, having the nationality of any state is better than having the nationality of none.

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[119] *Immigration and Asylum*. 86
[120] Spiro, *Citizenship*. 78
[121] Sloane, 'Breaking the Genuine Link'. 2
[122] United Nations High Commissioner for Refugees, 'Nationality and Statelessness'. 5
[123] Arendt, *The Origins of Totalitarianism*. 365

The discussion in this chapter on the right to nationality within the international human rights regime shall first examine the origins of Article 15 UDHR, before separately examining the development of its two aspects: the right to nationality and the right not to be arbitrarily deprived of nationality.

2.1 The right to nationality in the UDHR

The drafting of Article 15 of the UDHR was, alongside the conventions on refugees and statelessness, a response to the mass denationalisations that took place during the Second World War[124]. It was the first time that the individual became the subject, rather than the object, in discussions of international nationality norms[125]. The right to nationality has been recently reaffirmed as a fundamental human right by the UN Commission on Human Rights[126] as well as multiple Human Rights Council ("HRC") Resolutions[127]. Even so, Article 15 has been given relatively little development through binding international human rights law instruments in comparison to other UDHR rights[128], and contains no mechanisms through which it can be enforced[129].

Like many provisions in the UDHR, Article 15 is non-binding, short, and does not clearly define its boundaries. The full article reads:

> "1. Everyone has the right to a nationality.
>
> 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

It could be said that the inclusion of a right to nationality was an overly ambitious statement of the anticipated supernational power of an international human rights document to override international law[130]. The UDHR is an ambitious document as a whole, but the right to nationality is a direct instruction as to how states themselves should be constituted. Article 15,

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[124] Shiva Jayaraman, 'International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters Comments', *Chicago Journal of International Law* 17, no. 1 (2016): 178–216. 191
[125] van Waas, 'Article 15'. 127
[126] Commission on Human Rights, 'Resolution 1999/28 Human Rights and the Arbitrary Deprivation of Nationality' (Office of the High Commissioner for Human Rights, 26 April 1999).
[127] Human Rights Council, 'Resolution 2995/45 Human Rights and the Arbitrary Deprivation of Nationality', 19 April 2005; Human Rights Council, 'Resolution 7/10 Human Rights and the Arbitrary Deprivation of Nationality', 27 March 2008; Human Rights Council, 'Resolution 10/13 Human Rights and Arbitrary Deprivation of Nationality', 2009; Human Rights Council, 'Resolution 13/12 Human rights and arbitrary deprivation of nationality' (UN, 14 April 2010), https://digitallibrary.un.org/record/680721; Human Rights Council, 'Resolution 20/5 The Right to a Nationality: Women and Children', 5 July 2012; Human Rights Council, 'Resolution 26/14 Human Rights and the Arbitrary Deprivation of Nationality', 26 June 2014; Human Rights Council, 'Resolution 32/5 Human Rights and the Arbitrary Deprivaiton of Nationality', 30 June 2016.
[128] Adjami and Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights'. 94 78
[129] Spiro, *Citizenship*. 132
[130] van Waas, 'Article 15'. 126

while worded in general terms, was originally drafted with a specific objective: to tackle statelessness. But as migration patterns changed in the latter half of the 20th Century, and instances of dual and multiple nationality became more prevalent, Article 15 developed beyond this original objective.

2.1.1 The drafting and origins of Article 15

In the Hohfeldian sense of corresponding rights and duties, the right to nationality in Article 15(1) implies no corresponding duty on any particular state to confer nationality. Notable also is that Article 15(1) does not specify a right to any specific nationality. Neither does it create a right to multiple nationalities; within the wording of Article 15, the "a" acts as the indefinite article but also as the singular of nationality[131]. However, the existence of the right to a nationality implies its opposite, the existence of statelessness. The League of Nations had already made clear their intention to deal with the problem of statelessness in the 1920s and 30s, and the early drafting discussions of the UDHR and Article 15 makes clear that it was statelessness again that the United Nations had in mind. In the 1947 preliminary draft presented to the Drafting Committee on the UDHR, the right to nationality was worded as follows:

> "Every one has the right to a nationality.
>
> Every one is entitled to the nationality of the State where he is born unless and until on attaining majority he declares for the nationality open to him by virtue of descent.
>
> No one shall be deprived of his nationality by way of punishment or be deemed to have lost his nationality in any other way unless he concurrently acquires a new nationality.
>
> Everyone has the right to renounce the nationality of his birth, or a previously acquired nationality, upon acquiring nationality of another State."[132]

This clearly attempts to convert the state-centric wording of the Harvard Draft Convention and the Hague Convention to the international human rights regime. The Harvard Convention provides guidance for states that wish to confer nationality jus soli[133], as well as creating obligations that nationality be conferred in this way where the child has unknown parentage or parents of unascertainable nationality[134], and where the child does not acquire another nationality on birth[135]. Article 12 of the Harvard Convention mandates election at the age of

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131 Mónika Ganczer, 'The Right to a Nationality as a Human Right?', *Hungarian Yearbook of International Law and European Law* 2, no. 1 (December 2014): 15–33, https://doi.org/10.5553/HYIEL/266627012014002001002. 29

132 'Draft Outline of International Bill of Rights/Prepared by the Division of Human Rights: 04/06/1947', 1947, E/CN.4/AC.1/3. 12

133 'The Law of Nationality'. Articles 5 and 6

134 'The Law of Nationality'. Article 7

135 'The Law of Nationality'. Article 9

23, based on the current or most recent country of habitual residence of which the individual is a national. In the earlier UDHR draft, entitlement to nationality by virtue of jus soli was paired with an election right that could only be exercised with respect to nationality by virtue of jus sanguinis. Under the Hague Convention, for as long as a child's parentage or parents' nationality is unknown, they shall hold the nationality of the state in which they were born. Once the nationality of the parents is determined, the nationality of the child "shall be determined by the rules applicable where the parentage is known"[136]. Where a child of no or unknown nationality does not acquire nationality through the jus soli rules of the state in which they are born, they "may" obtain that state's nationality[137].

This earlier UDHR draft of Article 15 emphasises a desire towards single nationality without necessarily mandating it. Certainly relative to the Harvard and Hague Conventions there is an increased emphasis, in the form of an obligation on the state territory of birth, to provide the individual to nationality of that territory regardless of whether not to do so would result in statelessness. The reframing to the rights model promotes the individual over the state, but also identifies two relevant links an individual has in questions of nationality: a connection to the state of birth and to the state of their parent's nationality. This early draft attempts to marry the human rights framework with the order management objectives of nationality laws in the international legal context. The focus of the right to nationality was intrinsically linked with the aims of the international community to prevent and reduce statelessness. However, the wording above goes further than the Harvard and Hague Conventions, which were concerned only with prevention of statelessness as an undesirable condition for the state. This early draft of the UDHR asserted the right to nationality for the sake of itself alone.

The text above underwent many changes throughout the drafting process. The American Declaration on the Rights and Duties of Man was influential[138], particularly in its addition of the right to change ones nationality[139]. It contains in its Article XIX the right to nationality, formulated as follows: "every person has the right to nationality to which he is entitled by law and to change it, if he so wishes, to the nationality of any other country that is willing to grant it to him". The phrase "everyone has a right to nationality" was initially not included in the UDHR, but was added on the submission of Chile in 1947[140]. The UK was influential throughout the drafting process, playing a central role in the introduction of the prohibition against arbitrary deprivation. In 1948, the UK and India proposed the substitution of "every one has the right to nationality" with the phrase "no one shall be arbitrarily deprived of his

[136] Convention on Certain Questions Relating to the Conflict of Nationality Laws. Article 14
[137] Convention on Certain Questions Relating to the Conflict of Nationality Laws. Article 15
[138] 'American Declaration on the Rights and Duties of Man/Adopted By the 9th International Conference of American States: 10/06/1948', n.d., E/CN.4/122.
[139] Ganczer, 'The Right to a Nationality as a Human Right?' 17
[140] 'International Bill of Rights Documented Outline. Part 1, Texts: 11/06/1947', 1947, E/CN.4/AC.1/3/ADD.1. 273

nationality"[141]. However, while this was considered to aid the goal of preventing future statelessness, it would do little to alleviate the issues of those currently stateless. The UK further proposed that the prohibition should be included in a separate "declaration of general principles which were to be of significance for a long time to come" [142]. Eleanor Roosevelt, speaking as the delegate from the USA, agreed with the UK proposal, stating that the USA delegation "considered that the Declaration was not the place to say that everyone had the right to nationality and felt that that was a matter for consideration by an international conference on nationality"[143]. But the desire to protect currently stateless individuals as well as prevent future statelessness as soon as possible[144] ensured the right to nationality was returned to the text in October 1948 alongside the prohibition against arbitrary deprivation[145].

The choice to include an individual rights framing in the UDHR as part UN's goals to reduce and prevent statelessness can be somewhat understood through a 1949 UN report on statelessness:

> "Normally every individual belongs to a national community and feels himself a part of it. He enjoys the protections and assistance of the national authorities. When he is abroad, his own national authorities look after him and provide him with certain advantages. The organisation of the entire legal and economic life of the individual residing in a foreign country depends upon his possession of a nationality.
>
> The fact that the stateless person has no nationality places him in an abnormal and inferior position which reduces his social value and destroys his own self-confidence."[146]

Nationality begins to be seen as more than just an ordering mechanism in the international legal system, but as a social link between the individual and their community. Furthermore, nationality is recognised not just for its internal effects but its external effects also; nationality is a bond that has the specific intended effect of protecting individuals while outside their state of nationality. Viewed in this way, the right to nationality could also be the right to international protection by your state of nationality.

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[141] 'Proposed Amendments to the Draft Declaration on Human Rights/India and the United Kingdom: 24/05/1948', 1948, E/CN.4/99. 4
[142] UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, 'Intervention in the Case of Shamima vs. Secretary of State for the Home Department, UK Court of Appeal (2020)', 26 October 2020. para 10
[143] '59th Meeting, Held on Friday 4 June 1948', 1948, E/CN.4/SR.59. 7
[144] Ganczer, 'The Right to a Nationality as a Human Right?' 17
[145] 'Draft International Declaration of Human Rights. France: Amendments to the Draft Declaration (E/800). Third Committee, 3rd Session, A/C.3/244, 8 October 1948', 1948. 1
[146] 'A Study of Statelessness', E/1112;E/1112/Add.1 (Lake Success - New York: United Nations, August 1949), https://www.refworld.org/docid/3ae68c2d0.html.

2.2 The right to nationality

The development of the right to nationality after the UDHR can be seen mostly through four substantive areas: the prohibition against statelessness, children's rights, women's rights, and the prohibition against discrimination. Each of these areas will be examined in turn. Ultimately, the right to nationality in Article 15(1) of the UDHR suffers from its inability to place an obligation on specific states to provide a nationality, a problem which is reflected in nearly every iteration of the right in international instruments.

2.2.1 Statelessness Conventions

The 1949 UN report[147] and the work of the Ad Hoc Committee on Refugees and Stateless Persons[148] established the groundwork for two conventions enacted shortly after the UDHR that specifically dealt with statelessness. The 1954 Convention relating to the Status of Stateless Persons[149] ("1954 Convention") had the goal of "establish[ing] a framework for the international protection of stateless persons"[150], while the 1961 Convention on the Reduction of Statelessness[151] ("1961 Convention") concerned the establishment of a framework for preventing future statelessness. Together, the two conventions aim to protect those currently stateless, and prevent future instances of statelessness.

2.2.1.1 1954 Convention

The 1954 Convention establishes the international legal status of stateless persons while also providing practical provisions regarding, for example, identity papers[152] and travel documents[153]. It is the "primary international instrument that regulates the status of non-refugee stateless persons and ensures that stateless persons enjoy human rights without discrimination"[154] and has seen a recent resurgence in interest by States. On 1 January 2011, it had 65 States Parties, a number which increased to 80 by January 2014[155] and to 96 by 2021[156].

Article 1 is the 1954 Convention's "most significant contribution to international law"[157]. It defines a stateless person as someone "who is not considered as a national by any State under

[147] van Waas, 'Article 15'. 128
[148] Adjami and Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights'. 96
[149] 'Convention Relating to the Status of Stateless Persons 1954' (1954).
[150] Convention Relating to the Status of Stateless Persons 1954. Introductory Note
[151] 'Convention on the Reduction of Statelessness 1961' (1961).
[152] Convention Relating to the Status of Stateless Persons 1954. Art.27
[153] 05/08/2022 21:04:00 Art. 28
[154] United Nations High Commissioner for Refugees, 'Protecting the Rights of Stateless Persons: The 1954 Convention Relating to the Status of Stateless Persons', March 2014, https://www.refworld.org/docid/4cad88292.html. 3
[155] United Nations High Commissioner for Refugees. 1
[156] United Nations High Commissioner for Refugees, 'UNHCR Fact Sheet: The 1961 Convention on the Reduction of Statelessness', 2021, https://www.refworld.org/docid/612608084.html. 1
[157] Convention Relating to the Status of Stateless Persons 1954. Introductory Note

the operation of its law", a definition that has gained customary legal status[158]. The assessment of statelessness is thus a question of the factual application of domestic law and is not a predictive exercise on the possibility of future acquisition of a nationality. The definition does not cover persons subject to de facto statelessness, who must rely on the protections of international human rights law. The protection of the 1954 Convention excludes those for whom there are serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity[159], a serious non-political crime outside their country of residence prior to admission[160], or that "they have been guilty of acts contrary to the purposes and principles of the United Nations"[161]. The 1954 Convention also distinguishes those lawfully or unlawfully present on the territory in which they reside, with the former being the recipient of certain reserved guarantees, such as the right to association on equally favourable terms as afforded aliens generally[162], while the latter enjoys the more general convention rights. Article 2 places a duty on the stateless person to conform to the laws and public order measures of the country they are in. For most rights in the 1954 Convention, stateless persons are to be considered by the state in the same way that they would treat non-nationals. For certain specific rights, such as the freedom to practice religion[163] and access to the courts[164], stateless persons are awarded the same level of treatment as nationals. The protections afforded by statelessness status are not equivalent to nationality status, and so the 1954 Convention provides that "the Contracting States shall as far as possible facilitate the assimilation and naturalisation of stateless persons", including "mak[ing] every effort" to expediate proceedings and reduce the costs[165]. In any event, the 1954 Convention provides minimum guarantees, that are often less than the equivalent protection provided by international human rights law.

The 1954 Convention does not create a right to the nationality of any specific state. UNHCR guidance on this issue with regard to the 1954 Convention refers to Article 15 UDHR, implying that states can fulfil their part of their obligation to uphold this provision through adoption of the 1961 Convention[166]. Furthermore, the guidance highlights that "states are already committed to protecting the rights of stateless persons through their human rights obligations" and that the 1954 Convention provides standards that "complement and strengthen States' human rights commitments"[167]. The 1954 Convention does not provide any specific rules on how to determine whether a person fulfils the Article 1 definition, with UNHCR guidance elaborating that "national status determination procedures should offer certain core elements

[158] United Nations High Commissioner for Refugees, 'Protecting the Rights of Stateless Persons'. 4
[159] Convention Relating to the Status of Stateless Persons 1954. Art.1.2.(iii)(a)
[160] Convention Relating to the Status of Stateless Persons 1954. Art.1.2.(iii)(b)
[161] Convention Relating to the Status of Stateless Persons 1954. Art.1.2(iii)(c)
[162] Convention Relating to the Status of Stateless Persons 1954. Art.15
[163] Convention Relating to the Status of Stateless Persons 1954. Art.4
[164] Convention Relating to the Status of Stateless Persons 1954. Art. 16(2)
[165] Convention Relating to the Status of Stateless Persons 1954. Art.32
[166] United Nations High Commissioner for Refugees, 'Protecting the Rights of Stateless Persons'. 5
[167] Convention Relating to the Status of Stateless Persons 1954. 6

which are necessary for fair and efficient decision-making in keeping with international protection standards" such as a central knowledgeable authority, procedural safeguards and guarantees, and the availability of appeal or review proceedings[168]. While states are subject to the prohibition on refoulement under international human rights law, there is no obligation placed upon states to admit stateless persons onto their territory[169]. Although it was ground-breaking at the time, the Article 1 definition has been criticised for being overly technical; it ignores the political manipulation undertaken in practice by states when they exercise their nationality laws to avoid their statelessness obligations[170].

De facto stateless persons are referenced in the Final Act of both the 1954 Convention and the 1961 Convention, although only the 1954 Convention includes a definition of stateless persons. Despite the Final Act of the 1961 Convention recommending that de facto stateless persons should be treated in the same manner as the de jure stateless[171], the definition of statelessness only covers the latter. There is no definition of a de facto stateless person, but the UNHCR uses the working definition of: "persons outside of their own country, who are unable or, for valid reasons, are unwilling to avail themselves of the diplomatic protection of that country"[172]. However, there remain de facto stateless persons, in the sense that they lack an effective nationality, who do not ever cross a state border[173]. But even the above definition, as offered by UNHCR to parliamentarians, inaccurately represents the intended meaning of the 1954 Convention. In the 1954 Conference of Plenipotentiaries on the Status of Stateless Persons, convened to draft the 1954 Convention, it was made clear that the Final Act was not to be applied generally to de facto stateless persons who were refused or otherwise not protected by their state of nationality, but "only those persons who have renounced that protection and whose reasons for doing so are considered valid by the foreign State concerned"[174]. The definitional uncertainty of who constitutes a de facto stateless person means that population numbers, let alone methods of protection, are difficult to ascertain. It is possible that the de facto stateless outnumber the de jure[175], and where those persons have not crossed a state border, they remain unprotected by either the 1954 Convention or conventions relating to refugees.

[168] United Nations High Commissioner for Refugees, 'Protecting the Rights of Stateless Persons'. 6
[169] United Nations High Commissioner for Refugees. 12
[170] Adjami and Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights', 15. 106
[171] United Nations High Commissioner for Refugees, 'Nationality and Statelessness'. 34
[172] United Nations High Commissioner for Refugees. 10
[173] Adjami and Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights', 15. 107
[174] Hugh Massey, 'No. 16: UNHCR and De Facto Statelessness', Legal and Protection Policy Research Series (Geneva, April 2010), https://www.unhcr.org/protection/globalconsult/4bc2ddeb9/16-unhcr-de-facto-statelessness-hugh-massey.html. 18
[175] Adjami and Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights', 15. 107

2.2.1.2 1961 Convention

The 1961 Convention had only 37 states parties in January 2011, the year of its fiftieth anniversary. But in December of that year, 33 additional states pledged to accede. By January 2014 the number of states parties had increased to 55[176] and then to 77 by the 1961 Convention's sixtieth anniversary in 2021[177]. A further 19 states, mostly from Africa, have made the commitment to accede to one or both of the statelessness conventions[178]. However, UNHCR claims the impact of the 1961 Convention to be wider than what is represented by the number of accessions, due to its provisions influencing states' national legislation[179].

Where an individual would otherwise be left stateless, the 1961 Convention acts to regulate the acquisition or withdrawal of nationality. While the 1961 Convention is directly occupied with the prevention of statelessness, it equally aims to reduce statelessness. It does this firstly through the long-term effects of prevention, and secondly through encouraging states to introduce, simultaneously with the convention's provisions, measures that reduce statelessness, such as the application of the provisions retroactively to impact the currently stateless[180]. The content of the 1961 Convention is largely focussed on children, as reflected in Articles 1 to 4, and places an obligation on states to grant nationality to a child who would otherwise not obtain any nationality by operation of law upon birth. It prioritises the jus soli principle over jus sanguinis in the same way as previous international instruments. This is not framed as an overriding factor in general nationality law, but as a safeguard in the event of statelessness due to lack of acquisition through jus sanguinis or any other criteria[181]. Articles 5 to 7 deal with later in life, preventing statelessness where an individual renounces or otherwise loses their nationality. Articles 8 and 9 concern the deprivation of nationality and will be discussed in detail the context of the right not to be arbitrarily deprived of nationality later in this Chapter as well as in the UK context through Chapters 3 and 4. The remainder of the 1961 Convention regulates nationality issues arising in the context of state succession.

Neither the 1954 Convention nor the 1961 Convention directly address Article 15 UDHR. In other words, while Article 15 was drafted with the protection of stateless people and the reduction of statelessness in mind, it was not used as the basis for the only international conventions on the protection of stateless people and the reduction of statelessness.

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[176] United Nations High Commissioner for Refugees, 'Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness', March 2014, https://www.refworld.org/docid/4cad866e2.html. 1
[177] United Nations High Commissioner for Refugees, 'UNHCR Fact Sheet'. 1
[178] United Nations High Commissioner for Refugees. 1
[179] United Nations High Commissioner for Refugees, 'Preventing and Reducing Statelessness'. 1
[180] United Nations High Commissioner for Refugees. 6
[181] United Nations High Commissioner for Refugees. 6

2.2.2 Children's rights

The International Covenant on Civil and Political Rights[182] ("ICCPR") was enacted to make effective the provisions of the UDHR, but Article 15 was not included except to the extent that it concerned children. Children are a clear priority throughout the international legislation on nationality. The acquisition of nationality via descent is still the most common mode of nationality acquisition, and as such the condition of statelessness easily spreads down the family line, with modern estimates predicting that a child is born stateless every 10 minutes[183].

Article 24(3) ICCPR states generally that "every child has the right to acquire a nationality". Just as in the UDHR, this right does not come with an attendant obligation for a specific state to afford nationality to all children born on their territory[184]. The ICCPR provision is reflected in the near universally ratified Convention on the Rights of the Child[185] ("CRC"). Article 7(1) CRC provides just as the ICCPR does for the right for the child to be immediately registered on birth, to be given a name, and to acquire nationality. However, the CRC goes further than the ICCPR, stating that states shall "ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field" [186]. While statelessness is particularly noted, the provision does not expressly limit itself to cases where the child would otherwise be rendered stateless[187]. Article 8 CRC emphasises the role states must play in preserving the child's nationality[188], while also placing an obligation on states to, where a child has been illegally deprived of their nationality, "provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity"[189]. Article 8 (1) is significant for not only providing for the acquisition of nationality, but the retention of it throughout the child's life. The weight of this must be understood in the context of the near universal ratification of the CRC. The UN Committee on the Rights of the Child has not released a General Comment directly on Article 7, but has addressed it through, in particular, the right to non-discrimination enunciated in Article 2 CRC. The UN Commission on Human Rights has also stated that "where a child is precluded from obtaining a nationality on discriminatory grounds, this amounts to arbitrary deprivation of nationality"[190]. The application of the language of arbitrary deprivation to instances of discriminatory refusal of nationality

[182] 'International Covenant on Civil and Political Rights', United Nations Treaty Series vol.999 § (1966).
[183] Institute on Statelessness and Inclusion, 'Addressing the Right to a Nationality through the Convention on the Rights of the Child: A Toolkit for Civil Society' (Institute on Statelessness and Inclusion, June 2016). 6
[184] Human Rights Committee, 'CCPR General Comment No. 17: Article 24 (Rights of the Child)' (United Nations Human Rights Committee, 7 April 1989). Para 8
[185] 'Convention on the Rights of the Child', United Nations Treaty Series vol.1577 § (1989).
[186] Convention on the Rights of the Child. Art.7(2)
[187] Convention on the Rights of the Child. Art.7(2)
[188] Convention on the Rights of the Child. Art.8(1)
[189] Convention on the Rights of the Child. Art.8(2)
[190] Secretary General, 'Impact of the Arbitrary Deprivation of Nationality on the Enjoyment of the Rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, Inter Alia, of the Country in Which They Are Born, If They Otherwise Would Be Stateless', Annual Report (United Nations General Assembly, 16 December 2015). Para 8

acquisition is an extension that draws upon the obligation in Article 8(2) CRC and is not necessarily reflected in other human rights instruments.

It is through the rights of children that the right to nationality has received most success in human rights courts. In the 2005 case of *Yean* in the Inter-American Court of Human Rights ("IACtHR"), two young girls were denied nationality on the basis of a racially discriminatory policy. The IACtHR drew upon its previous caselaw to discuss the contemporary developments in international law and international human rights law that limited the extent to which states have unfettered control over their own national membership. Article 20 of the American Convention on Human Rights[191] has the same wording as Article 15 UDHR, except with the addition that "every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality". This convention is notable for being the only major international human rights convention to include Article 15 UDHR[192]. The IACtHR references *Nottebohm* to define nationality as a "juridical expression of a social fact that connects an individual to a State"[193], citing a previous IACtHR case to state the importance of nationality as "a requirement for the exercise of specific rights"[194]. In its finding the IACtHR holds that states are obligated to not adopt practices or laws that lead to an increase in statelessness, including where the lack of nationality occurs through either refusal to grant as well as arbitrary deprivation[195]. The IACtHR thus drew on the development of the right to nationality as authority to direct the future nationality legislation of states.

The right to nationality also received attention by the African Committee of Experts on the Rights and Welfare of the Child ("ACERWC") in the 2011 case *Children of Nubian Descent in Kenya*[196]. While the African Charter on Human and Peoples' Rights contains no nationality provision equivalent to Article 15 UDHR, Article 6 of the African Charter on the Rights and Welfare of the Child[197] ("ACRWC") provides nearly the same rights as under the CRC: to a name[198], immediate registration of birth[199], a nationality[200], and the obligation upon states to provide legislation allowing children to acquire the nationality of the territory on which they were born[201]. Unlike the CRC, this latter obligation is limited in its wording to situations where the child would otherwise be rendered stateless. The ACERWC did not directly hold that states

[191] 'American Convention on Human Rights, "Pact of San Jose", Costa Rica' (1969).
[192] Orentlicher, 'Citizenship and National Identity'. 315
[193] Case of the Yean and Bosico Children v. The Dominican Republic (Inter-American Court of Human Rights 8 September 2005). Para 136
[194] Case of the Yean and Bosico Children v. The Dominican Republic. Para 137
[195] Case of the Yean and Bosico Children v. The Dominican Republic. Para 142
[196] Institute for Human Rights and Development in African (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent v. The Government of Kenya, No. 002/Com/002/2009 (The African Committee on the RIghts and Welfare of the Child (ACERWC) 22 March 2011).
[197] 'African Charter on the Rights and Welfare of the Child', CAB/LEG/24.9/49 (1990) § (1990).
[198] African Charter on the Rights and Welfare of the Child. Art.6(1)
[199] African Charter on the Rights and Welfare of the Child. Art.6(2)
[200] African Charter on the Rights and Welfare of the Child. Art.6(3)
[201] African Charter on the Rights and Welfare of the Child. Art.6(4)

were obliged to adopt jus soli to be in accordance with the best interests of the child, but did so indirectly in saying that states should provide nationality in order to prevent statelessness. The ACERWC rejected the argument that, as the children in question may have been entitled to the nationality of the Sudan, Kenya was not obligated to provide nationality. As support, it cited the proactive, co-operative element of Article 6(4) ACRWC and the lack of effort on the part of the Kenyan government to secure that other nationality[202]. The outcome of both *Yean* and *Children of Nubian Descent* was that the respondent states were to change otherwise discriminatory nationality legislation, showing the normative movement towards human rights considerations in matters of nationality law.

2.2.3 Women's rights

Another major focus area for the right to nationality under international law throughout the 20th Century concerned the rights of women, particularly married women. This was framed in terms of the equality of men and women rather than a right to nationality, but still represented "the single area in which mid-century international law edged towards constraining nationality practices"[203]. The relatively widely adopted 1957 Convention on the Nationality of Married Women[204] ("CNMW") prevented automatic changes to the nationality status of women through marriage or its dissolution, or the changing of the husband's nationality[205]. The later 1979 Convention on the Elimination of All Forms of Discrimination Against Women[206] ("CEDAW") grants women equal rights to men in the acquisition, change, or retention of their nationality[207], as well as "with respect to the nationality of their children"[208]. This provision was successful in levelling up the rights of women with regard to nationality. However, in 2019 there were still 26 countries where women were not equal to men in transferring nationality to children, and more than 50 where women were unequal with respect to transferring their nationality to their male spouse[209]. Although CEDAW largely replaced CNMW, at least 20 states hold reservations to CEDAW Article 9[210].

[202] Institute for Human Rights and Development in African (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent v. The Government of Kenya. para 51.
[203] Spiro, 'A New International Law of Citizenship'. 712
[204] 'Convention on the Nationality of Married Women' (1957).
[205] Convention on the Nationality of Married Women. Art.1
[206] 'Convention on the Elimination of All Forms of Discrimination Against Women', United Nations Treaty Series vol.1249 § (1979).
[207] Convention on the Elimination of All Forms of Discrimination Against Women. Art.9(1)
[208] Convention on the Elimination of All Forms of Discrimination Against Women. Art.9(2)
[209] van Waas, 'Article 15'. 130
[210] Spiro, 'A New International Law of Citizenship'. 713

2.2.4 Discrimination treaties

Human rights instruments prohibiting discrimination along racial lines are also relevant to Article 15 UDHR. Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination[211] ("ICERD") defines racial discrimination as:

> "any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, social, cultural, or any other field of public life".

The ICERD continues, specifying that the above definition does not apply to distinctions between citizens and non-citizens[212], and that nothing within the convention shall infringe upon the states' right to determine nationality, citizenship, or naturalisation "provided that such provisions do not discriminate against any particular nationality"[213]. The ICERD, while barring discrimination along the line of race generally, thus allows for discrimination in nationality practices on a racial basis.

However, in recent years, there has been movement by the UN Committee on the Elimination of Racial Discrimination ("CERD") to more closely examine the national laws of states in this area[214]. In its 2002 General Recommendation XXX on Discrimination Against Non-Citizens[215], the CERD places a particular focus on Article 5 ICERD[216], under which states must prohibit and eliminate racial discrimination and afford everyone equality before the law in their fundamental rights. The provision lists various rights that include political and civil rights but also "the right to nationality"[217]. The Recommendation emphasises that

> "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim"[218].

Nationality laws that directly or indirectly discriminate on the basis of ethnicity can therefore be contrary to the prohibition against racial discrimination.

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[211] 'International Convention on the Elimination of All Forms of Racial Discrimination', United Nations Treaty Series vol.660 § (1965).
[212] International Convention on the Elimination of All Forms of Racial Discrimination. Art.1(2)
[213] International Convention on the Elimination of All Forms of Racial Discrimination. Art.1(3)
[214] Spiro, 'A New International Law of Citizenship'. 722
[215] Committee on the Elimination of Racial Discrimination, 'CERD General Recommendation XXX on Discrimination Against Non Citizens' (UN Committee on the Elimination of Racial Discrimination, 1 October 2002).
[216] Committee on the Elimination of Racial Discrimination. II.6
[217] International Convention on the Elimination of All Forms of Racial Discrimination. Art.5(d)(iii)
[218] Committee on the Elimination of Racial Discrimination, 'CERD General Recommendation XXX'. I.4

2.3 The right not to be arbitrarily deprived of nationality

Beyond the pronouncement on the right to nationality, the second key aspect of Article 15 UDHR, is the prohibition against arbitrary deprivation of nationality[219]. The right to nationality in Article 15(1) and the right not to be arbitrarily deprived of nationality in Article 15(2) are considered to be mutually reinforcing[220]. The concept of arbitrariness is well known in international law, but as with Article 15(1), Article 15(2) is not clear in its effects on international and national law.

The prohibition against nationality deprivation as it is found in the 1961 Convention is the most powerful expression in international instruments of the Article 15(2) UDHR right. Yet the 1961 Convention focusses on deprivation resulting in statelessness, and so does not necessarily cover all scenarios envisaged in Article 15(2).

2.3.1 1961 Convention

Article 8 of the 1961 Convention prohibits the deprivation of nationality of an individual "if such deprivation would render him stateless"[221]. Deprivation under Articles 8 and 9 is understood to mean where "the withdrawal is initiated by the authorities of the State"[222]. The prohibition of arbitrary deprivation covers deprivation situations under the 1961 Convention, as well as de facto deprivation that lacks a formal act but where state practice demonstrates that the competent authorities no longer consider that individual to be a national through, for example, the non-issue of identity documents or expulsion from the territory[223]. There are exceptions to the general prohibition through the exercise of Articles 8(2) and 8(3). Article 8(2) allows deprivation resulting in statelessness where the nationality to be deprived was obtained by fraud[224]. In order to engage the exception of Article 8(3), specific conditions must be met at the point of signature, ratification, or accession to the 1961 Convention. Where at that point the state has declared an intention to retain the right of deprivation even where it would render the individual stateless, they are permitted to do so provided the declaration concerns deprivation under one of the grounds of Article 8(3), and that those grounds existed in national law at the time of the signature, ratification or accession. The grounds are as follows:

> (a) "that, inconsistently with his duty of loyalty to the Contracting State, the person

[219] The right to change nationality is beyond the scope of this thesis and will not be discussed.
[220] United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness', May 2020, https://www.refworld.org/docid/5ec5640c4.html. para 85
[221] Convention on the Reduction of Statelessness 1961. Art.8(1)
[222] United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5'. 3
[223] United Nations High Commissioner for Refugees. 4
[224] Convention on the Reduction of Statelessness 1961. Art.8(2)(b)

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."[225]

The general starting point of the 1961 Convention is that deprivation should not result in statelessness. When states wish to deprive an individual of their nationality, they must first determine whether statelessness would occur were they to initiate deprivation proceedings. If statelessness would occur, they must consider the exceptions of Articles 8(2) and 8(3) before continuing with the deprivation[226]. The exceptions provided for in Article 8(3) are an exhaustive list that should have been "existing in national law at that time"[227]. It was proposed during drafting that, given the purpose of the Convention was to reduce statelessness, having a generally applicable list of explicit grounds that are contrary to this purpose would appear "positively ugly"[228] to the public. On the basis of balancing this concern against the hard stance that some states had in maintaining deprivation of nationality, the Federal Republic of Germany suggested that the 1961 Convention should simply freeze the current national legislations on nationality deprivation as they stood[229]. This amendment did not pass, with 11 votes both in favour and against, alongside 9 abstentions[230]. By contrast, the final wording specifies particular grounds that must have been in existence. There is a subtle difference in that retention is not of general deprivation power under national law, but of general deprivation on specific grounds were they existing in national law at the point of signature, ratification or accession. States are limited to those grounds as they existed in national legislation and cannot expand the scope beyond those grounds. The extent to which a state can modify its law while still being said to retain its right of deprivation is controversial and shall be discussed in Chapters 3 and 4.

Article 8(3)(a)(ii) places a very high threshold with regard to the conduct required for citizenship deprivation that would create statelessness. UNHCR guidance from May 2020 indicates that "the conduct must threaten the foundations and organisation of the State" and cannot be merely incidental to any harm caused, reflecting "the essential function of the State

[225] Convention on the Reduction of Statelessness 1961. Art.8(3)(a)-(b)
[226] United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5'. Para 45
[227] Convention on the Reduction of Statelessness 1961. Art.8(3)
[228] 'Summary Records, 12th Meeting of the Committee of the Plenary', in *A/CONF.9/SR.12*, 1961. 9
[229] 'Summary Records, 12th Meeting of the Committee of the Plenary'. 9
[230] 'Summary Records, 12th Meeting of the Committee of the Plenary'. 10

[…] to safeguard its integrity and external security and protect its constitutional foundations"[231]. The phrase "vital interests" is to be read as higher than "national interests", and deprivation should be the least intrusive means of the protecting them[232]. The UNHCR interpretation of the 1961 Convention thus shows that the risk to the state must be existential. Whether or not a single individual is capable of fulfilling such criteria is somewhat doubtful.

Where the prohibition against rendering an individual stateless is qualified on the above mentioned grounds, the procedural requirement enunciated through the right to a fair trial under Article 8(4) is unqualified. Article 8(4) specifies that the deprivation power shall only be exercised "in accordance with law which shall provide for the person concerned the right to a fair hearing by a court or other independent body"[233]. Article 8(4) thus has two elements of procedural fairness: the existence of a legal standard, and the independent application of this standard. UNHCR acknowledges that Article 8(4) leaves room for interpretation, but states that as a matter of 'good practice', the hearing and the conclusion of "all relevant legal proceedings" should precede the deprivation. Civil deprivation proceedings on the basis of criminal conduct should follow a conviction of guilt in criminal court. Where national law allows deprivation prior to a hearing, the effects of deprivation should be suspended pending the outcome of proceedings. The affected individual must be provided with "sufficient information" concerning the deprivation decision to be able to "meaningfully contest" it[234]. However, this guidance is non-binding and it is in no way guaranteed that to not follow the UNHCR guidance would give rise to a determination that a nationality deprivation measure was arbitrary under Article 15(2) UDHR.

Read as a whole, the fact that the 1961 Convention both allows for deprivation resulting in statelessness and provides absolute procedural guarantees indicates that a deprivation decision following Article 8(4) would not be considered arbitrary on the basis that it resulted in statelessness. Despite the objective of the 1961 Convention, the determination of lawfulness under Article 8(4) is a procedural, rather than substantive consideration.

2.3.2 The right not to be arbitrarily deprived of nationality in the UDHR

Article 15(2) grants the right not to arbitrarily deprived of nationality, and has been reaffirmed as a "fundamental principle of law" by the UN General Assembly[235]. Whether Article 15(2) constitutes purely a procedural requirement against arbitrariness or has a more substantive element is a crucial consideration. If it were to be read as a purely procedural requirement, Article 15(2) would not be violated where an individual was left stateless as a result of a

[231] United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5'. Paras 61-2
[232] United Nations High Commissioner for Refugees. Paras 61-2
[233] Convention on the Reduction of Statelessness 1961. Art.8(4)
[234] United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5'. Para 73-4
[235] Institute on Statelessness and Inclusion, 'Commentary to the Principles on Deprivation of Nationality as a National Security Measure' (Institute on Statelessness and Inclusion, March 2022). 52

deprivation measure, which would be paradoxical for seeming to violate Article 15(1). While the scope and content of the right to nationality under Article 15(1) is unclear and underdeveloped, particularly where it concerns the acquisition of a previously unheld nationality, the picture is different when an individual has an already held nationality subsequently removed. As has been established, Article 15 UDHR was drafted after the mass denationalisations of the Second World War, with the protection of stateless persons and the reduction of statelessness in mind. It is difficult to imagine a more appropriate use of the protection of the right to a nationality than the protection of a legitimately held nationality the removal of which would result in statelessness.

But the concept of arbitrariness as developed in international human rights jurisprudence, as opposed to its procedural formulation in the 1961 Convention, does encapsulate both a procedural and a substantive aspect. The UN Committee on Human Rights provides guidance on arbitrariness as it is understood in the ICCPR, a view which was endorsed in the context of deprivation measures by the Secretary-General in a report from the HRC[236]. The UN Commission on Human Rights had stated that

> "the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances[237]".

The Secretary-General confirmed that the notion of arbitrariness in the context of nationality deprivation also included "not only acts that are against the law but, more broadly, elements of inappropriateness, injustice and lack of predictability also"[238]. In light of the principle of proportionality in particular, the acts under consideration include "all State action, legislative, administrative and judicial"[239]. The 2013 Secretary-General report emphasised that in order to fulfil the procedural guarantees of Article 15(2), states should provide adequate procedural safeguards, including having nationality related decisions being "submitted in writing and open to effective administrative or judicial review", as well as the possibility of an effective remedy that includes but is not limited to the reinstatement of nationality and reparations for damage suffered. The report also highlights that the appeals process should have suspensive effect on the deprivation, so that the individual continues to enjoy their nationality pending the outcome of the proceedings. To do otherwise may impact the enjoyment of due process rights[240]. The

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[236] Secretary General and Human Rights Council, 'Human Rights and the Arbitrary Deprivation of Nationality', Annual Report (United Nations General Assembly, 14 December 2009).
[237] Human Rights Committee, 'CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (United Nations Human Rights Committee, 8 April 1988). para 4
[238] Secretary General and Human Rights Council, 'Human Rights and the Arbitrary Deprivation of Nationality'. Para 25
[239] Secretary General and Human Rights Council. Para 25
[240] Secretary General and Human Rights Council, 'Human Rights and Arbitrary Deprivation of Nationality'. paras 31-4

concept of arbitrariness as it pertains to the procedural guarantees in Article 15(2) UDHR is therefore much broader than the procedural guarantee of Article 8(4) of the 1961 Convention.

In order for deprivation measures to fulfil the substantive aspects of Article 15(2), the measures in question must conform to the principles of necessity, proportionality, and reasonableness[241]. In other words, deprivation of nationality must serve a legitimate aim, be the least intrusive method to achieve that aim, and be proportional. There are two main considerations: the occurrence of statelessness, and the principle of non-discrimination.

The development of the law on the deprivation of nationality as detailed in the international instruments stated above, the majority of which were enacted after the 1961 Convention, suggests the norm that the occurrence of statelessness should be a substantive consideration and therefore that any deprivation measure which results in statelessness should be deemed arbitrary. Although the power to deprive an individual of nationality even where it would render them stateless can be retained under Article 8(3) of the 1961 Convention via declaration, as of March 2020, only 16% of States parties have made declarations to this effect[242]. After the UNHCR acquired the role of the promotion of the 1954 and 1961 Conventions in 1995, ratifications to both conventions increased and accordingly so did the absolute number of declarations. Despite this "the proportional relationship of declarations submitted in relation to the total amount of State Parties has been characterised by a continuous decline since the [1961] Convention's entry into force in 1975"[243]. The proportional decline indicates that a perhaps disproportionate number of the states that were involved in the drafting of the 1961 Convention had a vested interest in maintaining deprivation measures. While the absolute increase shows a continued interest by states in the deprivation of nationality where it would render an individual stateless, the majority retains the opposite stance. The UN Secretary-General has stated that "given the severity of the consequence where statelessness results, it may be difficult to justify loss or deprivation resulting in statelessness in terms of proportionality"[244]. While this does not rule out the possibility of the result of statelessness being proportionate to the interest to be protected, any deprivation measure must also take into account considerations of the effectiveness of the measure and whether it is least intrusive means of achieving its legitimate aim.

[241] Adjami and Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights', 15. 101
[242] Institute on Statelessness and Inclusion, 'Commentary to the Principles on Deprivation of Nationality as a National Security Measure'. Para 39
[243] L. Bücken and R. de Groot, 'Deprivation of Nationality under Article 8 (3) of the 1961 Convention on the Reduction of Statelessness', *Maastricht Journal of European and Comparative Law* 25, no. 1 (2018): 38–51, https://doi.org/10.1177/1023263X17754036. 42
[244] Secretary General and Human Rights Council, 'Human Rights and Arbitrary Deprivation of Nationality'. Para 4

The principle of non-discrimination is "one of the foundational tenets of international human rights law"[245]. Within the UDHR, Article 2 states that the rights within the Declaration are to be enjoyed by everyone "without distinction of any kind". This right is also present in Article 2 of the ICCPR. While the ICCPR has limited the recognition of the right to be protected against arbitrary deprivation to the children, the ICCPR also has a freestanding right to equality before the law, and equal protection of the law[246]. This operates beyond just the rights enunciated within the ICCPR, and applies to any acts of public authorities that discriminate in law or in fact, and as such would cover nationality deprivation measures[247]. Despite no explicit reference to the deprivation of nationality within the ICERD, in a Recommendation the CERD implicitly includes a prohibition of citizenship deprivation in its reading of the right to nationality in Article 5(d)(iii) ICERD. The CERD Recommendation recognises deprivation on the basis of race, colour, descent, or national or ethnic origin as a breach of states' obligation "to ensure non-discriminatory enjoyment of the right to nationality"[248]. The discrimination prohibition is further strengthened by Article 9 of the 1961 Convention, which prohibited states from deprivations on the basis of "racial, ethnic, religious or political grounds", without consideration of whether the deprivation would render the individual stateless[249]. While the procedural guarantees under Article 8(4) of the 1961 Convention do not create a substantive requirement, the Article 9 discrimination prohibition creates substantive limitations to the exercise of the Article 8 deprivation power. In the context of children, the HRC has gone further, stating that discrimination in the acquisition of nationality also amounts to an arbitrary deprivation[250]. Article 15(2) thus contains a substantive conception of arbitrariness, where statelessness and non-discrimination are significant factors in considering whether a deprivation measure is legal under international human rights law. This substantive understanding of Article 15(2) is key for the analysis of the deprivation measures in the UK in Chapter 4.

While there is no recognised right to multiple nationalities, the 2013 UN Secretary-General report observes the perception of inequality between nationals where the statelessness prohibition prevents deprivation for single but not multiple nationality holders. Additionally, some states distinguish between born and naturalised citizens for the purpose of deprivation, with the latter group being more vulnerable to deprivation than the former. The 2013 report points to mitigation of this issue through states imposing temporal limitations on their ability

[245] Institute on Statelessness and Inclusion, 'Commentary to the Principles on Deprivation of Nationality as a National Security Measure'. Para 42
[246] International Covenant on Civil and Political Rights. art.26
[247] Institute on Statelessness and Inclusion, 'Commentary to the Principles on Deprivation of Nationality as a National Security Measure'. Para 43
[248] Committee on the Elimination of Racial Discrimination, 'CERD General Recommendation XXX'. IV.14
[249] United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5'. Para 77
[250] Secretary General, 'Impact of the Arbitrary Deprivation of Nationality on the Enjoyment of the Rights of Children Concerned, and Existing Laws and Practices on Accessibility for Children to Acquire Nationality, Inter Alia, of the Country in Which They Are Born, If They Otherwise Would Be Stateless'. Para 8

to deprive naturalised citizens[251]. UNHCR Guidelines acknowledge that discriminatory effects against minority groups may also be present in states with strong statelessness safeguards, and that efforts should be made to avoid disproportionate impacts on these groups from "laws and policies on and practices of withdrawal of nationality"[252]. This recognises that the differences between mono- and multinationals as well as born and naturalised nationals do not exist in a vacuum, free from consideration of discrimination along ethnic lines. Multinationals within a state are more likely to be of an ethnicity that is not the historically recognised ethnicity of that state. Despite there being no right to multiple nationalities, discrimination based on status as a multinational may in effect amount to indirect discrimination along ethnic lines.

2.4 Chapter conclusion

Where nationality was once an organisational tool for state purposes, limited in its regulation to the domain of sovereign states, international human rights has had a profound effect on how nationality is perceived. This in itself is a product of international law. In *Tunis*, the PCIJ stated that international jurisdiction was a relative question. While at that point nationality questions were found to be within the reserved domain of state prerogatives, *Tunis* acknowledged that state discretion was limited by the international obligations undertaken by states[253]. States that have acceded to international human rights treaties are thus bound by those treaties in the exercise of their sovereign right to determine nationality. The IACtHR in 1984 made statements to this effect that nationality was an inherent right on account of its importance to both the exercise of political rights and legal capacity. It held that despite the traditional reservation of nationality to the state prerogative, the law had developed to the point that the regulation of nationality was no longer within the "sole jurisdiction" of states but were "circumscribed by their obligations to ensure the full protection of human rights"[254]. Any sweeping statement that nationality questions are within the reserved domain and are therefore free from supranational consideration thus offers only a limited understanding of international law.

However, the right to a nationality is essentially reactive, drafted in reaction to statelessness, and then again developed in reaction to the inability of international human rights to achieve its project to denationalise rights. The extent to which the Article 15 UDHR states adopted in 1948 is the same Article 15 that has been developed in the following decades is perhaps debatable. But as concluded from this analysis, in actuality, what has changed in the intervening years is not necessarily the content of Article 15, but the development of international norms against statelessness and discrimination.

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[251] Secretary General and Human Rights Council, 'Human Rights and Arbitrary Deprivation of Nationality'. Para 6

[252] United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5'. Para 111

[253] *Tunis and Morocco Advisory Opinion*. 24

[254] Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica (Translation), OC-4/84 (Inter-American Court of Human Rights 1984). para 32

Without a significant inroad into the structure of the inter-state system in the form of an international treaty on nationality, the scope and content of the right to nationality will inevitably suffer from being vague and ineffective. But Article 15 gets its effect not necessarily through the article itself, but through its interaction with these other norms, which creates certain logical outcomes in the field of nationality deprivation. It is less Article 15 itself, but Article 15 as the representation of the intersection of statelessness and discrimination norms that impedes on states' sovereign discretion. This framing is important because while a direct instruction as to how states should order themselves is an overly idealistic view of the supranational power of human rights in general, an instruction to avoid discriminatory and statelessness inducing practices is likely to have greater effect. Article 15, when read in this context, provides a useful means of challenging nationality deprivation powers.

Within a state, there are normally two considerations in determining nationality type for the purposes of nationality deprivation: is the individual a born citizen or naturalised, and is the individual a mononational or a multinational. This results in four main types of nationality holder: the born mononational, the born multinational, the naturalised mononational, and the naturalised multinational. Imagine a national deprivation system that proceeds on the basis that only an individual who is a born mononational is fully protected from citizenship deprivation, while all other individuals are in theory at risk of becoming subject to deprivation measures of some sort. The individual categories of mononational and born national do not necessarily operate along ethnic lines, there are many people who receive their nationality through jus soli who are descendants of immigrants. However, from an intersectional perspective, the combined categories of born nationals and mononationals disproportionately impacts the predominant ethnicity of that particular state. As will be discussed in more detail in the next Chapters, the UK operates with such a deprivation system. In the UK, two in every five people from non-white ethnic minorities are likely to be eligible for deprivation, contrasted by only one in every twenty from a white ethnic background[255]. In this way, the preferential effect of deprivation measures can be seen along ethnic lines. While the effect of the UK deprivation system thus appears unjust, the question remains whether the system itself is illegal under international human rights law. This is the question that shall be considered in the remainder of this thesis.

[255] Ben van der Merwe, 'Exclusive: British Citizenship of Six Million People Could Be Jeopardised by Home Office Plans', *New Statesman*, 1 December 2021, https://www.newstatesman.com/politics/2021/12/exclusive-british-citizenship-of-six-million-people-could-be-jeopardised-by-home-office-plans.

3 CHAPTER 3 - Deprivation of nationality under UK Law

In the field of nationality deprivation measures, the UK has been described as "a global leader in the race to the bottom"[256]. Citizenship stripping was first introduced in the UK with the British Nationality and Status of Aliens Act 1914, but was used sparingly[257]. Its last known use in the 20th Century was in 1973[258]. The Nationality, Immigration and Asylum Act of 2002 ("NIA2002") signalled both a legal and political shift, as the rules regarding citizenship deprivation measures relaxed, and their use increased over the course of the following two decades. Globally in the period between 2000 and 2022, only Bahrain has been reported as depriving more of its citizens of nationality for security-based reasons[259]. The secrecy of deprivation proceedings on grounds of national security mean that exact figures for those who have had their British citizenship taken away are difficult to determine. For most states around the world, the numbers seem to be in the tens of figures, sometimes less[260]. It is estimated that since 2006, 175 British citizens have had their nationality removed on national security grounds[261].

The UK nationality deprivation system represents the collision between two policy objectives of the executive in the early 21st Century: the redefinition of what it means to be a British citizen, and the emergence of a new counter-terrorism agenda in the wake of the terror attacks of 11 September 2001[262]. At the meeting point of these two objectives was a new category of threat: the terrorist citizen. This category was particularly abhorrent not just because of their conduct, but of their betrayal of their state of nationality.

The distinction between citizen and non-citizen terrorists is profoundly xenophobic. Violent acts do not become more violent by virtue of the passport held by the perpetrator. The intention with such a distinction is presumably to show the ineffectiveness of border controls at preventing outside actors entering the UK when such actors are entitled to by virtue of being British citizens. However, this presumes an importance of physical borders "no longer in sync

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256 Institute on Statelessness and Inclusion, 'Instrumentalising Citizenship in the Fight Against Terrorism: A Global Comparative Analysis on Deprivation of Nationality as a National Security Measure' (Institute on Statelessness and Inclusion, March 2022). 10

257 The Guardian, 'Clause 9 and the Erosion of Citizenship Rights', Today in Focus, accessed 22 April 2022, https://open.spotify.com/episode/2CzvmoSsgEPxH5sYa2AVxY.

258 Home Office, 'Secure Borders, Safe Haven: Integration with Diversity in Modern Britain', February 2002. 2.22

259 Institute on Statelessness and Inclusion, 'Instrumentalising Citizenship in the Fight Against Terrorism: A Global Comparative Analysis on Deprivation of Nationality as a National Security Measure'. 5

260 Institute on Statelessness and Inclusion. 5

261 Diane Taylor, 'Hundreds Stripped of British Citizenship in Last 15 Years, Study Finds', *The Guardian*, 21 January 2022, sec. UK news, https://www.theguardian.com/uk-news/2022/jan/21/hundreds-stripped-british-citizenship-last-15-years-study-finds; Institute on Statelessness and Inclusion, 'Instrumentalising Citizenship in the Fight Against Terrorism: A Global Comparative Analysis on Deprivation of Nationality as a National Security Measure'. 10

262 Sandra Mantu, '"Terrorist" Citizens and the Human Right to Nationality', *Journal of Contemporary European Studies* 26, no. 1 (2018): 28–41, https://doi.org/10.1080/14782804.2017.1397503. 32

with the hyper-connected world in which we live and in which alleged terrorists, who really do not care about borders, operate"[263]. It perpetuates a view of terrorism as an ideological threat that is foreign to the territorial borders of the UK. The conflation of foreignness and ideology leads to a conclusion that the threat can be dealt with if it is kept external to the territorial borders. Where the ideology presents itself internally this is clearly a marker of foreignness that must be removed. The normative effect is that foreignness becomes conflated with threat. In the UK, the terrorist citizen is a criminal not only for their terrorist conduct, but for being a foreigner masquerading as a member of British community. The punishment should therefore be removal from that community.

This is the conclusion that must necessarily be drawn by the state for nationality deprivation measures to be seen as a legitimate counter-terrorism response. As Gibney states:

> "For denationalisation to be legitimate in a world of states, the expelling community cannot simply characterise the former citizen as *outcast*. The individual must be portrayed as someone who rightly belongs in another state; the individual must turn into a *foreigner*." [264]

Under international law, individuals have the right to enter and reside in their country of nationality by virtue of their status as a national and so they a national cannot be removed from the territory of their state of nationality. If terrorist threats are signifiers of foreignness, individuals who are deemed to be terrorists must be foreigners. Deprivation of nationality as a counter-terrorism measure in the UK is only legitimate if the threat of terror is viewed as inherently foreign to 'true' British citizens, and deprivation then becomes the only means by which the rightful order can be restored.

In the UK since the turn of the millennium, the legal language of immigration has been transposed onto that of national security as the protection of the nation became focussed on the exclusion of these individuals from within its borders. The interplay of the relative roles of the executive, legislature, and judiciary within the UK system have shown a cyclical pattern: the executive encounters an individual they want to deprive of citizenship but their attempt to do so is rendered unlawful by the courts. In response, the executive capitalises on national security fears to table and pass legislation amending deprivation rules to extend their power, rendering lawful the action the court had previously deemed unlawful. This process is repeated over two decades in the direction of a steady erosion of the substantive and procedural safeguards in citizenship deprivation measures through the pursuit of a counter-terrorism agenda.

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[263] Institute on Statelessness and Inclusion, *Global Seminar Series on Ciitzenship Stripping. Lecture 5.*, 2021, https://www.youtube.com/watch?v=ms9mPQOQ1A4.

[264] M.J. Gibney, 'Denationalisation and Discrimination', *Journal of Ethnic and Migration Studies* 46, no. 12 (2020): 2551–68, https://doi.org/10.1080/1369183X.2018.1561065. 5

This Chapter outlines the key developments of citizenship deprivation measures in the UK since 2002. Chapter 4 will determine the international legality of these measures.

3.1 Origins of deprivation power

The UK executive has held nationality deprivation powers continuously from 1914[265], where it was introduced in response to the public's fear of naturalised British citizens operating as German spies[266]. Several hundred deprivation orders were made by the UK in the period following the First World War. But, excepting a few minor legislative changes, the power was largely unused and unnoticed for the rest of the 20th Century. In the period between 1950 and 1970, the executive issued less than a dozen deprivation orders and then none at all from 1973 onwards[267].

The British Nationality Act of 1948[268] ("BNA1948") allowed deprivation of naturalised British citizens on grounds of disloyalty towards the King, where the individual had assisted an enemy during war, as well as where the individual had, within 5 years after their naturalisation, received a prison sentence of no less than 12 months in any country[269]. The BNA1948 was amended in 1964 to restrict deprivations on this latter ground where it appeared to the Secretary of State that to do so would render the individual stateless[270]. This amendment was to bring domestic law more in line with the 1961 Convention[271], but without limiting the deprivation power with respect to the other two grounds. The basis for the current law on citizenship deprivation in the UK is the British Nationality Act 1981[272] ("BNA1981"), of which the substantive citizenship deprivation provisions are largely the same as for the BNA1948[273]. The operative provision of the BNA1981 is s40, which has been reproduced in the Appendix in its current form as of 25 May 2022. The BNA1981 was significantly amended by the Nationality, Immigration, and Asylum Act 2002[274] ("NIA2002"), Asylum and Immigration (Treatment of Claimants) Act 2004[275] ("AITCA2004"), the Immigration Asylum and Nationality Act 2006[276]

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265 Patrick Weil and Nicholas Handler, 'Revocation of Citizenship and Rule of Law: How Judicial Review Defeated Britain's First Denaturalization Regime', *Law and History Review* 36, no. 2 (May 2018): 295–354, https://doi.org/10.1017/S0738248018000019. 296
266 The Guardian, 'Clause 9 and the Erosion of Citizenship Rights', 9.
267 Home Office, 'Secure Borders, Safe Haven: Integration with Diversity in Modern Britain'. 2.22
268 'British Nationality Act 1948' (1948).
269 British Nationality Act 1948. s.20(3)(a)-(c)
270 'British Nationality (No. 2) Act 1964' (1964). s4(2)
271 P. Arnell, 'The Legality of the Citizenship Deprivation of UK Foreign Terrorist Fighters', *ERA Forum* 21, no. 3 (2020): 395–412, https://doi.org/10.1007/s12027-020-00615-9. 399
272 'British Nationality Act 1981' (1981).
273 David W. K. Anderson, 'Citizenship Removal Resulting in Statelessness: First Report of the Independent Reviewer on the Operation of the Power to Remove Citizenship Obtained by Naturalisation from Persons Who Have No Other Citizenship: Presented to Parliament Pursuant to Section 40B(5) of the British Nationality Act 1981' (London: David Anderson, April 2016). 2.6
274 'Nationality, Immigration and Asylum Act 2002' (2002).
275 'Asylum and Immigration (Treatment of Claimants, Etc.) Act 2004' (2004).
276 'Immigration, Asylum and Nationality Act 2006' (2006).

("IANA2006"), and the Immigration Act 2014[277] ("IA2014"). The background to these developments is crucial in understanding the changing aims and objective of the nationality deprivation power in the UK and will be examined in turn.

3.2 Nationality, Immigration and Asylum Act 2002

The first major modern overhaul of the rules surrounding citizenship deprivation came through the NIA2002, which amended the BNA1981. Prior to its enactment, the UK government had two goals: firstly to align itself more closely with the new European Convention on Nationality[278] ("ECN") as well as the 1961 Convention[279], but also "to develop a stronger understanding of what [British] citizenship really means" [280] within the context of the increasing diversity brought by migration. This latter aim had two approaches which could be described as a positive and a negative aspect. The positive aspect involved the promotion of citizenship values in current and prospective citizens. The negative aspect was a reignited interest in citizenship deprivation. In its 2002 White Paper[281], the UK government discussed both aspects. It proposed changes to its citizenship deprivation measures, stating that the focus was on situations where an individual had concealed information on their past involvement in terrorism or war crimes. The White Paper acknowledged that

> "although it is not always possible in such cases to take subsequent action to remove an individual from the UK, the Government considers that deprivation action would at least mark the UK's abhorrence of their crimes and make it clear that the UK is not prepared to welcome such people as its citizens"[282].

Deprivation at the time was thus envisaged as providing more of a deterrent effect for future undesirable citizenship applicants, rather than a punitive one for acts committed while a citizen. The legislative outcome was the NIA2002, which had two major effects on citizenship deprivation that could not have been predicted from the content of the White Paper: the broadening of the deprivation power and the reduction of procedural safeguards.

Through the NIA2002, not only naturalised British citizens, but also born British citizens were now for the first time eligible to be subject to nationality deprivation powers. Additionally, all categories of citizens would be protected against statelessness. These changes were intended to bring UK legislation more in line with the ECN in anticipation of the UK becoming a signatory[283]. Article 5(2) ECN instructed that states be "guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired

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[277] 'Immigration Act 2014' (2014).
[278] 'European Convention on Nationality', Pub. L. No. ETS 166 (1997).
[279] Mantu, '"Terrorist" Citizens and the Human Right to Nationality'. 32
[280] Home Office, 'Secure Borders, Safe Haven: Integration with Diversity in Modern Britain'. 10
[281] Home Office. 10
[282] Home Office. 35
[283] Gibney, '"A Very Transcendental Power"'. 649

nationality subsequently". Article 7(2) ECN prohibited loss of nationality where it would result in statelessness. The cumulative effect of these provisions was that the reach of deprivation powers were in practice limited to multinationals. Whereas the BNA1981 had previously enunciated specific grounds for revocation of citizenship, (generally: disloyalty, communications with the enemy, and conviction within 5 years of naturalisation), under the NIA2002, the Secretary of State was permitted to deprive an individual of citizenship where they were the "satisfied that the person has done anything seriously prejudicial to the vital interests" of the UK[284]. This shall be referred to as the 'prejudicial to the vital interests test'. The wording of the test was lifted from the same wording as in the ECN[285]. The expression "vital interests" was generally understood by government ministers to cover "threats to national security, […] economic matters, as well as the political and military infrastructure of our society"[286]. In the passing of the Bill for the NIA2002, the executive pointed expressly to the 11 September 2001 terror attacks as a "horrific illustration of the sort of threat we have in mind" when drafting the grounds for deprivation of nationality[287]. However, there was no statutory requirement for the Secretary of State to base their deprivation decision on objective or reasonable criteria. The only requirement was that they were "satisfied" that the deprivation ground had been fulfilled. Where the White Paper had loosely indicated that the government's plan for deprivation powers was punitive towards those who had misled the authorities through concealing material facts about past wrongdoings in their nationality application, the provision that emerged made it clear that all conduct for multinationals would be subject to scrutiny. Contemporary commentators noted that the kind of behaviours mentioned in the context of citizenship deprivation were already criminal acts under domestic legislation and therefore questioned the purpose of deprivation.

Secondly, the means of contesting a deprivation decision were changed with NIA2002. Previously, where a deprivation decision had been contested, the Secretary of State was under a duty to consult a committee of inquiry that would conduct an ex ante review. This procedure had been in place continuously since 1918[288]. The decisions of the committee of inquiry were non-binding, and yet in practice it had a profound limiting effect on the power of the executive, to the extent it has been argued as the reason for the dramatic decline of citizenship deprivation orders in the UK after the First World War[289]. This duty and the committee were removed with the NIA2002, to be replaced with an automatic right to an ex post appeals procedure through the Special Immigration Appeals Commission ("SIAC"). Through a SIAC hearing, the Secretary of State was capable of relying in whole or in part on evidence that could not be made

[284] Nationality, Immigration and Asylum Act 2002. S4
[285] European Convention on Nationality. Art.7(1)(d)
[286] Anderson, 'Citizenship Removal Resulting in Statelessness'. 2.13
[287] Sandra Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (Leiden | Boston: Brill Nijhoff, 2014). 185-6
[288] British Nationality Act 1981. S40(7) (as enacted)
[289] Weil and Handler, 'Revocation of Citizenship and Rule of Law'. 298

public, for reasons including in the interests of national security, to justify a deprivation decision[290]. This procedure will be examined in detail in Chapter 4. As enacted in the NIA2002, the exercise of the right to appeal had a suspensive effect on the deprivation pending the conclusion of any appellate procedure.

In terms of extending and consolidating the deprivation power of the state, the NIA2002 was somewhat of a "mixed bag"[291]. The impact of these changes has been described as an "odd combination of expansion and contraction" as the UK executive aimed to align itself with its new security objectives, as well as the human rights objectives of the ECN and jurisprudence of the European Court of Human Rights ("ECtHR"). The NIA2002 therefore occupies the curious position of being both a power grab in response to new terrorist threats, but also an attempt at progressive human rights compliant legislation.

In practice, the NIA2002 was the basis for only one (attempted) deprivation: that of the radical Finsbury Park imam, Abu Hamza[292]. Prior to the NIA2002 passing, the Prime Minister had been under pressure to deport Hamza due to his extremist preaching and links to Al-Qaeda, but was unable to do so because Hamza had held British nationality for the previous 16 years and could not be caught under any of the grounds for nationality deprivation under the BNA1981 as it then stood. The extent to which the NIA2002 was written specifically with Abu Hamza in mind led to its dubbing in legal circles at the time as the "Hamza amendment"[293]. Three days after the coming into force of the NIA2002, the government gave notice to Abu Hamza of the decision to deprive him of his British citizenship[294]. Hamza appealed the decision, claiming that he had lost his Egyptian nationality and as such the deprivation order would render him stateless in breach of the BNA1981[295]. Given the vague standard set by the seriously prejudicial to the vital interests test and the general deference of the SIAC procedure to the Secretary of State's application of that test, statelessness was the main ground for appeal. The complexity and secrecy of Egyptian law made it difficult to determine whether Hamza had in fact lost his Egyptian nationality, and so Hamza's representatives submitted to the SIAC that the statelessness prohibition encompassed both de facto and de jure statelessness. As has been discussed in the context of the 1954 and 1961 Conventions, there is no universally agreed upon definition of de facto statelessness, and in any event the Final Act of the latter convention only recommends that de facto stateless persons be treated as far as possible like the de jure stateless. The SIAC accepted that it was parliament's intent in drafting the legislation that statelessness was to be understood in the de jure sense, as being "not considered a national under by any

[290] John Jackson, *Special Advocates in the Adversarial System* (London: Routledge, 2019), https://doi.org/10.4324/9781315278773. 17
[291] Gibney, '"A Very Transcendental Power"'. 649
[292] Gibney. 650
[293] The Guardian, 'Clause 9 and the Erosion of Citizenship Rights'.
[294] Abu Hamza v. Secretary of State for the Home Department, No. SC/23/2003 (SIAC 5 November 2010). Para 2
[295] British Nationality Act 1981. S40(4), as amended by NIA2002

state under the operation of its law" and confirmed that the onus was on Hamza to prove this statelessness on the balance of probabilities[296]. In a very public failure for the UK government, Hamza ultimately was able to prove statelessness on this standard, preventing the deprivation order. The SIAC seemingly followed UNHCR guidance[297] in using a combination of law and fact to determine statelessness in terms of the effect of foreign laws, not their reasonableness: "if the effect is to deprive a person of nationality and that person has no nationality other than British, he may not be deprived of his British citizenship"[298]. However, the SIAC judgment was not made until November 2010, and the legislation passed in the intervening period had further significant effects on citizenship deprivation measures as the UK executive attempted to formulate a deprivation system that would suit its objectives.

3.3 Asylum and Immigration (Treatment of Claimants) Act 2004

One of the features of NIA2002 was that the automatic right of appeal to the SIAC was combined with the suspensive effect of the deprivation decision. This meant that the deprivation could not occur while the appeal was ongoing or while there remained a possibility within the statutory time limits to exercise the right of appeal[299]. This essentially created a two stage process where the notice of intention to deprive would be followed by the deprivation order after the conclusion of appeals. This suspensive effect was removed in the AITCA2004[300]. This change was labelled by parliamentarians as "minor and technical", and purportedly was made in order to increase efficiency by combining deprivation and deportation proceedings without limiting the grounds of appeal or otherwise affecting appeal rights[301]. The AITC2004 itself was a legislative act intended to make provision on immigration and asylum, not nationality[302]. However, in combination with the new appellate procedure introduced in the NIA2002, it had the effect that a person could be deprived of their nationality prior to any review. While this would not normally affect the appeal rights of those who had been deprived of nationality while they were within the UK, for those outwith the country it could have a substantial impact, as was highlighted in the *Begum*[303] case in 2021.

In this case, Begum was deprived of her British nationality on national security grounds while she was living in a displaced persons camp in Syria. She sought to appeal the deprivation decision but also sought leave to enter the UK on the basis that she was unable to conduct an

[296] Abu Hamza v. Secretary of State for the Home Department. Para 6
[297] Sandra Mantu, 'Citizenship Deprivation in the United Kingdom: Statelessness and Terrorism', *Tilburg Law Review (Gaunt)* 19, no. Issues 1-2 (2014): 163–70. 169
[298] Abu Hamza v. Secretary of State for the Home Department. Para 6
[299] British Nationality Act 1981. As in effect 01/04/2003. S40A(6)(a)-(b)
[300] Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Schedule 4
[301] Institute on Statelessness and Inclusion, *Global Seminar Series on Citizenship Stripping: Amanda Weston QC. Lecture 2.*, 2021, https://www.youtube.com/watch?v=kkk4xdXVSsc.
[302] Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Introductory text.
[303] R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant), No. 7 (United Kingdom Supreme Court 26 February 2021).

effective appeal from her present location[304]. The SIAC accepted that "in her current circumstances" Begum was unable to meaningfully participate in her appeal and further accepted that this meant her appeal would "not be fair and effective"[305]. Begum's counsel argued that the exercise of deprivation power was only lawful when it could occur in accordance with natural justice principles. Parliament had created the appeals process to conform to principles of natural justice, and therefore where a fair and effective appeal was not possible there could not be a lawful exercise of deprivation power. The United Kingdom Supreme Court ("UKSC") response was that this reasoning was "fallacious", stating: "the fact that the appeal process is a safeguard against unfairness does not mean that a decision which cannot be the subject of an effective appeal is unfair"[306]. This conclusion is remarkable in its interpretation of the purpose of an "effective" appeal.

The UKSC in *Begum* acknowledges that there was nothing within the legislation that indicated how to continue where a fair procedure is impossible[307]. Courts are limited in the extent they can consult the Parliamentary Debate Record when legislation is passed, as to do so would be to question the sufficiency of the legislative process[308]. This is a fundamental principle of the separation of powers under the rule of law. The Court makes its ruling based on the presumption that Parliament has legislated 'with its eyes open' and that it has afforded adequate scrutiny to any and all potential outcomes of its legislation. However, with respect to the situation where an individual has been deprived of their British citizenship while that individual is in circumstances where they cannot effectively exercise their statutory right of appeal, the UK legislation is silent on how the appellate body should proceed[309]. An examination of Parliamentary Debate Record shows that in the passing of the AITC2004, there was no debate on the impact of repealing the suspensive effect of the right of appeal on a deprivation decision on individual outwith the UK[310]. The amendment was seemingly made purely with the aim of increasing efficiency in deportation, an immigration concern, which is an irrelevant consideration where the individual is not in the UK. This can be contrasted with the statutory immigration rules for foreign nationals in the UK, where Parliament has provided detailed provisions. This provides, inter alia, protection for the affected individual, including support for participation in appeals for vulnerable persons, and territorial provisions on when powers

[304] R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant). Para 7
[305] R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant). Para 85
[306] R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant). Para 88
[307] R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant). Para 95
[308] Wilson & Ors v. Secretary of State for Trade and Industry, No. 40 (House of Lords 10 July 2003). Para 67
[309] R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant). Para 89
[310] Institute on Statelessness and Inclusion, *Global Seminar Series on Citizenship Stripping*.

may be used on individuals outwith the UK along with the right to appeal within the UK for foreign nationals where the removal order is suspended pending the outcome of appellate proceedings[311].

In at least one case, that of *L1*[312] in 2014, the Secretary of State was advised to deliberately wait until the affected individual had left the UK before depriving them of their British nationality. This was in order to exclude the individual from the UK. Both the deprivation and the exclusion were justified on grounds of national security[313], indicating that the deprivation was simply the means by which the exclusion was to be achieved. The advice as given to the Secretary of State by the Security Service, was done in full cognizance that the effect would entail, in their own words,

> "forcing into permanent exile an individual who arrived in the UK aged 20 and has spent most of the subsequent 20 years in this country, seven of them as a British citizen; suffers from ill health and whose access to continued free medical treatment will be stopped; and has four British citizen children"[314].

Although the deprivation decision could have been made while L1 was in the UK and then followed by a deportation order, this was considered unfavourable given that it would have allowed L1 to remain in the country pending a potentially lengthy appeal. This was contrary to the Security Service's operational objective, which was to prevent L1 "establishing himself in the UK in order to use the UK as a platform for terrorist-related activities"[315]. The representative for the Office for Security and Counter Terrorism submitted that while the Secretary of State has the discretion to deliberately wait until the affected person has left the UK before depriving them of their nationality where it is in the public interest, they do not have a policy of doing so, and at the time of submission in July 2013, this was the only instance in which it had occurred[316]. A year later in June 2014, the same representative added that he was aware of one other national security case in which such a course was considered but "was not pursued because it was overtaken by events". He acknowledged that he could not be certain that the course was not considered in other cases[317].

The appellant's position was summarised by the SIAC as being that the Secretary of State had seriously manipulated the system with such significant effects for the affected individual that it constituted an abuse of power[318]. The SIAC held that the action of the Secretary of State did not reach the high threshold of an abuse of power, and that while the approach taken to ensure

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311 Institute on Statelessness and Inclusion, 'The World's Stateless Report 2020: Deprivation of Nationality', March 2020. 276
312 L1 v Secretary Of State For The Home Department, No. SC/100/2010 (SIAC 4 August 2014).
313 L1 v Secretary Of State For The Home Department. Para 19
314 L1 v Secretary Of State For The Home Department. Para 34
315 L1 v Secretary Of State For The Home Department. Para 36-7
316 L1 v Secretary Of State For The Home Department. Para 50
317 L1 v Secretary Of State For The Home Department. Para 52
318 L1 v Secretary Of State For The Home Department. Para 73

L1 would not be able to conduct an in-country appeal was "not on the face of it attractive", she was acting within her powers and her action was justified on national security grounds. Although L1's appeal was made to be deliberately more difficult, it could still be effective. The SIAC noted that where such a course of action would prevent an effective appeal, it would constitute an abuse of power[319].

The *L1* decision took place in 2014 prior to that of *Begum* in 2021, and the facts, that of utilising the timing of deprivation measures to ensure exclusion from the UK, are not strictly analogous between the two cases. However, the *L1* case implicitly anticipated a situation where an appeal may be significantly affected by where the individual was physically located when the deprivation decision was made, to the extent that they could not conduct an effective appeal. There is no explicit statutory duty upon the Secretary of State to ensure that the deprived person will be able to mount an effective appeal prior to the deprivation decision. The legislation contains no indication of the circumstances in which the right to an effective appeal could be removed on balance against national security risks. The key issues in both *Begum* and *L1* would have been rendered moot had the suspensive right not been repealed, but even if that were not the case there is no guidance for courts in the legislation as to their role in ensuring the fairness of proceedings in cases where national security is a deciding factor. The two cases compound the relative unimportance of the right to enter the country of one's nationality in the domestic implementation of national security policies. Being deprived of British nationality while outside the UK places the individual in a disadvantageous position in the exercise of their appeal rights but also crucially places them outside the jurisdiction of the UK's human rights jurisdiction. This point shall be discussed further in Chapter 4.

The only individual known to have been afforded their suspensive right of appeal during the period where it existed under the NIA2002 and prior to the enactment of the AITC2004 was Abu Hamza. It is unclear if at the date of the deprivation decision Hamza actually held Egyptian nationality like the UK claimed. What is known is that even if Hamza had held Egyptian nationality at the time of the UK giving notice of their intention to deprive his British nationality, he did not have Egyptian nationality by the time his case came to the UK courts and the matter was investigated properly. The period of time between the notice and the actual deprivation could have allowed the Egyptian authorities the time to deprive Hamza of Egyptian nationality first while the appeals process was ongoing within the UK. Thus the statelessness prohibition ultimately prevented British authorities being able to remove British nationality where they would have previously been able to do so had the suspensive effect not been in place. The race between multiple countries of nationality to deprive an individual of nationality is an inevitable consequence of a deprivation system where the strongest ground of appeal if the prohibition against statelessness.

[319] L1 v Secretary Of State For The Home Department. Para 90-5

There is no right to an in-country appeal against deprivation decisions. In practice, since 2004, nearly all deprivation orders on national security grounds have occurred while the affected person is outside the UK[320], thus impeding the affected individual's right as a UK national to return to the country in order to pursue their appeal in person. The impact of a "minor and technical" amendment thus has profound implications not just in individual deprivation cases, but on how the deprivation system in the UK can be viewed as a whole. Whether the exclusionary impact is deliberately intended, as in *L1*, or an unplanned consequence, as in *Begum*, there is a legal advantage gained by the UK executive that is not fully balanced by procedural safeguards in the appeals system.

3.4 Immigration, Asylum and Nationality Act 2006

While the IANA2006 was proposed prior to 7 July 2005 terror attacks on London, its passage through Parliament was influenced by those events[321]. The attacks were conducted by Muslim British citizens, a fact which led to "increased questioning of the entire possibility of cultural difference" within the UK[322]. In a speech a month after the attacks, the Prime Minister delivered the message: "if you come to our country from abroad, don't meddle in extremism … [or] you are going to be back out again", announcing that the citizenship deprivation procedure would be made "simpler and more effective"[323]. Section 56(1) IANA2006 replaced the seriously prejudicial to the vital interests test with the lower test of whether the deprivation order was "conducive to the public good". This shall be referred to as the 'conducive to the public good test'. This was the only change, the prohibition against statelessness and the application to all British citizens regardless of acquisition remained the same. As with the NIA2002, the standard of proof that the Secretary of State must reach had no objective criteria, only that they were "satisfied" as to the conduciveness of the deprivation to the public good.

The conducive to the public good test is common in the field of immigration law. It had appeared in early UK citizenship deprivation legislation as part of the British Nationality and Status of Aliens Act 1918[324] ("BNSA1918"). However, the test in that statute was applied as an additional requirement after a specific ground for deprivation, such as unlawfully trading with an enemy of the Crown[325]. Through the IANA2006, conduciveness to the public good itself became the necessary and sufficient ground for deprivation. The test is not defined in the statute but the UK Government, shortly after the 7 July 2005 terror attacks, published a document outlining a list of 'unacceptable behaviours' that would form the basis for the

[320] Institute on Statelessness and Inclusion, 'The World's Stateless Report 2020: Deprivation of Nationality'. 276
[321] Mantu, 'Citizenship Deprivation in the United Kingdom'. 166
[322] Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives*. 190
[323] Gibney, '"A Very Transcendental Power"'. 650
[324] 'British Nationality and Status of Aliens Act 1918' (1918). s7(2)
[325] British Nationality and Status of Aliens Act 1918. S7(2)(a)

conducive to the public good test in the exercise of both its exclusion and deportation powers in immigration matters, as well as its deprivation powers under the IANA2006[326]. Such behaviours include the expression of views that:

> "ferment terrorism or seek to provoke others to terrorist acts; justify or glory terrorism; ferment other serious criminal activity or seek to provoke others to serious criminal acts; foster hatred which may lead to intra community violence in the UK; advocate violence in furtherance of particular beliefs; are in conflict with the UK's culture of tolerance"[327].

This list was incorporated into Terrorism Act 2006[328], and has been criticised for its broadness as well as the crossover between these behaviours and acts which already give rise to criminal responsibility under UK law[329]. In terms of efficiency, harmonising the test for deprivation and deportation allows ministers to rely on the same grounds in both proceedings for the same individual. But, as shall be discussed later in Chapter 4, using deprivation as part of a counter-terrorism policy is problematic from the point of view of international human rights obligations. Even with the list of unacceptable behaviours, the lack of statutory definition creates additional ambiguity for a test that is already decidedly lower than the previous standard. This change, in combination with the expansion of potentially affected persons through the changes of the NIA2002, creates an appreciably broader discretionary power of deprivation. As with the repeal of the suspensive provision through AITC2004, the IANA2006 adopted a migration-based approach to deprivation through a significantly lower standard that "effectively made citizenship status as easy to lose as an alien's residence status"[330]. Unlike the NIA2002, no additional safeguards were introduced in the IANA2006 to counterbalance the decreased protection.

A key element of the change in grounds for deprivation is the specific timing of the conduct that is the basis for which the person is deprived on nationality. Where the previous test was concerned with whether "the person *has done* anything"[331] that fulfilled the seriously prejudicial test, the new standard applied retrospectively when considering conduciveness to the public good; no reference was made to a specific conduct that had occurred in any specific time period. The importance of this change can be seen through the *Hicks*[332] case, an aspect of which was decided on the basis of the test of the original BNA1981, but had consequences for the amended test in the NIA2002. David Hicks was an Australian detainee at Guantanamo Bay

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[326] Joint Committee on Human Rights, 'Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters: Third Report of Session 2006-06' (Joint Committee on Human Rights, 28 November 2005). paras 105-6

[327] Hina Majid, 'Protecting the Right to Have Rights: The Case of Section 56 of the Immigration, Asylum and Nationality Act 2006' 22, no. 1 (2008): 27–44. 29

[328] 'Terrorism Act 2006' (2006).

[329] Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives.* 195

[330] Gibney, '"A Very Transcendental Power"'. 652

[331] Nationality, Immigration and Asylum Act 2002. S4. Emphasis added.

[332] Secretary of State for the Home Department v Hicks [2006] EWCA Civ 400 (EWCA (Civ) 12 April 2006).

who sought British citizenship on the basis of a statutory scheme whereby the descendants of born British nationals who had themselves been born in a former British colony were entitled to apply for registration as British citizens. Although British citizenship was being newly acquired, there was no discretion to refuse granting it where the entitlement existed. Discriminatory aspects of this scheme were removed under the NIA2002 to the effect that Hicks could now apply for registration where he had not previously been able to[333]. The UK had negotiated release from Guantanamo Bay for several other British citizens and Hicks hoped that after he became a British citizen the UK would do the same for him[334]. The Secretary of State informed Hicks that they would grant him British citizenship and then simultaneously revoke it on the basis of prior alleged terrorist activities.

The UK Court took no issue with this policy, but stated that under the relevant statutory scheme, here the BNA1981 prior to the NIA2002 amendments, Hicks could not be deprived of British nationality for conduct that showed disloyalty or disaffection towards the Crown because the alleged conduct that formed the basis of this deprivation ground had occurred prior to Hicks being a British citizen. Without the relationship of allegiance between citizen and state, there could be no disloyalty and further no disaffection, the latter being a broader concept than the former that included where "an individual has by word or deed displayed active hostility [to the UK] by showing himself unfriendly to the Government of the United Kingdom or hostile to its vital interests"[335]. Hicks could thus not be deprived of British nationality for conduct prior to the acquisition of that nationality. The Court pointed out that this analysis also arises in the use of past conduct as part of the ground for deprivation through the seriously prejudicial to the vital interests test of the NIA2002[336]. The UK government was thus ordered to allow Hicks to acquire British nationality and prohibited from depriving him of that nationality on the basis of the BNA1981. The executive was not clear on the limits of the seriously prejudicial to the vitals test as it had not been judicially considered. As has been stated, the only person the UK had attempted to deprive of nationality under the NIA2002 was Abu Hamza, whose case would not be decided for years after *Hicks* (and in any event would be decided on the point of statelessness, not the test). But the *Hicks* judgment seemed to indicate the executive would likely also have been prevented from depriving Hicks of nationality under the NIA2002. The *Hicks* appellate decision was released on 12 April 2006, but the UK delayed in granting Hicks nationality until 7 July 2006. A couple of hours after it was granted, the UK deprived Hicks of his British nationality[337] on the basis of the new conducive to the public good test in the IANA2006, which had come into effect on 16 June 2006[338]. It has been stated that the *Hicks*

[333] Secretary of State for the Home Department v Hicks [2006] EWCA Civ 400. Para.2
[334] Secretary of State for the Home Department v Hicks [2006] EWCA Civ 400. Para 6
[335] Secretary of State for the Home Department v Hicks [2006] EWCA Civ 400. Para 24
[336] Secretary of State for the Home Department v Hicks [2006] EWCA Civ 400. Para 42
[337] Vikram Dodd, 'Reid Revoked Citizenship of Guantánamo Detainee', *The Guardian*, 11 January 2007, sec. UK news, https://www.theguardian.com/uk/2007/jan/11/world.politics.
[338] 'The Immigration, Asylum and Nationality Act 2006 (Commencement No. 1) Order 2006' (2006).

case had a direct impact on the IANA2006[339], a speculation that could be supported by the unusual delay between the court judgment and the deprivation decision that allowed the IANA2006 to come into effect.

The IANA2006 test received significant judicial consideration through the 2009 SIAC judgment of *Al-Jedda*[340]. The SIAC observed that

> "[t]he legislative purpose of the amendment seems clear: to broaden the grounds upon which a person may be deprived of citizenship and to permit the Secretary of State to take into account all relevant factors, whether they occurred before or after a person […] acquired British citizenship by registration or naturalisation",

and that it had the express purpose of reversing *Hicks*[341]. The SIAC understood that when the Secretary of State viewed past conduct in accordance with the conducive to the public good test, the purpose of this was to assess the future risk to national security posed by the individual. If the SIAC could establish that the alleged past conduct relied upon by the Secretary of State in their deprivation decision met the civil standard threshold of proof, then it would uphold the exercise of the test[342]. It was held, mainly on the basis of closed material, that the Secretary of State had reached this standard. The exercise of the IANA2006 test was thus largely deferential to the risk assessment made by the Secretary of State, who could subject factual circumstances to less rigorous scrutiny than in a criminal trial, where the relevant standard of proof would have been 'beyond reasonable doubt'.

Al-Jedda was unsuccessful in challenging his deprivation decision on the basis of the IANA2006 test, but succeeded through a complex sequence of hearings in the SIAC, the Court of Appeal, and the UK House of Lords/Supreme Court in an argument that depriving him of British nationality would make him stateless[343]. The question was whether Al-Jedda held Iraqi nationality in addition to the British nationality that he had acquired through naturalisation. The House of Lords stated as fact in its 12 December 2007 judgment that Al-Jedda held both Iraqi and British nationality. The Secretary of State accordingly issued a deprivation decision notice the same day. It was later accepted that upon his voluntary naturalisation in 2000, Al-Jedda had lost the Iraqi nationality he acquired upon birth by virtue of Iraqi law[344]. Due to an error in the application of Iraqi law, the SIAC had claimed that despite losing Iraqi nationality, Al-Jedda had regained it automatically prior to 12 December 2007 through the operation of a

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339 Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives*. 205
340 Al-Jedda v. Secretary of State for the Home Department, No. SC/66/2008 (SIAC 7 April 2009).
341 Al-Jedda v. Secretary of State for the Home Department. Para 5
342 Al-Jedda v. Secretary of State for the Home Department. Para 9
343 Secretary of State for the Home Department v Al -Jedda [2013] UKSC 62 (UKSC (2013) 9 October 2013).
344 Secretary of State for the Home Department v Al -Jedda [2013] UKSC 62. Para 4

law that was no longer in existence. With open and explicit reluctance[345], the Court of Appeal set this finding aside to declare that on 12 December 2007, Al-Jedda had held only British nationality and so the deprivation decision must be quashed on account of the prohibition against statelessness. In their judgment, the judges expressed confusion as to why the UK had legislated away from the legitimately held the power to render an individual stateless in the originally enacted BNA1981, prior to the amendment of the NIA2002.

On appeal from this judgment before the UKSC, the Secretary of State argued that, since it had been open to Al-Jedda to apply, with the certainty of success, for Iraqi nationality under the law in force at the date of the deprivation notice, the deprivation decision should be upheld. The UKSC summarised the issue in the proceedings as: "whether an order for deprivation made against a person who, at its date, can immediately, by means only of formal application, regain his other, former, nationality is invalid under Section 40(4) of the [BNA1981]"[346]. Section 40(4) was the statelessness prohibition that had been introduced through the NIA2002, a change which the UKSC in *Al-Jedda* describes as Parliament going "further than was necessary in order to honour the UK's existing international obligations"[347]. In their argument, the executive emphasised that the use of the word 'satisfied' in s40(4) permitted the Secretary of State to use a predictive assessment of statelessness. The UKSC rejected the word's significance, emphasising that what was key was the factual existence of de jure statelessness. The UKSC further rejected the submission that s40(4) involved a causative analysis that said it was not the deprivation order that 'made' Al-Jedda stateless, but Al-Jedda's lack of application for Iraqi nationality[348]. The fallaciousness of the Secretary of State's argument was brought into sharp relief when the UKSC quoted from her own government's guidance, adopted from UNHCR, which presented the contrary position to her own on when the assessment of nationality is to be made[349].

Through the deprivation decision in *Al-Jedda*, the executive had attempted to argue that they were able to use their statutory powers to render an individual stateless, on the basis that the person had some link to another country that enabled them to apply for another nationality. When the judgment made clear that, while they would have been able to do this prior to the NIA2002 on the basis of the UK's reservation to Article 8 of the 1961 Convention, they had removed this right through statute. The *Al-Jedda* judgment, the culmination of years of litigation, was damning towards the arguments advanced the executive. As with the cases of *Hamza* and *Hicks* and the NIA2002 and IANA2006 respectively, the *Al-Jedda* UKSC decision directly led into a legislative change in the form of the IA2014[350].

[345] Al-Jedda v. Secretary of State for the Home Department (Rev 2), 358 (EWCA (Civ) 2012). para 124- 131
[346] Secretary of State for the Home Department v Al -Jedda [2013] UKSC 62. Para 26
[347] Secretary of State for the Home Department v Al -Jedda [2013] UKSC 62. Para 22
[348] Secretary of State for the Home Department v Al -Jedda [2013] UKSC 62. Paras 30-2
[349] Secretary of State for the Home Department v Al -Jedda [2013] UKSC 62. Para 34
[350] Anderson, 'Citizenship Removal Resulting in Statelessness'. 2.17

3.5 Immigration Act 2014

The IA2014 amended the BNA1981 again, inserting s40(4A) in addition to the previous rules on deprivation. Statelessness had so far been the most effective ground of appeal against deprivation decisions. Under the new section, the Secretary of State was permitted to render stateless naturalised persons where they were: "satisfied that the deprivation was 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". This equates in effect to the seriously prejudicial to the vital interests test. The Secretary of State must also have "reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory"[351]. This provision is retrospective in the sense that the Secretary of State "may take account of the manner in which a person conducted him or herself before [s40(4A)] came into force"[352]. The IA2014 additionally introduced s40(4B) to the BNA1981, which mandated a review of the s40(4A) power to be undertaken after 1 year and then every 3 years subsequently[353]. The first and also only report under s40(4B), as of 25 May 2022, was released in April 2016[354].

The amendments of the IA2014 represent the current law in force on citizenship deprivation measure and will be discussed in detail in Chapter 4 to determine the legality of the deprivation system in the UK. A summary of the deprivation landscape after the IA2014 is as follows. Deprivation of citizenship is possible regardless of the mode of acquisition of British nationality. But following the IA2014, both the capacity to deprive and the applicable deprivation test differs depending on the individual's status as a mononational or multinational, and on the mode of acquisition. For multinationals, regardless of acquisition of UK nationality through birth or naturalisation, deprivation is possible on the conducive to the public good test but it cannot induce statelessness. For a mononational citizen by birth, there can be no deprivation of nationality and accordingly no test and no possibility of inducing statelessness. For a mononational citizen by naturalisation, deprivation can occur where the Secretary of State has reasonable belief the individual can acquire another nationality, and the deprivation is conducive to the public good because of conduct seriously prejudicial to the vital interests of UK, and can therefore induce statelessness.

3.6 Nationality and Borders Bill 2021

In 2021, the executive introduced a new Nationality and Borders Bill[355] ("NBB2021") that was intended to further amend the BNA1981. Clause 9 of the NBB2021 had significant effects for

[351] Immigration Act 2014. S66(1)
[352] Immigration Act 2014. S66(2)
[353] Immigration Act 2014. S66(3)
[354] Anderson, 'Citizenship Removal Resulting in Statelessness'.
[355] 'Nationality and Borders Bill 2021' (2021).

appeal rights under the citizenship deprivation system. While the relevant clause was ultimately removed from the final act after the bill passed through parliament, it is significant for being a rare legislative, as opposed to judicial, defeat for the government in an attempted expansion of its deprivation powers. The timing of the bill also presents a contemporary picture of the government's agenda on citizenship deprivation and for these reasons its provisions merit examination.

As with previous amendments regarding the provisions on citizenship deprivation, Clause 9 was introduced in response to the government's failure in court. Here it was the July 2021 *D4*[356] judgment that spurred the introduction of Clause 9 at a late stage of the scrutiny of the NBB2021 and after only 9 minutes of debate[357]. The *D4* case had concerned the government's Regulation 10(4)[358], which allowed the Secretary of State to issue the notice of the deprivation decision to the individual that was required by statute[359] through placing that notice in the individual's file at the Home Office[360]. Regulation 10(4) had been amended in 2018 to allow the Secretary of State to issue notice in such a way to the deprived individual that was effective for the purposes of the legislation where the whereabouts of the individual were unknown, where there was no valid correspondence address, and where there was no acting representative[361].

Applying rules of statutory interpretation, the High Court in *D4* found the Regulation 10(4) to be ultra vires and struck it down, to the effect that the deprivation order was nullified[362]. Although the Secretary of State had powers under the BNA1981 to make regulations for the giving of effective notice of deprivation decisions[363], the High Court pointed out:

> "as a matter of ordinary language, you do not 'give' someone 'notice' of something by putting the notice in your desk drawer and locking it. No-one who understands English would regard that purely private act as a way of 'giving notice'".[364]

The High Court noted the impact of deprivation on fundamental rights only to the extent that it was unwilling to interpret an incursion into the fundamental status of citizen where it had not

[356] D4, R (On the Application Of) v Secretary of State for the Home Department, 2179 (EWHC (Admin) 2021).
[357] Simone Shah, 'How the U.K.'s Immigration Bill Could Erode Citizenship Rights Further', *Time*, 10 February 2022, https://time.com/6146655/uk-citizenship-nationality-immigration-bill/.
[358] 'The British Nationality (General) Regulations 2003' (2003).
[359] British Nationality Act 1981. S40(5)
[360] D4, R (On the Application Of) (Notice of Deprivation of Citizenship) v Secretary of State for the Home Department (EWCA (Civ) 26 January 2022). Para 1
[361] 'The British Nationality (General) (Amendment) Regulations 2018' (2018). s3
[362] D4, R (On the Application Of) (Notice of Deprivation of Citizenship) v Secretary of State for the Home Department, 33. Para 2
[363] British Nationality Act 1981. S41(1)(e)
[364] D4, R (On the Application Of) v Secretary of State for the Home Department, 2179. Para 49

been expressly authorised to do so by statute. It left it open to Parliament to legislate in such a way[365]. On appeal in 2022, the Court of Appeal came to the same conclusion following much of the same reasoning as the High Court judgment[366].

Under Clause 9 of the NBB2021, the Secretary of State would be permitted not to provide notice of a deprivation decision in effectively five circumstances: where they lacked the information needed to give notice, where it would not be reasonably practicable to give notice, or where notice should not be given in the interests of national security, the relationship between the UK and another country, or otherwise in the public interest[367]. The grounds for not serving notice were thus significantly more than what had been at issue in *D4.* While Regulation 10(3) was removed following *D4*, the NBB2021 also made valid any deprivation decisions issued through that regulation, so that they were retroactively deemed effective from the date that they had been made[368]. The Parliamentary Joint Committee on Human Rights criticised the broadness of the phrases "national security", "foreign relations", and "public interest". The Joint Committee pointed out that national security issues were "almost always" relevant to citizenship deprivation cases and further that it was unclear why the public interest or the interests of foreign relations would be relevant to an individual deprivation notice[369]. During debate in the House of Commons, an MP described this aspect as effectively allowing deprivation without notice where notice would "be internationally embarrassing"[370], as these 'interest' grounds, unlike Regulation 10(4), would have effect even where it was reasonably possible to serve notice to the deprived person.

The removal of the notice requirement as envisaged by the NBB2021 would significantly impact appeal rights. Those wishing to appeal a deprivation decision from outside the UK have 28 days in which to give notice[371]. The 28 day period begins on the date when the notice of the deprivation decision is served, but if the serving of the notice is deemed effective when the notice is placed in a drawer, there would be a real likelihood that the deprived individual would not be aware of the deprivation until the time limit for lodging an appeal had already expired. The NBB2021 does not provide increased procedural rights to counterbalance this. When directly questioned by the Joint Committee, a government Minister avoided answering on

[365] D4, R (On the Application Of) v Secretary of State for the Home Department, 2179. Para 50
[366] D4, R (On the Application Of) (Notice of Deprivation of Citizenship) v Secretary of State for the Home Department, 33. Para 28
[367] Nationality and Borders Bill 2021. Cl.9(2)
[368] Nationality and Borders Bill 2021, 20. Cl.9(4)-(7)
[369] Joint Committee on Human Rights, 'Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4 – Asylum, Home Office Decision-Making, Age Assessments, and Deprivation of Citizenship Orders)', 12 January 2022. Para 234
[370] 'Nationality and Borders Bill - Hansard - UK Parliament', accessed 16 March 2022, https://hansard.parliament.uk//commons/2021-12-07/debates/E3398434-EA4E-4717-9BF5-92B8962F82D1/NationalityAndBordersBill. Col.221
[371] 'The Special Immigration Appeals Commission (Procedure) Rules 2003' (2003). Rule 8

whether this was compatible with the right to a fair trial[372]. The NGO Reprieve has stated that the effect of the change afforded greater due process rights to someone accused of speeding on the motorway than someone deprived of their British citizenship[373].

Clause 9 of the NBB2021 received considerable criticism from NGOs, as well as media and public outrage in the form of protests[374]. The motivation behind these protests was not merely the expansion of the deprivation power under the NBB2021, but the way that citizenship deprivation disproportionately affected those with multiple nationalities, and in particular those from minority ethnic backgrounds. Despite their impact, neither the NIA2002 or the IANA2006 had attracted much media attention[375]. With the NBB2021, the public were becoming alive to the fact that the executive's deprivation powers could potentially impact 6 million British citizens, including nearly half a million who had been born in the UK[376]. The precise number of how many British citizens could be eligible for deprivation that results in statelessness through s40(4A) BNA1981 is difficult to ascertain given the lack of fully illustrative census data that takes into account variation in nationality acquisition laws of other countries. Analysis by the New Statesman of the available census data estimated that: "two in every five people from non-white ethnic minorities (41 per cent) are likely to be eligible for deprivation of citizenship, compared with just one in 20 people categorised as white (5 per cent)"[377]. These figures represent deprivation of citizenship regardless of whether it results in statelessness. A closer analysis showed that 50 per cent of Asian British people in England and Wales, as well as 39 per cent of black Britons could be affected by the law[378]. The conclusions reached led one former human rights barrister to label the NBB2021 "a profoundly racist law"[379], though perhaps, given that the NBB2021 did not itself increase the applicability of deprivation measures to minority ethnic backgrounds, a better assessment would be that the NBB2021 was *another* profoundly racist law.

While the NBB2021 was just the latest in the long line of broadening powers, reduced due process rights, and lowered threshold standards in the field of deprivation powers, it achieved what no other proposed legislative change had done: it drew public attention to the UK nationality deprivation system as a whole. Commentators drew comparisons with the wider

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372 Joint Committee on Human Rights, 'Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4 – Asylum, Home Office Decision-Making, Age Assessments, and Deprivation of Citizenship Orders)', 12 January 2022. Para 241-2

373 Maya Foya, 'Stripping Citizenship Undermines the Rule of Law', *Reprieve* (blog), 8 December 2021, https://reprieve.org/uk/2021/12/08/stripping-citizenship-undermines-the-rule-of-law/.

374 'Nationality and Borders Bill: Why Is It Causing Protests?', *BBC News*, 7 January 2022, sec. Newsbeat, https://www.bbc.com/news/newsbeat-59651523.

375 Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives*. 192

376 van der Merwe, 'Exclusive: British Citizenship of Six Million People Could Be Jeopardised by Home Office Plans'.

377 van der Merwe.

378 van der Merwe.

379 van der Merwe.

public debates on the place of race and national belonging within the UK, making connections with the government's 'hostile environment' policy and the Windrush scandal[380], as well as accusations of systemic Islamophobia[381]. The UK government has responded to the criticisms levied in the context of the NBB2021, defending the Bill by stating that the executive has held deprivation powers continuously since 1914[382]. As this Chapter has hopefully demonstrated, this assertion does not accurately paint the whole picture of how exactly the content and effect of that power has changed in the last hundred years. Furthermore, the government's statement does not capture the source of public discontent, as it does not seem to have been the introduction of the NBB2021 alone that created the renewed media attention to matter of citizenship deprivation. A common feature of media coverage of the NBB2021 is some reference being made to the very public denationalisation of Shamima Begum in February 2019. At the time, the British press was vocal about its disdain and general lack of sympathy for Begum, but the extensive coverage provided the catalyst that would ignite interest in the NBB2021 when it was introduced 2 years later. Clause 9 of the NBB2021 was not written in response to Begum or her legal case, but its attempted passing served to consolidate the public perception of the inherent unfairness of the citizenship deprivation system that the Begum case had brought to mainstream attention.

3.7 Chapter conclusion

Even though the UK courts have decided against the UK government in multiple high profile deprivation cases throughout the last two decades, the decisions of *Al-Jedda* and *D4* in particular have been clear that their findings are the result of statutory interpretation, not an examination of the merits of the deprivation. It is thus generally open for the executive to introduce legislation that would undo the effects of a judgment, which it has in practice done repeatedly. The resulting deprivation system in the UK is thus a piecemeal collection of politically motivated laws that lack overall coherence and justification.

Gibney conducted a review of the history of deprivation powers in the UK from a political theorist perspective to discover why, against the liberalisation of nationality acquisition practices, the UK had adopted a decidedly illiberal view of nationality deprivation. He discovered that while the UK had historically justified nationality deprivation for naturalised individuals on the liberal principle that nationality was a social contract voluntarily entered

[380] Sayeeda Warsi, 'Behold the New "Hostile Environment" – with the Power to Rob Millions of British Citizenship', *The Guardian*, 15 February 2022, sec. Opinion, https://www.theguardian.com/commentisfree/2022/feb/15/new-hostile-environment-british-citizenship-government-islamic-state.

[381] Suhaiymah Manzoor-Khan, 'Look at Ministers' Plans to Secretly Make Britons Stateless and What Do You See: Islamophobia', *The Guardian*, 14 March 2022, sec. Opinion, https://www.theguardian.com/commentisfree/2022/mar/14/islamophobia-widespread-britain-trojan-horse-prevent-racist-joke.

[382] Richard Ekins, 'Notice and Removal of Citizenship: The Problem with Clause 9 of the Nationality and Borders Bill', *Policy Exchange* (blog), 11 February 2022, https://policyexchange.org.uk/notice-and-removal-of-citizenship/.

into, the introduction of the NIA2002 destroyed this justification through the application of deprivation to all British citizens, regardless whether they were born or naturalised citizens. Despite this, the NIA2002 was labelled by the executive as a liberal document, relying on the liberal principle of non-discrimination between citizens. However, this is in direct conflict with the contractual notion of nationality that is used to legitimate deprivation powers. Gibney concludes that the UK government has been able to 'cherry-pick' the liberal principles that suit their political objectives, with the effect that "while changes in the UK's power to denaturalise may have been justified through liberal principles, the results of these changes were often distinctly illiberal"[383]. The result is that the system founded on nationality as a contract without discrimination actually allows nationality deprivation that discriminates between those who contract into it and those who do not.

While the UK courts cannot strike down a provision or Act of the UK Parliament, they can declare it to be incompatible with the European Convention on Human Rights[384] ("ECHR")[385]. This has no strict legal effects but can be a political incentive for Parliament to repeal or modify legislation. Human rights arguments were raised in *L1* and *Al-Jedda* but were not decisive of the case outcome. Unless and until human rights arguments are successful in the courts, it is the parliamentary process then that is responsible for ensuring adequate human rights scrutiny is afforded to citizenship deprivation legislation. The examples of the AITC2004 and the NBB2021 provide polar opposite examples of the application of parliamentary scrutiny to citizenship deprivation measures.

The accelerated development of citizenship deprivation measures in the UK in the last two decades is in stark contrast to the measure as it stood in the 20th Century. On the face of it, the measures appear unjust. The current system of deprivation creates a two-tier system of citizenship that places millions of people in the UK at risk of having their British nationality removed, a disproportionate number of whom come from a minority ethnic background. The legislation deliberately discriminates between those who are born in the UK and those who are not, as well as between mono- and multinationals. The cumulative result is that being born British is a necessary but insufficient condition for protection against citizenship deprivation.

Out of two individuals, both born in the UK and alike in every way except that one of them also holds the nationality of another state, the mononational will always be entitled to greater protection by the state from the exercise of its deprivation power. Regardless of any genuine link or social fact of attachment between individual and state, a multinational will always be in a less privileged position. In the international forum, where nationality matters most, the mononational will be entitled to the privileges of UK membership regardless of their actions,

[383] Gibney, '"A Very Transcendental Power"'. 653
[384] 'European Convention Ofor the Protection of Human Rights and Fundamental Freedoms' (1950).
[385] 'Human Rights Act 1998' (1998). s4

while the multinational will awarded international protection only conditionally as a reward for good conduct. This is the effect of the legislation as legally enacted under domestic law. International law has declared the determination of a state's nationals to be within the exclusive domain of states, subject to international obligations. The question then is whether the UK is in accordance with the international human rights law as outlined in Chapter 2. It is this question that will be answered in the next and final Chapter.

4 CHAPTER 4 – Legality of UK Law

Whether the UK citizenship deprivation system is illegal under international law must be examined from several perspectives: the compatibility of the measures under the 1961 Convention prohibition against statelessness, the regional human rights obligations of the UK as a member of the Council of Europe, and the prohibition against the arbitrary deprivation of citizenship under Article 15 UDHR.

4.1 1961 Convention

Section 40(4A) BNA1981, inserted by the IA2014, introduced the power to deprive a naturalised individual of their citizenship even where to do so would render them stateless. As such, the statelessness conventions of 1954 and 1961 are applicable to deprivation resulting in statelessness on the seriously prejudicial to the vital interests test. Under Article 8(3) 1961 Convention, a state may retain its power to deprive its citizens of their nationality even where to do so would render them stateless. In accordance with this provision, the UK made the following declaration upon acceding to the 1961 Convention:

> "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 and 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."[386]

The UK was thus permitted to retain its power to render a naturalised person stateless only on the above two grounds. The power had existed in the BNA1948, and survived in the same form through amendments in 1964 and the enactment of the BNA1981. With the enactment of the NIA2002, the UK moved to align itself with new European standards with the aim of signing the ECN. The seriously prejudicial test to the vital interests test remained but alongside a prohibition against statelessness and an ability to deprive all citizens of nationality, regardless of how that nationality was acquired. Through this, the UK voluntarily legislated to remove its ability to render a person stateless. The seriously prejudicial to the vital interests test was itself removed with the NIA2006, to be replaced with the lower conducive to the public good test. However, the IA2014 reinstated the ability to render a naturalised citizen stateless on the basis

[386] 'United Nations Treaty Collection', accessed 1 May 2022, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=_en.

that "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"[387]. This follows precisely the wording of the declaration to the 1961 Convention, subject to slight modernisation. It is a deliberate move by the executive, following *Al-Jedda*, to reverse the effect of the NIA2002. The legality of the deprivation power under Article 40(4A) BNA1981 thus turns on the meaning of the word 'retain' in Article 8(3) of the 1961 Convention.

During the passing of the IA2014, the Secretary of State asserted that the reinstatement of the power was within the UK's international legal obligations[388]. There was no direct parliamentary challenge to the executive on the whether the new legislation fell under the meaning of "retain" in the 1961 Convention[389]. But there was a contradictory position under international law as to validity of the Secretary of State's position, which was raised by the Open Justice Society Initiative at the time of the Bill passing. As was discussed in Chapter 2, the intent of Article 8(3) was the preservation of specific grounds for deprivation. Under international law, states must have consideration towards the object and purpose of the treaty[390], which in the case of the 1961 Convention is the reduction of statelessness. Reduction is a relative term that implies a specific legislative direction. It is difficult to see how a measure that expands capacity to create statelessness can be described as adhering to reducing statelessness. Furthermore, the reduction objective must be understood in combination with Article 13 of the 1961 Convention, which states that the convention "shall not be construed as affecting any provisions more conducive to the reduction of statelessness", emphasising progression to a norm. The word 'retain' should be interpreted in light of this and the fact that Article 8(3) is an exception to the overall 1961 Convention. Within the law of treaty interpretation it could also be argued that the UK had not given an express written statement as to the withdrawal of the reservation it made under Article 8(3), as is a general rule of international law[391]. However, as the Open Justice Society states: "[t]he existence of the right to withdraw the reservation does not determine the extent of the right which is retained by the reservation"[392]. A stronger argument would be based on Article 13 of the 1961 Convention.

The UK's government's position is that Article 13 "cannot be read as detracting from Article 8", relying on the *Al-Jedda* judicial statements that the NIA2002 goes further than what is

[387] British Nationality Act 1981. S40(4A)(b)
[388] Bücken and de Groot, 'Deprivation of Nationality under Article 8 (3) of the 1961 Convention on the Reduction of Statelessness'. 49
[389] Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives*. 201
[390] 'Vienna Convention on the Law of Treaties', United Nations Treaty Series vol.1155 § (1969). art.31
[391] Vienna Convention on the Law of Treaties. Art.23(4)
[392] Open Society Justice Initiative, 'Opinion on Clause 60 of UK Immigration Bill and Article 8 of UN Convention on Reducing Statelessness', 5 March 2014, https://www.justiceinitiative.org/publications/opinion-clause-60-uk-immigration-bill-and-article-8-un-convention-reducing. para 32

necessary under the UK's international obligations[393]. As the Open Justice Society Initiative points out, this statement has been paraphrased and taken out of context. While the executive describes the judgment as saying that the UK goes further than what *is* necessary, Lord Wilson instead states in the UKSC *Al-Jedda* judgment that "Parliament *went* further than *was* necessary"[394]. This is consistent with the tone of Stanley Burnton LJ and Gross LJ's comments from the Court of Appeal judgment. While both judges bemoan the "lost"[395] inability to deprive Al-Jedda of his nationality, neither open the door for that power to be reinstated. Burnton specifically states that Parliament "did not legislate to retain that right [under Article 8(3)]"[396]. The tone and wording of these statements by no means provide authority for the retention of the UK's deprivation power under the 1961 Convention. While they may not necessarily provide evidence for the contrary proposition, that the power had *not* been retained, they are at the very least not appropriate support for the Secretary of State's position.

In any event, if it could be said that the UK has in fact retained its deprivation power under Article 8(3), the broadness of the terrorism offences constituted under domestic legislation and applied to the seriously prejudicial to the vital interests test are beyond the scope of the deprivation grounds under the 1961 Convention. A group of experts convened by UNHCR agreed that 'terrorist acts' may fall within the scope of acts that are seriously prejudicial to the vital interests of the state under the 1961 Convention. But the implication of the word 'may' is that not every terrorist act is applicable[397]. There is no international definition of terrorism, but the UK domestic definition is found in the Terrorism Act 2000[398]. The required conduct includes the commission of violent acts against people and property, as well as the endangerment to life, and creation of risks to public health or safety, and serious interference with electronic systems. The use or threat of this conduct must be designed to influence a government or organisation or intimidate the public, and must be done in pursuit of "advancing a political, religious, racial, or ideological cause". The list of unacceptable behaviours used by the UK as part of its conducive to the public good test was also incorporated into statute as national terrorism offences. Alongside the participation in or commission of terrorist acts, the list encapsulates such broad acts as, inter alia, the encouragement and glorification of terrorism through writing, publishing and disseminating material[399]. Such acts are treated equally whether they are committed within and outwith the UK[400].

[393] Joint Committee on Human Rights, 'Legislative Scrutiny: Immigration Bill (Second Report)', 3 March 2014, https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/14205.htm. para 28
[394] Secretary of State for the Home Department v Al -Jedda [2013] UKSC 62. Para 22 Emphasis added
[395] Al-Jedda v. Secretary of State for the Home Department (Rev 2), 358. Para 130
[396] Al-Jedda v. Secretary of State for the Home Department (Rev 2), 358. Para 127
[397] United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5'. para 68
[398] 'Terrorism Act 2000' (2000). s1
[399] Terrorism Act 2006. Part 1
[400] Terrorism Act 2006. S17

The UNHCR expert group states that the phrase 'vital interests' as it exists within the 1961 Convention refers to acts that "threaten the essential function"[401] of the state, and are inconsistent with the 'duty of loyalty' to the state of nationality. They specify that the Article 8(3) exception "applies only to conduct which is seriously prejudicial to the vital interests of that State, rather than those of other States with which it has friendly relations"[402]. In contrast to the UK domestic terrorism definition, the threshold is higher that criminal offences of a general nature[403] and the actions must be directly targeting the state that is seeking to deprive the individual of their nationality. It is highly doubtful that, for example, an individual publishing pamphlets in Syria that support the commission of a terrorist act against the Syrian government could be considered an act that threatens the essential function of the United Kingdom. Such an act would not be sufficient to engage the 1961 Convention Article 8(3) exception, but UK domestic law allows for this possibility in its interpretation of the prejudicial to the vital interests test. The reintroduction for deprivation resulting in statelessness under the IA2014 is thus, contrary to what the Secretary of State has stated, not a matter of "returning our position to the scope of our declaration under [the 1961 Convention]"[404]. The extent of the current deprivation power, if it could be said to have been retained under the 1961 Convention, would therefore in any event be ultra vires to that Convention.

There is thus a strong argument to be made that s40(4A) BNA1981 is not in accordance with the 1961 Convention.

4.2 Regional Human Rights Law

Europe was forced to reckon with questions of nationality upon the breaking up of the former Soviet states in the 1990s, which spurred the creation of the ECN and the Convention on the Avoidance of Statelessness in Relation to State Succession[405]. A study examining national legislations over the period 2000 to 2022 described Europe as "the epicentre of the expansion of security-based deprivation powers"[406]. Out of the 37 countries globally that had expanded such powers, 18 of those were in Europe, accounting for nearly 40% of European states[407]. The enforcement capabilities of the ECtHR, effected through its compulsory jurisdiction and the right for individual to bring applications, is part of what make the European human rights

[401] United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5'. Paras 61-2
[402] United Nations High Commissioner for Refugees. Para 68
[403] Institute on Statelessness and Inclusion, 'Commentary to the Principles on Deprivation of Nationality as a National Security Measure'. para 74
[404] Open Society Justice Initiative, 'Opinion on Clause 60 of UK Immigration Bill and Article 8 of UN Convention on Reducing Statelessness'. para 16
[405] Adjami and Harrington, 'The Scope and Content of Article 15 of the Universal Declaration of Human Rights'. 99
[406] Institute on Statelessness and Inclusion, 'Instrumentalising Citizenship in the Fight Against Terrorism: A Global Comparative Analysis on Deprivation of Nationality as a National Security Measure'. 5
[407] Institute on Statelessness and Inclusion. 26

system so successful[408]. And yet, there is no human right to nationality in the ECHR. The ECtHR has acknowledged that issues of nationality deprivation may engage Article 8 rights. But despite Europe's role at the forefront of the security-based deprivation measures, the ECtHR has not taken up this specific issue in a significant way.

4.2.1 European Convention on Nationality

The ECN is the most comprehensive and progressive regional treaty on nationality in Europe, and has been ratified by 21 states with a further 8 states having signed[409]. As has been discussed, it was influential in the passing of the NIA2002, even though the UK later backtracked on its intention to sign. The right to nationality and the prohibition against arbitrary deprivation of nationality are principles in the ECN[410]. Article 7 also states that the general loss of nationality at the initiative of the state, i.e. deprivation without the qualifiers of arbitrariness or the result of statelessness, is also prohibited. However, there is an exception in Article 7 that allows deprivation for "conduct seriously prejudicial to the vital interests of the State Party"[411], subject to the general prohibitions of the ECN. The Explanatory Notes suggest that this exception may not be sufficient to justify deprivation on terrorism grounds, stating that it includes treason and work for a foreign secret service "but would not include criminal offences of a general nature, however serious they may be"[412]. This is consistent with the 1961 Convention understanding of the seriously prejudicial to the vital interests test.

The ECN includes a general non-discrimination provision in Article 5(1), prohibiting discrimination in nationality laws on the basis of "sex, religion, race, colour or national or ethnic origin"[413]. In Article 5(2), the ECN goes further, stating that states "shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently"[414] in the determination of their nationality laws. Generally through the ECN, states parties are to recognise other states parties' nationality laws only to the extent that they conform to international law, including the principles on the right to nationality and against arbitrary deprivation[415]. But this does not include the Article 5(2) prohibition against discrimination between birth nationals and nationals by other means of acquisition, which is worded as only a guiding principle and not a mandatory rule[416]. The

[408] Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives*. 91
[409] 'Chart of Signatures and Ratifications of Treaty 166', Council of Europe Treaty Office, accessed 4 May 2022, https://www.coe.int/en/web/conventions/full-list; 'Chart of Signatures and Ratifications of Treaty 166'.
[410] European Convention on Nationality. Art.4
[411] European Convention on Nationality. Art.7(2)
[412] A. Walmsley, 'Nationality Issues and the Denial of Residence in the Context of the Fight against Terrorism CDCJ-BU (2006) 22', 5 December 2006. 4.1
[413] European Convention on Nationality. art.5(1)
[414] European Convention on Nationality. article 5(2)
[415] European Convention on Nationality. Art.3(2)
[416] European Convention on Nationality. Art.5(2)

ECtHR's engagement with Article 5(2) ECN was tested in the case of *Biao*[417]. Here the applicant was arguing against discrimination between born citizens and those who had acquired citizenship later in life in the context of family reunification legislation in Denmark. He sought to rely on Article 8 ECHR, alone and also in conjunction with Article 14 ECHR, as well as Article 5(2) ECN. The Grand Chamber acknowledged that Article 5(2) was not a binding rule in itself, but highlighted that "the paragraph was a statement of intent aimed at eliminating the discriminatory application of rules in matters of nationality between nationals from birth and other nationals, including naturalised persons"[418]. The Grand Chamber found that the ECN indicated a new European trend, which it considered to be a relevant consideration[419]. In a separate concurring opinion, one judge considered that, contrary to the lower court, Article 5(2) ECN was intended to go further than Article 14 read in conjunction with Article 8 ECHR, and should be read as a general provision. The UK has not ratified the ECN but the *Biao* case shows the growing recognition by the ECtHR of changing standards in the extent to which the application of human rights principles can affect nationality law. But the low ratification rate perhaps belies an alternate position held by the European community, particularly as regards Article 5(2), which is stated to be one of the main reasons behind the low take up of the ECN[420].

4.2.2 Council of Europe Soft Law

In 2006 the Council of Europe issued a study[421] directed at the European Committee of Legal Co-Operation with the purpose of influencing future international instruments. The study envisaged several scenarios involving best practice for the deprivation of a multinational. Within these scenarios, the individual was convicted of terrorism offences as a necessary ground for considering deprivation measures. The study suggested that deprivation measures used on the grounds of mere suspicion of terrorism would be arbitrary, and in any event that prosecution should be a priority over deprivation[422]. It denounced deprivation of mononationals on grounds of statelessness[423] but also noted that it could not see why multinationals as a result of a terrorism conviction would be subject to a deprivation measure that could not be used against a mononational. In any event, it stressed co-operation between the states of nationality when considering a deprivation that would not result in statelessness. The study emphasised a solution that had at its root the principle that "States should bear the consequences for the situations where their residents have become terrorists" and should "consider why an individual whose family has been previously accepted as immigrants has become a terrorist"[424]. It

[417] Biao v. Denmark, No. 38590/10 (European Court of Human Rights (Grand Chamber) 24 May 2016).
[418] Biao v. Denmark. Para 132
[419] Biao v. Denmark. Para 132
[420] Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives*. 84
[421] Walmsley, 'Nationality Issues and the Denial of Residence in the Context of the Fight against Terrorism CDCJ-BU (2006) 22'. 4.4
[422] Walmsley. 4.4
[423] Walmsley. 4.2
[424] Walmsley. 4.3

suggested that the state of nationality that was the convicted person's previous residence should not seek to deprive the individual of nationality and should accept that person back into their territory if convicted abroad. Any states of nationality where the person had not been resident would be justified in depriving the person of that nationality and deporting them post-conviction if they had been convicted on their territory. The study went so far as to say that the non-resident state may also revoke nationality on the ground of lack of effective links with the country, invoking *Nottebohm*. In the event that the individual was convicted in a third country, one in which they did not hold nationality, the study found it "clearly necessary" that this country should be able to deport the terrorist post-conviction, and for this reason the state of residence should not deprive the individual of nationality[425]. This residency-based approach, underlined by the statelessness prohibition, offers a practical compromise that recognises the importance of procedural safeguards, through the emphasis on deprivation following a terrorism conviction, as well as the inherent fairness of a state taking responsibility for the actions of its resident nationals. At the very least the study recognises the inherent unfairness of states forcibly assigning responsibility for its nationals to states that lack a sufficient connection to origins of the criminal behaviour through depriving them of nationality while in they are in third states.

There have been indications of a more recent normative shift in the Council of Europe. In a 2019 Resolution, the Parliamentary Assembly of the Council of Europe ("PACE") identified the European trend towards deprivation as a counter-terrorism measure, including where its sole purpose was the exclusion of individuals from state territory[426]. PACE noted the development of the ECtHR towards recognition of some aspects of the right to nationality through its interpretation of Article 8 ECHR[427]. It stated that deprivation of nationality on terrorism grounds should be decided or reviewed by a criminal court, not be discriminatory, not lead to statelessness, have suspensive effect, be proportionate to the pursued objective, and only applied if it can be foreseen that other domestic measures will be ineffective[428]. It issued a Recommendation to the Committee of Ministers for the commission of a comparative study on such uses of deprivation measures in Council of Europe states, as well as a draft of guidelines on deprivation of nationality and possible alternative counter-terrorism measures[429]. The Committee of Ministers' response highlighted that the sovereign right of states to determine their own nationals was limited by the requirement for lawfulness and non-discriminatory effects. As a solution it urged to states to sign the ECN, but also considered that guidelines on the application of the seriously prejudicial to vital interests test as it existed within

[425] Walmsley. 4.3
[426] Parliamentary Assembly of the Council of Europe, 'Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach? Resolution 2263 (2019)', 25 January 2019. para 5
[427] Parliamentary Assembly of the Council of Europe. para 3
[428] Parliamentary Assembly of the Council of Europe. Para 7
[429] Parliamentary Assembly of the Council of Europe, 'Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach? Recommendation 2145 (2019)', 25 January 2019.

the ECN could be looked into. The Council of Ministers considered that the comparative study recommended by PACE could fall under the remit of the activities of the Council of Europe's Counter-Terrorism Strategy 2018-22, specifically the 'Collection of best practices with regard to de-radicalisation, disengagement, and social reintegration'[430]. This movement from the Council of Europe adopts an appropriate response to the trend in Europe by identifying the reasons why states deprive their nationals of citizenship and seeking to address this within the counter-terrorism and human rights frameworks, with a focus on rehabilitation of those who would otherwise be deprived. It indicates a desire among legislators in Europe to look behind the traditional reservation of nationality matters to states, in recognition of the overriding human rights concerns of statelessness and non-discrimination.

4.2.3 European Convention on Human Rights

The ECtHR has repeatedly reiterated the fact that there is no right to a nationality under the ECHR, but its provisions are still relevant in nationality questions. A number of aspects of the UK system potentially interact with the substantive provisions of the rights to private and family life and non-discrimination. Also relevant are procedural aspects of the ECHR, such as in the right to an effective remedy and a fair trial, and the rights contained within the optional protocols on expulsion, as well as the question of extraterritorial application of ECHR rights.

4.2.3.1 Private and Family Life: Article 8

The ECtHR has acknowledged that nationality questions are capable of engaging the right to private and family life under Article 8. It has ruled that the concept of 'private life' "can embrace multiple aspects of the person's physical and social identity", and that it "cannot be ruled out that an arbitrary denial of citizenship might in certain circumstances raise an issue under Article 8"[431]. But this area is one in which the ECtHR margin of appreciation plays a significant role, which is unsurprising given the traditional assignation of nationality to the reserved domain of states.

The case of *Ramadan*[432] established that when examining whether or not a deprivation decision is arbitrary the ECtHR will examine both the arbitrariness of the decision and the consequences for the individual. This is the same test as the one used for cases when nationality has been denied, as opposed to deprived, which the ECtHR justifies on the basis that it considers the impact on the private life of the individual deprived of nationality to be the same or else bigger

[430] Parliamentary Assembly of the Council of Europe, 'Withdrawing Nationality as a Measure to Combat Terrorism: A Human Rights-Compatible Approach? Reply to Recommendation 2145 (2019)', 12 November 2019. Paras 2-4

[431] Genovese v. Malta, No. 53124/09 (European Court of Human Rights (Fourth Section) 11 October 2011); Karassev v. Finland, No. 31414/96 (European Court of Human Rights (Fourth Section) 12 January 1999).

[432] Ramadan v. Malta, No. 76136/12 (European Court of Human Rights (Fourth Section) 21 June 2016).

than the impact of a denial of nationality[433]. This equivocation has been criticised on the grounds that international law has been more receptive to questions of deprivation, such as through the 1954 and 1961 statelessness conventions, than imposing a rule regarding acquisition of nationality[434]. The applicant in *Ramadan* had lost his previous nationality and gained Maltese nationality upon his marriage to a Maltese citizen. His Maltese nationality was then revoked on the annulment of the marriage 13 years later for the reason that the authorities believed it had been carried out for the purpose of acquiring Maltese nationality. *Ramadan* is troubling in the sense that the ECtHR acknowledges that in this case the applicant was legally stateless as a result of the deprivation. Despite this, the ECtHR held that this did not render the deprivation decision arbitrary. It took a procedural rather than substantive view on the question of arbitrariness, noting that the rules regarding deprivation were clearly founded in domestic law.

Human rights arguments have been advanced in domestic cases in the UK but have not been successful in comparison to statelessness arguments. By virtue of s6 of the Human Rights Act 1998, the executive must exercise their powers in accordance with the ECHR rights of the affected individual. The UK government acknowledged with the coming into force of the IA2014 that nationality issues could be covered under Article 8, but asserted that the deprivation measures leading to statelessness were promulgated by law, with the high threshold ensuring they were in pursuit of a necessary objective of "national security, public safety, or potentially, the economic well-being of the UK", and would be considered on a case-by-case basis as to proportionality[435]. The government denied that an out-of-country deprivation decision would be subject to the jurisdiction of the ECHR, but accepted that if there were family members of the deprived person remaining in the UK that such a deprivation could impact their Article 8 rights. It stated that as with deportation decisions, the family's Article 8 rights would be considered. But for the same reasons as for the deprived person, it considered that there would be no breach of Article 8[436].

These issues were raised in cases such as *Al-Jedda* and *L1*. In *Al-Jedda* an argument was advanced that the deprivation decision was contrary to Al-Jedda's right to family life under Article 8[437]. The UKSC found that the deprivation decision did not in practical terms interfere in the applicant and his family's right to family life, as the interactions between them had

[433] Ramadan v. Malta. Para 85
[434] Marie-Bénédicte Dembour, 'Ramadan v. Malta: When Will the Strasbourg Court Understand That Nationality Is a Core Human Rights Issue?', *Strasbourg Observers* (blog), 22 July 2016, https://strasbourg.weichie.dev/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/.
[435] Home Office, 'Immigration Bill. European Convention on Human Rights. Supplementary Memorandum by the Home Office', 29 January 2014. paras 12-3
[436] Home Office. paras 12-3
[437] Al-Jedda v. Secretary of State for the Home Department. Para 23

generally been conducted across multiple countries[438]. On the basis of the assessment of Al-Jedda's risk to national security, the UKSC also stated that were there to be an interference, it would be justified for being necessary and proportionate. The former condition was on the basis that the effect of the deprivation would prevent Al-Jedda establishing a base in the UK and would ensure that he could not use the freedom that came with a British passport to travel to other countries. The UKSC's decision on the latter condition was highly deferential to the assessment by the SIAC that Al-Jedda's presence in the UK would be contrary to national security and that the measure of deprivation would be "more secure" than the lesser, but still highly restrictive, control order measure[439]. The *L1* case also highlighted Article 8 in the context of L1's children being affected by the deprivation decision. However, the Secretary of State submitted that three of L1's children held the nationality of another state in addition to their British nationality, and had been living primarily in that other state with L1 for many years. As such the impact of the deprivation of L1's British nationality would not have a significant enough effect to outweigh the security considerations used to justify the deprivation decision[440]. Article 8 is not an absolute right and, when subjected to a balancing exercise, the UK Courts have shown deference in practice to the assessments of the national security risks conducted by the Secretary of State, making it unlikely that an Article 8 challenge will be successful on its own in challenging deprivation decisions in domestic courts.

The question of the legality of the UK deprivation system was directly raised before the ECtHR in the 2017 admissibility decision of *K2 v United Kingdom*[441]. In this case the applicant had been deprived of his British nationality on the basis that it was conducive to the public good, following s40(2) BNA1981. The ECtHR held that K2's Article 8 claim was inadmissible on the basis that it was manifestly ill-founded[442]. First, following the test in *Ramadan*, the ECtHR found the deprivation not to be arbitrary on the basis that it was in accordance with the law, carried out diligently and swiftly, and with sufficient procedural safeguards[443]. Second, as the applicant was not rendered stateless and had in fact left the UK voluntarily prior to the deprivation decision being made, the ECtHR found that the consequences of the deprivation were not sufficient to violate Article 8[444]. The ECtHR thus did not offer more than a strict procedural analysis of the deprivation system in the UK, considering this to be sufficient for Article 8 compatibility without requiring a consideration on the merits.

While the use of Article 8 ECHR as a means of challenging UK deprivation measures is theoretically possible, in practice the ECtHR has not been open to engaging very much with

[438] Al-Jedda v. Secretary of State for the Home Department. Para 27
[439] Al-Jedda v. Secretary of State for the Home Department. Paras 28-30
[440] L1 v Secretary Of State For The Home Department. Para 27
[441] K2 v. The United Kingdom, No. 42387/13 (European Court of Human Rights (First Section) 7 February 2017).
[442] K2 v. The United Kingdom. Para 64
[443] K2 v. The United Kingdom. Para 60
[444] K2 v. The United Kingdom. Para 63

nationality deprivation in a substantive way. Not only has the Court shown little recognition of the effect of deprivation beyond statelessness, *Ramadan* shows that the ECtHR is perhaps willing to accept a deprivation decision even where it is does result in statelessness. However, there have been indications of movement by the ECtHR on the question of Article 8 in conjunction with the discrimination provision in Article 14.

4.2.3.2 Non-discrimination: Article 14

Article 14 prohibits discrimination on a non-exhaustive list of grounds including national or ethnic origin and can be applied only to measures that impact other ECHR rights. Although there exists a standalone discrimination provision within the ECHR, this is in the Optional Protocol 12 which the UK has not signed. However, as the ECtHR has accepted the possibility of deprivation cases engaging Article 8, Article 14 becomes a relevant consideration. Where a measure impacts the ECHR rights of individuals along one of the Article 14 grounds, lacks a legitimate aim, and fails in a test of proportionality it can be found to be discriminatory. Measures can be indirectly discriminatory against a group "even where it is not specifically aimed at that group and there is no discriminatory intent" provided the measure lacks "objective and reasonable" justification[445]. In the field of nationality deprivation, the question is then whether discrimination between naturalised and non-naturalised citizens, or else between mono- and multinationals, can be sufficient to engage Articles 14 and 8. While the applicant in *K2* submitted an argument to the ECtHR that he had been discriminated against in comparison to British citizens not holding a second nationality, this argument was not given judicial consideration on the basis that it had not been raised previously and so domestic proceedings had not been exhausted[446]. This key issue of discrimination in UK nationality legislation has not therefore been considered in any substantive way by the ECtHR.

In the recent Grand Chamber decision in *Biao*, the applicants argued that there was a violation of Article 8 in conjunction with Article 14. Article 8 was engaged through the issue of family reunification laws, but Article 14 related to indirect discrimination in the context of nationality. The applicants' argument had two approaches, first that that they had been treated differently as naturalised Danish citizens from born Danish citizens, and secondly that, as Danish citizens of non-Danish ethnic origin, they had been treated differently from Danish citizens of Danish ethnic origin[447]. The ECtHR reaffirmed that discrimination on the basis of ethnic origin was not "capable of being justified in a democratic society" as it equated to racial discrimination[448]. Although the legislation did not directly discriminate on the basis of ethnic origin, the applicants submitted that in practice, most Danish born nationals were ethnically Danish, while those who acquired Danish nationality subsequently "would overwhelmingly be of different

[445] Biao v. Denmark. Paras 90-1
[446] K2 v. The United Kingdom. Paras 68-70
[447] Biao v. Denmark. Para 62
[448] Biao v. Denmark. Para 94

ethnic origins" than Danish[449]. The ECtHR held that Article 14 had been violated through indirect discrimination on grounds of ethnic origin that "[placed] at a disadvantage, or [had] a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish". The ECtHR found no objective justification for the measure, and took into account developing international standards of non-discrimination between born and naturalised citizens.

Judge Pinto de Albuquerque agreed with the finding of a violation of Article 14 but disputed the reasoning, agreeing with the applicants' submission that there was deliberate discriminatory intent on the part of the legislators along ethnic lines[450]. Given the fundamental objection to racial discrimination, he noted that for the purposes of Article 14, measures that discriminate along this line must be scrutinised with the same intensity regardless of discriminatory intent, and was critical that the majority judgment had attempted to look behind the legislation for an objective justification[451]. Through searching for it, the court impliedly allows for the existence of objective justification for indirect discrimination along racial lines. In his finding that there was indirect discrimination along racial lines, Judge de Albuquerque had determined that this alone was sufficient to establish the measure had no legitimate aim and thus violated Article 14. Overall the *Biao* judgment shows movement by the ECtHR away from its previously more permissive approach as regards immigration measures that lack specific discriminatory intent, moving instead towards an Article 14 centric approach that promotes the prohibition of discrimination along racial lines, preferencing the use of nationality statistics to show discriminatory effect on certain ethnic groups[452]. However, the decision should be read in light of the narrow margin of appreciation offered to states in the field of family reunification[453].

If it were to be found that deprivation measures that discriminate between born and naturalised citizens constituted a violation of Article 14 in combination of Article 8, this could be sufficient to find that Article 40(4A) is discriminatory. But the risk with findings of discrimination is that the response of states will be to level down, reducing the benefit for these previously advantaged to the level of the presently disadvantaged. If it is held that the UK has not retained its deprivation power under Article 8 of the 1961 Convention, the prohibition against statelessness should provide protection against a levelling down response. This would be an appropriate human rights response to Article 40(4A) BNA1981 which currently permits deprivation of naturalised British mononationals but not born British mononationals where the result would be statelessness.

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[449] Biao v. Denmark. Para 102
[450] Biao v. Denmark. Separate Opinion para 1
[451] Biao v. Denmark. Separate Opinion para 7
[452] Alix Schlüter, 'Biao v. Denmark: Grand Chamber Ruling on Ethnic Discrimination Might Leave Couples Seeking Family Reunification Worse Off', *Strasbourg Observers* (blog), 13 June 2016, https://strasbourg.weichie.dev/2016/06/13/biao-v-denmark-grand-chamber-ruling-on-ethnic-discrimination-might-leave-couples-seeking-family-reunification-worse-off/.
[453] Biao v. Denmark. Paras 138-9

However, where deprivation occurs against multinationals through s40(2) BNA1981, there cannot be said to be discrimination along ethnic grounds as described in *Biao*, there being no differential treatment between born and naturalised British citizens under UK legislation as a result of the NIA2002. But this belies the contractual relationship put forward by the UK government as justification for deprivation resulting in statelessness. The UK government suggests that statelessness as a result of deprivation is justified on the basis that a voluntary contract is formed by naturalisation. This has the effect that naturalised British citizens with multiple nationalities are afforded preferential treatment when faced with deprivation. Also, the contractual relationship is not relevant to born British nationals as nationality acquired by birth cannot be said to have been voluntarily acquired. While born British mononationals are not subject to deprivation, born British multinationals are subject to deprivation. While they would not be subject to statelessness, they are at a disadvantage to born British mononationals while also being caught under the language of deprivation justified on the basis of a voluntary contract. The bottom line is that if you are born British, but have links to another country through an additional nationality, your British nationality is less secure than those born British without another nationality. Invariably this disproportionately impacts British citizens whose parents are immigrants.

It is unlikely that any tentative moves by the ECtHR to accept discrimination in deprivation of born and naturalised mononationals on ethnic grounds would stretch to discrimination between mononationals and multinationals, the latter category likely to be less overwhelmingly divided along ethnic lines and less at a risk of statelessness. Gibney points to the global rise in national acceptance of dual nationality in the last decades to highlight the irony that the increased practice of denationalisation "simultaneously affirms the strength of norms on statelessness *and* demonstrates just how much states would like to escape them"[454]. However, ECtHR jurisprudence on Article 14 and Article 8 does open the door to possible challenge against the UK citizenship deprivation measures on the basis of discrimination along ethnic lines against naturalised citizens.

4.2.3.3 Procedural Rights

Against all arguments of discrimination between naturalised and non-naturalised citizens, and mono- and multinationals, the UK's baseline stance is that deprivation measures are in practice only applicable to terrorists, and the general public should not be concerned. Disregarding for the moment the valid arguments of the long term social damage these measures have towards the trust between the UK executive and UK immigrant and minority ethnic communities, the procedural aspects of deprivation are troubling with respect to how effectively they ensure that it is in fact only seriously dangerous people who are subject to deprivation. The NIA2002

[454] Institute on Statelessness and Inclusion, 'The World's Stateless Report 2020: Deprivation of Nationality'. 209

established that the appellate procedure for deprivation cases on matters of national security in the UK is through the SIAC[455]. This procedure has been the subject of repeated human rights criticisms, and raises many potential issues under Article 6 ECHR. Some key concerns are the secrecy of proceedings, the low standards of proof, and the deference of the courts to the assessments of the executive. As stated above, when considering whether a deprivation of nationality violates Article 8, the ECtHR looks to whether the decision is arbitrary. Using a procedural understanding of arbitrariness in the case of *K2*, this finding by the ECtHR reflects a long line of jurisprudence, that has been followed by domestic courts, on the legality of the SIAC under Article 6. However, this caselaw is complex and controversial and merits independent examination.

While the SIAC was created through statute, it was itself a direct response to the 1996 ECtHR Grand Chamber decision in *Chahal*[456], which examined the previous UK system for reviewing deprivation decisions and found it to be contrary to Article 6. Since 1918, there had been no appeals system for deprivation decisions. The BNSA1918 instead created a committee independent from the government. Weil and Handler argue that this system was instrumental in the reduction of deprivation cases throughout the 20th Century, as the committee was able to wield remarkable political influence through its ability to embarrass the government in its exercise of an otherwise legally unchecked power[457]. They highlight that the deprivation power was originally created in the context of a xenophobic fear by the British public against German citizens naturalised and living in the UK throughout the First World War. Contemporary liberal thinkers could not prevent legislation allowing for the deprivation of British nationality and instead sought to limit the state's discretion through the creation of a review committee. From its creation, this committee was a compromise between the conservative understanding of citizenship as a privilege and the liberal idea that citizenship was instead "a contract between the state and its naturalised citizens that conferred benefits and obligations on both" [458]. In its early years, and against a popular appetite for denationalisation, the committee only recommended deprivation in half of its referred cases[459]. The committee, came to be known colloquially as the 'Three Wise Men', issued non-binding ex ante advice to the Secretary of State on the legality of deprivation decisions. The affected individual was not permitted legal representation, nor were they allowed to hear the case against them. On the basis of these aspects, the ECtHR in *Chahal* found that the Three Wise Men did not constitute a court for the purposes of Article 5(4) ECHR[460]. Consequential to this finding, the ECtHR continued:

[455] Nationality, Immigration and Asylum Act 2002. S4(1)-(2)
[456] Chahal v. United Kingdom, No. 22414/93 (European Court of Human Rights (Grand Chamber) 15 November 1996).
[457] Weil and Handler, 'Revocation of Citizenship and Rule of Law'. 298
[458] Weil and Handler. 305-7
[459] Weil and Handler. 305-7
[460] Chahal v. United Kingdom. Para 130

> "The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved […]."[461]

The ECtHR then implicitly endorsed the Canadian system of security-cleared counsel as a sufficient safeguard that balanced procedural justice with the rights of the individual. On the basis of this judgment[462], the UK adopted the Special Immigration Appeals Commission Act 1997[463] ("SIAC1997"), replete with its own form of security-cleared counsel in the form of 'special advocates'[464].

Appeals against deprivation decisions will go to the SIAC in cases where the Secretary of State made their decision based wholly or in part in reliance of information they deem should not be made public on one of three grounds: in the interests of national security, in the interests of the relationship between the UK and another country, or otherwise in the public interest[465]. Sitting in the SIAC will be three panel members that must as a minimum comprise a current or former holder of high judicial office and a current or former Asylum and Immigration First-Tier or Upper Tribunal judge[466]. The third member will normally be a national security expert[467]. The appeal can be heard through a combination of open and closed proceedings. In closed material proceedings ("CMPs"), the content of certain material that is deemed unable to be disclosed for one of the above reasons will be kept from the appellant. This material may be decisive in the appeal, with the effect that an individual can be deprived of their British nationality without knowing the evidence against them. This clearly runs contrary to fair trial principles. The role of special advocate was created to counterbalance this unfairness, as the special advocate would be able to view closed material and act in the interests of the appellant in challenging that material within CMPs.

In 2009, the ECtHR examined the legality of CMPs in the *A* case, which concerned the application of Article 5(4), a standard which the ECtHR stated applied equally to Article 6(1) under criminal law given the impact on the fundamental rights of the applicants[468]. The ECtHR acknowledged that proceedings will be in accordance with Article 6 even when certain evidence is withheld from one of the parties to a criminal trial on the grounds of public interest

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461 Chahal v. United Kingdom. Para 131
462 John Ip, 'The Rise and Spread of the Special Advocate', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 1 July 2008), https://papers.ssrn.com/abstract=1292537. 6
463 'Special Immigration Appeals Commission Act 1997' (1997).
464 Special Immigration Appeals Commission Act 1997. S6
465 British Nationality Act 1981. S40A(1)-(2)
466 Special Immigration Appeals Commission Act 1997. Sch.1 s.5
467 Jackson, *Special Advocates in the Adversarial System*. 17
468 A v United Kingdom, 49 E.H.R.R. 29 (European Court of Human Rights (Grand Chamber) 2009). Para 217

provided there were sufficient procedural safeguards[469]. Specifically in *A*, the ECtHR looked at the question as to whether special advocates were able to counterbalance the lack of procedural fairness in national security cases[470]. It was held that CMPs should provide to the applicant "sufficient information about the allegation against him to enable him to give effective instructions to the special advocate", stating that cases that were decided "solely or to a decisive degree on closed material" would be incompatible with Article 5(4) where the open material consisted "purely of general assertions"[471]. This decision was made with the proviso that Article 5(4) "does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances" [472], leaving the door open for fact-dependent interpretations of the application of the judgment. The scope of the requirement for *A*-type disclosure in CMPs was unclear, but it seemed that what was key was the quality and not the quantity of the information[473].

The UK courts interpreted *A* as a principle whereby the appellant should be provided with the "core irreducible minimum" of the case against them[474] which would "vary from case to case"[475]. This principle was developed through the national courts to the effect that it applied only in CMPs where the appellant's fundamental rights, such as their personal liberty, were at stake[476]. Therefore, cases that did not deal with such severe consequences for the appellant would be in accordance with the ECHR even without the requirement for *A*-type disclosure. The ECtHR in 2018 confirmed the UK's approach to *A*, emphasising that proceedings must be assessed as a whole, including any safeguards, to determine fairness, balancing national security interest with the individual's procedural rights[477]. Over the course of a decade, the ECtHR shifted from approaching cases from the perspective of the applicant in the form of ensuring the 'core irreducible minimum' of disclosure, to an approach grounded in counterbalancing interests of both parties. Its finding in *Tariq* in particular has been criticised for its "unsatisfactory brevity" in handling the issue of the substantial incursion of the applicant's procedural right to an equality of arms[478]. Article 6 is not an absolute right, but this change is emblematic of Lord Hope's warning against complacency in *AF*:

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469 A v United Kingdom, 49 E.H.R.R. para 206
470 A v United Kingdom, 49 E.H.R.R. para 209
471 A v United Kingdom, 49 E.H.R.R. para 220
472 A v United Kingdom, 49 E.H.R.R. para 203
473 Daniel Kelman, 'Closed Trials and Secret Allegations: An Analysis of the "Gisting" Requirement', *The Journal of Criminal Law* 80, no. 4 (1 August 2016): 264–77, https://doi.org/10.1177/0022018316657939. 267
474 Secretary of State for the Home Department v. AF & Anor, No. 28 (House of Lords 10 June 2009). Para 81
475 Secretary of State for the Home Department v. AF & Anor. Para 86
476 Tariq v Home Office, UKSC 452 (Supreme Court 2011). Lord Hope para 81
477 Gulamhussein and Tariq v. The United Kingdom, No. 46538/11 and 3960/12 (European Court of Human Rights (First Section) 3 April 2018). Paras 70-1
478 Lewis Graham, 'Tariq v. United Kingdom: Out with a Whimper? The Final Word on the Closed Material Procedure at the European Court of Human Procedure at the European Court of Human Rights', *European Public Law* 25, no. 1 (1 March 2019), http://kluwerlawonline.com/journalarticle/European%20Public%20Law/25.1/EURO2019004. 53

> "The consequences of a successful terrorist attack are likely to be so appalling that there is an understandable wish to support the system that keeps those who are considered to be the most dangerous out of circulation for as long as possible. But the slow creep of complacency must be avoided. If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle."[479]

The ECtHR places great stock in safeguards such as special advocates, but special advocates themselves have raised concerns. One special advocate preferred to resign rather than allow their presence to provide a "fig-leaf of respectability and legitimacy"[480] to proceedings described as "Kafkaesque" by the UK Joint Human Rights Committee[481]. Warnings have been raised that the presence of special advocate should not distract from "the inherent unfairness of CMPs"[482]. The normalisation of such procedures through their legitimation by human rights courts is a recent controversial phenomenon.

In the context of deprivation measures engaging Article 8, the ECtHR's assessment that the existence of the SIAC procedure indicates a lack of arbitrariness should therefore not be taken at face value to indicate that the procedures themselves are fair. Ultimately, the ECtHR has decided that the UK system is compliant with Articles 5 and 6 ECHR. The ECtHR in *K2* found the existence of UK system as it stood was sufficient to prevent an arbitrary decision. It also examined the second aspect of the *Ramadan* test, namely the consequences of the measure for the individual, noting that the applicant was not rendered stateless and his family life was not significantly affected[483]. Given the ECtHR's stance and its endorsement of the UK deprivation system, it is unlikely that a challenge to UK citizenship deprivation measures would be successful using Articles 5 and 6 ECHR.

4.2.3.4 Expulsion

Also relevant to the UK deprivation measures is Article 3 Protocol 4, which is the only reference to nationality within the ECHR. Under this provision, member states are not permitted to expel their own nationals. During the drafting of Article 3 Protocol 4, the majority of the drafting committee agreed with the principle that a deprivation of nationality should not occur for the purpose of a state expelling one of its own nationals. This addition was rejected due to the sensitivity of the topic of deprivation of nationality, with the observation that such a deprivation would be difficult to prove[484]. The ECtHR has addressed the question of the legality

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[479] Secretary of State for the Home Department v. AF & Anor. Para 84
[480] Jackson, *Special Advocates in the Adversarial System*. 116
[481] Joint Committee on Human Rights, 'Nineteenth Report Session 2006-07'. Para 220
[482] Martin Chamberlain, 'Special Advocates and Amici Curiae in National Security Proceedings in the United Kingdom', *University of Toronto Law Journal* 68, no. 3 (1 July 2018): 496–510. 507
[483] K2 v. The United Kingdom. Para 64
[484] Council of Europe, 'Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other than Those

of a deprivation decision being made for the purposes of facilitating an expulsion decision under of Article 3 Protocol 4 and Article 8 in its latest guidance issued 30 April 2022. The guidance stated that in the event of a *denial* of nationality followed by an expulsion, "the existence of a causal link between the two decisions can create the presumption that the denial of citizenship was intended to make the expulsion possible"[485] and may raise an issue under Article 3 Protocol 4. It stated that this was truly similarly for deprivation cases, "especially where such a decision is taken for the purpose of expelling the applicant"[486]. The PACE has also acknowledged that such cases included direct or indirect discrimination against naturalised citizens contrary to Article 5(2) ECN, to which the UK is not a party, but also Article 9 of the 1961 Convention, to which the UK is a party[487].

This follows cases such as *Slivenko*[488], which concerned state succession issues but involved a family of non-nationals being deported from the state in which they had lived practically their whole lives. While the ECtHR found that the domestic measures had a legitimate aim of national security, it found a violation of Article 8 on the basis that the expulsion was disproportionate for not striking a fair balance between the legitimate aim and the applicants' rights under Article 8[489]. In his dissenting opinion in *Ramadan*, Judge Pinto de Albuquerque cited *Slivenko* to declare that a right to citizenship existed in the ECHR through the operation of Article 8, read in conjunction with Article 3 Protocol 4[490]. Having established this, the judge questioned the delay between the registration of the marriage annulment in 1998, and the deprivation decision based off that annulment that came more than 8 years later, during which time the applicant had conducted his business unbothered by the state authorities. Judge de Albuquerque expressed that such a delay made the justification by the executive of 'the protection of public order' untenable[491].

While only a dissenting opinion, the above ECtHR guidance addresses the same link between nationality and Article 3 Protocol 4, and the importance of a purposive understanding of deprivation that precedes removal from the state. While deprivation decisions made by the UK against individuals residing outwith the UK's territory is not strictly expulsion, this has an exclusionary effect, known to be deliberate in cases such as *L1*. Where an individual was

Already Included in the Convention and in the First Protocol Thereto', European Treaty Series (Strasbourg, 19 September 1963). para 23

[485] European Court of Human Rights Registry, 'Guide on Article 3 of Protocol No. 4 of the European Convention on Human Rights: Prohibition of Expulsion of Nationals', 30 April 2022. Paras 17-8

[486] European Court of Human Rights Registry. Paras 17-8

[487] Parliamentary Assembly of the Council of Europe, 'Resolution 2263 (2019) Withdrawing Nationality as a Measure to Combat Terrorism: A Human-Rights Compatible Approach?', 2019, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25430&lang=en. Para 5

[488] Slivenko v. Latvia, No. 48321/99 (European Court of Human Rights (Grand Chamber) 9 October 2003).

[489] Slivenko v. Latvia. Paras 128-9

[490] Ramadan v. Malta. Separate opinion paras 9, 11

[491] Ramadan v. Malta. Separate Opinion paras 15-7

deprived of nationality within the UK for the purposes of removal from the state territory, there may be an argument under Article 3 Protocol 4.

4.2.3.5 Extraterritoriality

The majority of citizenship deprivation decisions made by the UK have occurred when the individual is outwith the UK. Regardless of the question as to whether this is an intentional policy, there is a question as to whether the UK's human rights obligations are engaged when the individual is beyond its territorial jurisdiction. The question displays what Moreno-Lax describes as "competing conceptions of the mission and rationale of human rights, whether seen as essentially underpinned by a universalist vocation or as fundamentally constrained by national borders as key delineators of state powers and state obligations"[492]. Where nationality is the key to access to human rights, the contradiction of the removal of human rights itself not being itself a human rights violation was highlighted by Arendt 60 years ago[493]. However, the jurisdiction of states for the protection of ECHR rights does not arise from the nationality of the individual but from their presence on the territory of Council of Europe States. This is key in an analysis of whether out-of-country deprivation decisions can engage ECHR rights.

This problem is particularly prevalent through ECtHR jurisprudence. Article 3 is the prohibition against torture or inhuman and degrading treatment and is absolute. The UK has made clear that an individual deprived of British nationality while on UK territory will be subject to deportation where they hold another nationality. In order to avoid violating its obligations against refoulement, the UK has stated it will seek a Memorandum of Understanding with the country of deportation. The issue with this is illustrated by the case of Abu Qatada, where the ECtHR found that although the Memorandum was sufficient for averting the risk of torture, it did not account the fact that the country of deportation accepted torture as evidence in trials. While the Memorandum was updated to reflect this, the fact that it took judicial scrutiny by the ECtHR to guarantee this is troubling[494].

Where deprivation decisions are taken while the individual is outwith the UK, the government has argued that it does not have the same obligations under the ECHR. The UK's position is that deprivation orders in these cases do not engage the jurisdiction of the ECHR. In its submission to the Joint Human Rights Committee, the government used the case of *Al-Skeini* to state that the ECHR does not have extra-territorial effect as a matter of practice, and where it is applied it is exceptional[495]. The Immigration and Security Minister acknowledged that,

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[492] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"', *German Law Journal* 21, no. 3 (April 2020): 385–416, https://doi.org/10.1017/glj.2020.25. 386

[493] Arendt, *The Origins of Totalitarianism*. 390-1

[494] L. Zedner, 'Citizenship Deprivation, Security and Human Rights', *European Journal of Migration and Law* 18, no. 2 (2016): 222–42, https://doi.org/10.1163/15718166-12342100. 8

[495] Joint Committee on Human Rights, 'Legislative Scrutiny: Immigration Bill (Second Report)'. 43

following *Al-Skeini*, in exceptional cases the UK will have jurisdiction over an individual outwith the UK in respect of whom a deprivation decision is made, but these exceptional situations are not detailed by the Minister[496] or by ECtHR jurisprudence. Many commentators have found issue with the ECtHR approach to extraterritorial jurisdiction, both in the scope of the principles and the reliance on fact dependent conclusions that result in a "piecemeal" nature to the body of judicial decisions[497]. For example, it is not known whether 'exceptional' refers to the frequency of the situation or the degree to which it is justified[498]. Arnell argues that the 'effective control' and 'state agent authority' principles of *Al-Skeini* are in fact less relevant to deprivation decisions, stating that the key legal rule is more analogous to the line of reasoning in *Soering*, where an intra-territorial decision creates an extra-territorial risk of an ECHR rights violation[499]. The difficulty with a *Soering* approach in this context is that it still comes up against the inherent deference by the UK Courts to the assessment of the Secretary of State in national security matters.

This point was raised within the already mentioned *Begum* litigation, with regard to what was known succinctly as the Secretary of State's 'extra-territorial policy'. This was her practice of not depriving individuals of their British citizenship "if she is satisfied that doing so would expose those individuals to a real risk of treatment which would constitute a breach of article 2 or 3 [ECHR] if they were within the UK's jurisdiction and those articles were engaged"[500]. Begum argued that having been deprived of UK nationality, she was at risk of deportation to Bangladesh, where she would be at risk of mistreatment in the form of torture or death. The UK submitted that repatriation to Bangladesh, let alone mistreatment there, was not a "foreseeable outcome of deprivation"[501]. On this submission, the Court of Appeal applied a substantive review on the merits of the executive's assessment of foreseeable risk to find that the SIAC should have made an independent evaluation of the risks of violation of Begum's Article 2 and 3 rights under the ECHR that would result from the deprivation decision. However, the UKSC dismissed this approach, applying instead principles of judicial review to the Secretary of State's decision, considering the SIAC was correct in deferring to the Secretary of State's assessment of risk without an independent evaluation[502].

The Joint Human Rights Parliamentary Committee has rejected the position of the executive that its ECHR obligations would not be engaged by extra-territorial deprivation decisions,

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[496] James Brokenshire, 'Letter from James Brokenshire MP, Immigration Bill Clause 60: Deprivation of Citizenship', 20 February 2014. 2-3
[497] Moreno-Lax, 'The Architecture of Functional Jurisdiction'. 386
[498] Moreno-Lax. 399
[499] Arnell, 'The Legality of the Citizenship Deprivation of UK Foreign Terrorist Fighters'. 402
[500] R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant). Para 21
[501] R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant). Para 24
[502] R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant). Paras 124, 129-31, 134

stating that the exercise of deprivation power was itself an exercise of jurisdiction. Goodwin-Gill describes the position as follows:

> "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 her rights."[503]

Article 1 of the ECHR clearly states that jurisdiction under the Convention is territorial and does not attach to the individual. While the cases of *Bankovic* and *Al-Skeini* amend this understanding slightly to "primarily territorial" but subject to exceptional circumstances[504], Goodwin-Gill's assessment appears more in line with the equivalent rule in international human rights law under Article 2(1) ICCPR, which defines the scope of state obligations with respect to "all individuals within its territory and subject to its jurisdiction". Orentlicher states, with reference to Article 2(1) ICCPR, that state obligations being engaged through extraterritorial jurisdiction "reinforces the principle underlying the basic approach of territorial responsibility: states owe human rights obligations to individuals who are vulnerable to their exercise of sovereign power"[505]. She argues that it is not the collection of rules under international human rights law, as detailed in Chapter 2, that has so impeded state discretion in the field of nationality law, it is rather this doctrine of who is vulnerable to the state's exercise of its sovereign power, the doctrine that underlies human rights. As this category of persons is generally those upon the state's territory, this reinforces territorial/civic models of citizenship, encouraging states to afford nationality towards their long-term residents, but also allows for a doctrinal extension of territorial jurisdiction.

Moreno-Lax posits 'functional jurisdiction' as a solution to the incoherence of extraterritorial human rights obligations. Under this model, jurisdiction is engaged through states exercising policy or operational action abroad, through which a type of situational control is created. Functional jurisdiction "maintains that operational power projected and actioned abroad, like other methods of territorial and/or personal control, amounts to an exercise of jurisdiction"[506]. She describes control to be effective "when it is determinative of the material course of events unlocked by the exercise of jurisdiction". Its effectiveness "should be judged against its influence on the resulting situation and the position in which those affected by an exercise of

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[503] Guy Goodwin-Gill, 'Deprivation of Citizenship Resulting in Statelessness and Its Implications in International Law - Opinion', 12 March 2014. para 26

[504] Bankovic & Ors v Belgium & Ors, 890 (European Court of Human Rights (Grand Chamber) 2001). Paras 59-61

[505] Orentlicher, 'Citizenship and National Identity'. 322

[506] Moreno-Lax, 'The Architecture of Functional Jurisdiction'. 387-8

public powers find themselves upon execution of the measures concerned" taking into account both de facto and de jure aspects[507]. This accords with Goodwin-Gill's assessment that deprivation measures fall under the UK's human rights jurisdiction.

Concerns about extending the extraterritorial application of the ECHR based off floodgate arguments and the uncertainty in predicting the limits of the extraterritorial application of ECHR rights prior to their violation are not unmerited. But neither of these issues are relevant to the exercise of deprivation powers, where there is already an internationally recognised established link between the person affected, the deprived individual, and the Council of Europe state. While the exceptional circumstances referred to by the ECtHR remain undefined, the above discussion provides an argument for the inclusion of out-of-country deprivation decisions within the ECHR's extraterritorial jurisdiction.

4.2.4 Regional Human Rights Law Conclusion

Historically the ECtHR has refused to hear cases that touch upon the right to nationality, but in recent times, it has no longer rejected nationality cases *ratione materiae*[508]. There is a growing acceptance by the court to examine nationality, particularly in deprivation cases, in light of "clear and uncontested evidence of a continuing international trend" of a right to nationality and a right not to be arbitrarily deprived of nationality[509]. Alongside developments on indirect discrimination along ethnic lines between born and naturalised citizens, the door is open for a human rights challenge to the substantive provisions of the UK deprivation system. However, in practice the reliance of the UK executive of out-of-country deprivations means there would need to be an expansion of the notion of extraterritorial jurisdiction in order to engage ECHR rights in the majority of cases.

4.3 International Human Rights Law

As has been made clear in Chapters 2 and 4, the prohibition against arbitrary deprivation of nationality under Article 15(2) UDHR is broader than the equivalent consideration through the ECHR, in that the former encompasses both substantive aspects as well as broader procedural aspects[510]. Combined, these two aspects require that for a measure to be in accordance with Article 15(2) it must serve a legitimate aim, be promulgated in law, conform to the principles

[507] Moreno-Lax. 403-4
[508] Ramadan v. Malta. para 84
[509] Ramadan v. Malta. Separate Opinion of Judge Pinto de Albuquerque para 7
[510] Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women and girls, 'Communication to the United Kingdom', 11 February 2022. 3

of necessity and proportionality, and have sufficient procedural safeguards[511]. All state action, including "legislative, administrative, and judicial" measures, are applicable to considerations of applicability to Article 15(2)[512].

The UK deprivation scheme contains two distinct strands of deprivation measure. Under the first, multinationals may be deprived of nationality on the conducive to the public good test. Under the second, naturalised mononationals may be deprived of nationality where it is conducive to the public good on the seriously prejudicial to the vital interests test, where the Secretary of State has a reasonable belief the person can acquire another nationality. These two strands have different effects and will be considered separately where these effects impact on their compliance with international human rights law. The substantive and procedural aspects of the obligation against arbitrary deprivation of nationality will be examined in turn in their application to the UK, to determine whether the UK deprivation measures are contrary to Article 15(2).

4.3.1 Substantive

To be in accordance with Article 15(2) UDHR, the deprivation measures in the UK must be in pursuit of a legitimate aim, be the least intrusive means of achieving that aim, and be the proportionate to the interest to be protected.

4.3.1.1 Legitimate aim

While nationality deprivation powers were revitalised in the UK as part of a wider package to redefine British citizenship, their specific aim was the protection of the interests of national security, in particular counter-terrorism.

With the introduction of the conducive to the public good test in the IANA2006, the government defended the lower threshold as "necessary to fight the domestic terror threat" [513]. This is reflected also in the link between the test and the statutory list of 'unacceptable behaviours' that included supposed terrorist activities. The Minister of State for Security, Counter-Terrorism, Crime and Policing at the time of the Act passing stated with reference to this list that is it: "now essential that we have similar powers [to those for deporting immigrants] to withhold and to remove British nationality […] where an individual is found to have engaged in [unacceptable behaviours]" [514]. The IA2014 amendment to the BNA1981 was also part of a

[511] Institute on Statelessness and Inclusion, 'Commentary to the Principles on Deprivation of Nationality as a National Security Measure'. Para 71
[512] Secretary General and Human Rights Council, 'Human Rights and the Arbitrary Deprivation of Nationality'. Para 25
[513] Gibney, '"A Very Transcendental Power"'. 650
[514] Gibney. 650

wider push towards anti-terrorism measures[515]. The Explanatory Notes to the IA2014 state that the target of the provision allowing for deprivation even where it would lead to statelessness is "the most serious cases – such as those involving national security, terrorism, espionage or taking up arms against Britain or allied forces"[516]. More recently, in defence of the ultimately removed Clause 9 in the NBB2021, the UK government asserted that "deprivation of citizenship on conducive grounds is rightly reserved for those who pose a threat to the UK or whose conduct involves very high harm"[517]. There is thus a clear line from the UK that the expansion and practice of both strands of citizenship deprivation measures has been in pursuit of a national security agenda.

Despite the existence of some nationality articles, such as Articles 24 (child's right to nationality) and 26 (non-discrimination) ICCPR, whose wording does not allow for any justifiable limitation, national security is "broadly accepted as a generally applicable legitimate aim for restrictions" [518]. The former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism states that the effect of this acceptance is that even discriminatory measures may have reasonable and objective justification when in the context of national security[519]. The pursuit by the UK of the legitimate aim of national security is therefore in compliance with international human rights law.

However, citizenship deprivation measures will be contrary to international human rights laws where they are undertaken with the aim of administering a sanction, or preventing the entry or exit to a territory. These aims are not deemed to be legitimate by virtue of Article 9 UDHR, which prevents arbitrary arrest, detention and exile, and Articles 13(2) UDHR, and 12(4) ICCPR which provide the right to leave and enter one's own country, and the right not to be arbitrarily deprived of the right to enter one's own country respectively. UN General Comment No.27 states that 'own country' in Article 12 ICCPR embraces as a minimum individuals "who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien" [520]. The General Comment further states that: "[a] State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country" [521]. While the precise HRC interpretation has been relatively inconsistent on the precise application of this definition since the publication of General Comment No.27, it has remained clear that "own country" is broader

[515] Bücken and de Groot, 'Deprivation of Nationality under Article 8 (3) of the 1961 Convention on the Reduction of Statelessness'. 45
[516] Immigration Act 2014. Explanatory Notes
[517] Haroon Siddique, 'New Bill Quietly Gives Powers to Remove British Citizenship without Notice', *The Guardian*, 17 November 2021, sec. Politics, https://www.theguardian.com/politics/2021/nov/17/new-bill-quietly-gives-powers-to-remove-british-citizenship-without-notice.
[518] Institute on Statelessness and Inclusion, *Global Seminar Series on Ciitzenship Stripping. Lecture 5.*
[519] Institute on Statelessness and Inclusion.
[520] Human Rights Committee, 'CCPR General Comment No. 27 : Article 12 (Freedom of Movement)' (United Nations Human Rights Committee, 1 November 1999). para 20
[521] Human Rights Committee. para 21

than the link of nationality[522]. While derogation is allowed from Article 12(4) "in times of public emergency which threatens the life of the nation", the UK has not made the necessary declaration of any derogation to this effect[523]. A measure undertaken with the aim of exporting the administration of justice in the context of counter-terrorism to another state will also not be deemed legitimate on the basis of prosecution obligations found in the UN Security Council ("UNSC") Resolutions 2178 (2014)[524] and 1373 (2001)[525]. Deprivation measures undertaken for the aim of denial of entry to the UK, or for the purposes of expulsion will therefore not be deemed legitimate aims under international human rights law.

4.3.1.2 Necessity and proportionality

The questions of necessity and proportionality are interlinked in the context of citizenship deprivation and will be considered concurrently.

For a deprivation measure to be considered necessary under international human rights law, it must be both effective in fulfilling the legitimate aim pursued, and be the least intrusive means of achieving that aim when compared to another equally effective measure. Where a measure does not achieve its legitimate aim, it is an ineffective measure and cannot be justified even if it is with reference to the strong counterbalancing aim of national security. Under Article 12(4), any measure that restricts the right of entry to one's own country must also fulfil the necessity requirement.

Scheinin highlights two approaches to the assessment of proportionality in the context of citizenship deprivation. Assuming in both approaches that the measure in question is effective, the first is the general balancing test between national security and human rights, through which "national security always wins". The second approach addresses the specific question: is there such a benefit to national security that it is proportionate to intrude on a person's human rights by depriving them of their nationality[526]. In a recent HRC report, the Secretary-General asserts that even where deprivation does not lead to statelessness, states "must weigh the consequences of loss or deprivation of nationality against the interest it is seeking to protect"[527]. This indicates that a deprivation decision made against a multinational is also capable of being disproportionate.

Citizenship deprivation measures finds their greatest relevance and application in the fields of national security when considering the question of so called 'foreign terrorist fighters'

[522] Rutsel Martha, 'The Right to Enter His or Her Own Country', *EJIL: Talk!* (blog), 23 June 2020, https://www.ejiltalk.org/the-right-to-enter-his-or-her-own-country/.
[523] International Covenant on Civil and Political Rights. Article 4
[524] 'Resolution 2178 (2014)' (2014). paras 4, 6
[525] 'Resolution 1373 (2001)' (2001). para 2
[526] Institute on Statelessness and Inclusion, *Global Seminar Series on Ciitzenship Stripping. Lecture 5.*
[527] Secretary General and Human Rights Council, 'Human Rights and Arbitrary Deprivation of Nationality: Report of the Secretary General' (United Nations General Assembly, 19 December 2013). para 40

("FTFs"). The development of the concept of FTFs as a distinct category is in response to the phenomenon that occurred with the rise of ISIS in the region of Syria and the Levant. While groups in previous conflicts have been able to attract foreign militants to their cause, a notable example being the Mujahadeen in the Soviet-Afghanistan war of the 70s and 80s[528], ISIS was notable for its ability to effectively utilise social media as part of its recruitment. It was able to impart its ideology with ease to people in countries all over the world, recruiting FTFs in numbers that dwarf those of previous conflicts[529].

UNSC Resolution 2178 was passed in 2014 and addresses "the acute and growing threat" of FTFs. The Resolution also places obligations on states on how to deal with this threat. It defines FTFs as:

> "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts of the providing or receiving of terrorist training, including in connection with armed conflict"[530].

What is key in this definition is the movement from a state with which the individual has strong ties in the form of residence or nationality.

Resolution 2178 reaffirms previous resolutions to state that "terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and […] any acts of terrorism are criminal and unjustifiable regardless of their motivations"[531]. While it is generally understood that extreme acts such as killing civilians for political purposes in peace time are terrorist acts, there is no internationally agreed definition of terrorism. UNSC Resolution 1566 of 2004 suggests the definition of:

> "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or abstain from doing any act, which constitutes offences within the scope of and as defined in the international conventions and protocols relating to terrorism."[532]

Resolution 2178 uses the term terrorism but effectively leaves the matter of definition to the discretion of states. This has the consequence of a large degree of differentiation between

[528] Jayaraman, 'International Terrorism and Statelessness'. 187
[529] Jayaraman. 185
[530] Resolution 2178 (2014).
[531] Resolution 2178 (2014).
[532] 'Resolution 1566 (2004) on Threats to International Peace and Security Caused by Terrorist Acts' (2004). para 3

terrorism definitions in national legislations, including measures with broad scope that capture non-violent activities which do not constitute criminal offences in other contexts[533]. As such, the lack of a generally accepted international definition of terrorism has been the subject of the majority of complaints by civil society actors to the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism[534].

Resolution 2178 specifically mentions the groups of Islamic State, Al-Qaeda, and the Nusra Front. There was a marked increase in the numbers of individuals traveling to Iraq and Syria between 2014 to 2017. Estimates by the UN Counter-Terrorism Implementation Task Force show 12,000 people from around 80 countries travelling in June 2014, rising to nearly 30,000 from 100 countries by September 2015[535], around 4,000 of which were from Western Europe[536]. In 2017, the number had risen again to around 40,000 people from 110 countries, but the year saw a reduced flow of individuals to the region after military successes against ISIS and 5,600 of those who had travelled were estimated to have returned home[537]. By 2018, ISIS had lost 98% of the territory it had held in Iraq and Syria and while it was anticipated that there would be a "flood" of returning nationals this turned out to be more of a "trickle"[538]. The UNSC Counter-Terrorism Committee Executive Directorate estimates around 5,700 of 42,000 FTFs in 2018 were from Western Europe, globally the third highest sending region in absolute numbers behind only the Former Soviet Republics and the Middle East[539]. The International Centre for the Study of Radicalisation estimated that in June 2018, around 1,765 foreign nationals had returned back to Western Europe. In January 2018, the UK government revealed that 50% of the 850 of its nationals who had travelled to Iraq and Syria had returned, 20% were known to be dead, and the rest were unaccounted for[540].

The UN Counter-Terrorism Committee outlines 4 specific threats posed by FTFs to all states: the conducting of terrorist attacks, the planning and directing of terrorist attacks (regardless of location of the FTF in their state of origin or the destination state), the relocating of experienced

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533 Letta Tayler, 'Foreign Terrorist Fighter Laws: Human Rights Rollbacks under UN Security Council Resolution 2178 Special Issue: Foreign Fighters and Foreign Terrorist Fighters: An International Law and Human Rights Perspective', *International Community Law Review* 18, no. 5 (2016): 455–82. 463

534 Wadie E. Said, 'The Destabilizing Effect of Terrorism in the International Human Rights Regime', *UCLA Law Review* 67, no. 6 (April 2021): 1800–1819. 1811-2

535 Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, 'Guidance to States on Human Rights Compliant Responses to the Threat Posed by Foreign Fighters' (New York: United Nations Counter-Terrorism Implementation Task Force, 2018). para 1

536 Jayaraman, 'International Terrorism and Statelessness'. 187

537 Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, 'Guidance to States on Human Rights Compliant Responses to the Threat Posed by Foreign Fighters'. Para 1

538 Counter-Terrorism Committee Executive Directorate, 'The Challenge of Returning and Relocating Foreign Terrorist Fighters - Research Perspectives', CTED Trends Report (United Nations Security Council, March 2018). 2

539 Counter-Terrorism Committee Executive Directorate. 4

540 J Cook and G Vale, 'From Daesh to "Diaspora": Tracing the Women and Minors of Islamic State' (King's College London: International Centre for the Study of Radicalisation, 2018). 45

'veteran' FTFs to reinforce or build new organisations in third states, and returning FTFs who use their status to radicalise new recruits upon their return[541]. UNSC Resolution 2396 of 2017 notes that there is evidence of attacks and attempted attacks by FTFs in their countries of origin or nationality, with particular emphasis placed by the Resolution on the prevalence of open calls by ISIS to its followers to initiate attacks regardless of location[542]. While FTFs pose the same threats as any member of a terrorist group, their ability to travel between states more easily on the basis of their nationality, creates a specific and very real risk. This consideration, combined with the sheer numbers of FTFs travelling throughout the period of 2014 to 2017, created serious concerns about the specific ability of FTFs to cross borders more easily than other members of terrorist groups by virtue of their preferential residence or nationality status.

It must then be considered whether citizenship deprivation measures are an effective means of countering the threat of FTFs to the national security of the UK. In line with international human rights law, the effectiveness of citizenship deprivation must also be considered in light of the UK's other international obligations, such as those under UNSC Resolutions.

Resolutions 2178 (2014) [543] and 2396 (2017)[544] place obligations upon states to address to the threat of FTFs, particularly to prevent their movements between states. The broad wording of the Resolutions leave the specific implementation of domestic measures combatting terrorism open to interpretation, and many states, including those such as Austria, Australia, Belgium, the Netherlands, have taken this as authority to introduce citizenship deprivation laws[545].

Deprivation of nationality of citizens while they are within the UK will not in itself diminish the possibility of a domestic terror attack. Deprivation of nationality of those outwith the UK has in effect merely left suspected FTFs stranded in detainment camps in Syria and Iraq in conditions that amount to torture[546]. In a 2019 open letter, national security experts with decades of experience called upon Western governments to recognise the radicalising conditions of these camps towards their detainees, the majority of whom are children subject to "persistent indoctrination" [547]. With respect to the nationals of Western states living in these camps, the experts told Western governments that "the denial of citizenship by their home

[541] Counter-Terrorism Committee Executive Directorate, 'The Challenge of Returning and Relocating Foreign Terrorist Fighters - Research Perspectives'. 7
[542] 'Resolution 2396 (2017)' (2017).
[543] Resolution 2178 (2014). Paras 2, 5, 14
[544] Resolution 2396 (2017). Para 2
[545] Tayler, 'Foreign Terrorist Fighter Laws'. 468
[546] Letta Tayler, 'Foreign ISIS Suspects, Families: Why a Single "R" Word Matters at the UN', *Human Rights Watch* (blog), 17 June 2021, https://www.hrw.org/news/2021/06/17/foreign-isis-suspects-families-why-single-r-word-matters-un.
[547] 'Open Letter from National Security Professionals to Western Governments: Unless We Act Now, the Islamic State Will Rise Again', *The Soufan Center* (blog), 11 September 2019, https://thesoufancenter.org/open-letter-from-national-security-professionals-to-western-governments-unless-we-act-now-the-islamic-state-will-rise-again/.

nations will bolster their sense of being, in effect, citizens of the Islamic state, potentially preparing them to form the core of a future resurgence"[548]. By revoking the British citizenship of such individuals, the UK is essentially pursuing a counter-terrorism agenda that constitutes at best inaction and at worst compounds the threat of international terrorism. Richard Barrett, former Mi6 Director of Global Counter-Terrorism, provided evidence to the UK Parliament that if UK citizens remain trapped in camps in places like Syria without facing prosecution,

> "the security threats increase, rather than degrade […] [n]ot just in any direct threat that those individuals may pose from a hardening of mindset and deepening of radicalisation, but from those attached to their plight who gather resentment and anger towards the UK's wanton inaction."[549].

National security experts thus assert that citizenship deprivation creates a threat not only to the states where the former citizens are held, but to the international community, including the national security of individual states.

Paulussen argues that a concept of national security that allows for out-of-country citizenship deprivation as a counter-terrorism measure is "no longer in sync with the hyper-connected world in which we live and in which alleged terrorists, who really do not care about borders, operate"[550]. A prominent example of an individual who was deprived of their citizenship and then went on to form terrorist networks in other countries with devastating global effects is Osama Bin Laden. Bin Laden was among many jihadis deprived of citizenship by Arab states following the terrorist violence of the '80s and '90s. It was after these states had revoked citizenships and accordingly abdicated responsibility of these violent individuals that Bin Laden went on to mastermind the 11 September 2001 terrorist attacks[551]. For many, the example of Bin Laden alone is likely sufficient to show that depriving a dangerous individual of citizenship is not an effective counter-terrorist measure and has no significant bearing on that person's ability to conduct terrorist acts in any particular location.

In the SIAC, deprivation decisions are taken not necessarily on account of specific criminally proven conduct, but an assessment on the balance of probabilities of the future risk that the individual might pose. The SIAC greatly defers to the Secretary of State's assessment of future risk in assessing the legality of deprivation orders. This reflects the development of a more preventative, intelligence-based approach to counter-terrorism. As an illustration of this attitude, the Director of the FBI in the USA stated in 2014 that: "all of us with a memory of the '80s and '90s saw the line drawn from Afghanistan in the '80s and '90s to Sept. 11. […] we

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548 'Open Letter from National Security Professionals to Western Governments'.
549 'Evidence | Inquiry by the APPG on Trafficked Britons in Syria', *APPG on Trafficked Britons in Syria* (blog), 10 February 2022, https://appgtraffickedbritons.org/evidence-inquiry-into-trafficked-britons-in-syria/.
550 Institute on Statelessness and Inclusion, *Global Seminar Series on Ciitzenship Stripping. Lecture 5.*
551 'Open Letter from National Security Professionals to Western Governments'.

are determined not to let lines be drawn from Syria today to a future 9/11"[552]. What national security experts have made clear is that employing citizenship deprivation measures not only does not break that line, but can only compound it.

Even where a measure has not been undertaken with the specific aim of exporting justice to another state, the effect of the obligations under UNSC Resolutions 2178 and 2396 to prosecute and rehabilitate FTFs ensures that citizenship deprivation decisions are contrary to Article 15(2) through the test of necessity. Resolution 2178 calls upon states to co-operate in the prosecution, rehabilitation, and reintegration of foreign terrorist fighters, including the creation of domestic criminal offences[553]. Although Resolution 2178 obliges states to prevent the entry or transit of FTFs within their territory, this is "without prejudice to entry or transit necessary in the furtherance of a judicial process", including the arrest or detention of an FTF, and does not oblige states to prevent entry of their own nationals or permanent residents[554]. The Resolution also calls upon states to co-operate in preventing the travel of FTFs[555] as well as to address the sources of violent extremism both domestically and internationally[556]. Resolution 2396 reaffirms that member states should, in accordance with international human rights law, "implement appropriate investigative and prosecutorial strategies" in order to hold accountable those responsible for terrorist acts through bringing them to justice[557]. Member states should co-operate in matters of extradition, and take "appropriate prosecution, rehabilitation, and reintegration measures" for returning FTFs[558].

In light of the obligations above, the UK, by depriving its nationals of citizenship, can be said to be in breach of its international obligations to counter terrorism. Scheinin highlights that often it is only the state of residence or nationality that will have sufficient jurisdiction to prosecute an individual, using the principle of active nationality. Even where the deprivation does not result in statelessness, the individual's other state of nationality may not be able or willing to prosecute by virtue of its status as a failed state or itself having an association with the terrorist group with which the individual has aligned themselves[559]. Nationality can therefore be key to the effective prosecution of FTFs.

The use of citizenship deprivation measures are therefore not only not ineffective as a means of protecting national security, but are contrary to the UK's international obligations under

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[552] Charles Lister, 'Returning Foreign Fighters: Criminalization or Reintegration?', *Brookings* (blog), 13 August 2015, https://www.brookings.edu/research/returning-foreign-fighters-criminalization-or-reintegration/. 3
[553] Resolution 2178 (2014). Para 6
[554] Resolution 2178 (2014). para 8
[555] Resolution 2178 (2014). para 11
[556] Resolution 2178 (2014). paras 16, 18
[557] Resolution 2396 (2017). para 17-9
[558] Resolution 2396 (2017). Para 29
[559] Institute on Statelessness and Inclusion, *Global Seminar Series on Ciitzenship Stripping. Lecture 5.*

UNSC Resolutions 2178 and 2396. Citizenship deprivation with the aim of the protection of national security is thus contrary to the necessity requirement of compliance with Article 15(2) UDHR. In any event the prosecution and rehabilitation obligations under Resolutions 2178 and 2396 demonstrate a less intrusive means of achieving national security objectives. Given the low numbers of returnees, the existence of a national reintegration strategy, and the relative resources of the UK, Barrett states that there is ample capacity to reintegrate suspected terrorists such as Shamima Begum. Furthermore, the identities of British FTFs are known to UK authorities by virtue of their British nationality. Barrett states that actual risks and unknowns are often conflated, and that only the former can be categorised and controlled. By taking control of these individuals, the UK would be better able to deal with the threat of terrorism through "moving the unknowns into categories of risk"[560]. By depriving them of their nationality, the UK only pushes FTFs further into the unknown.

On the question of proportionality, the Organisation for Security and Co-operation in Europe ("OSCE") affirms the position of the UN Secretary-General that "it would be difficult to justify deprivation of liberty that leads to statelessness as a proportional measure"[561]. On the question of deprivation, even where it would not lead to statelessness, the OSCE Report refers to the UK deprivation legislation, stating that the "conducive to the public good" test creates a "much lower threshold" than is required under international human rights law through the principles of necessity and proportionality[562]. The permanent nature of nationality deprivation is a factor for consideration regardless of the result of statelessness[563].

Given the nature of jus sanguinis, proportionality assessments must take into account the right to family life under Article 17 ICCPR and the best interests of the child as a primary consideration under Article 3(1) CRC. Even where a child is not themselves deprived of their nationality, their rights can be impacted through the deprivation of a parent. A stark example of this is in the Begum case, where Begum's citizenship was revoked after she stated her intent to return to the UK to give birth. She was 9 months pregnant and both her previous children had died as babies. Her concern was that her next child would die due to the conditions in the refugee camp in which she was living, a concern that directly fuelled her decision to return to

[560] 'Evidence | Inquiry by the APPG on Trafficked Britons in Syria'.
[561] Organisation for Security and Co-operation in Europe, 'Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework', 12 September 2018. 48-9
[562] Organisation for Security and Co-operation in Europe. 48-9
[563] Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women and girls, 'Communication to the United Kingdom', 11 February 2022. 6

the UK[564]. Begum's child was born a British citizen by descent and died in Syria 3 weeks later[565].

The ineffectiveness of citizenship deprivation as a counter-terrorism measure renders it unnecessary for the purpose of fulfilling the legitimate aim of national security and thus creates a violation of Article 15(2) UDHR.

4.3.2 Procedural

To be in accordance with the procedural aspect of Article 15(2), the deprivation measures in the UK must be promulgated by law and have appropriate legal safeguards as two separate considerations. Arbitrariness under Article 15(2) thus goes beyond mere promulgation of law, to ensure that measures are in accordance with the provisions, aims, and objectives of international human rights instruments such as the ICCPR. It encapsulates elements of inappropriateness, injustice and lack of predictability and is thus distinguished from unlawfulness in that it is "not so much something opposed to *a* rule of law, as something opposed to *the* rule of law […] it is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety" [566]. These procedures should be in place in any deprivation appeal regardless of whether the individual will be rendered statelessness as an effect[567].

The SIAC is not a criminal body, and is subject to the civil standard of proof of evidence on the balance of probabilities. While citizenship deprivation is itself an administrative measure, given the serious impact of deprivation, it has been labelled by some commentators as a punishment[568]. Indeed, in the passing of the NIA2002, the UK government described the benefit of a lowered test standard for overcoming the evidentiary hurdles required by criminal prosecution for the same behaviours:

> "[…] we do not believe that liability to deprivation should arise only following a conviction. For example, there may be situations where the evidence of seriously prejudicial conduct would not be admissible in criminal proceedings. The protection of vital interests which the deprivation

[564] 'Shamima Begum: Ex-Bethnal Green Schoolgirl Who Joined IS "Wants to Come Home"', *BBC News*, 14 February 2019, sec. UK, https://www.bbc.com/news/uk-47229181.
[565] 'Shamima Begum: Sajid Javid Criticised as Baby Dies', *BBC News*, 9 March 2019, sec. UK, https://www.bbc.com/news/uk-47506145.
[566] UN Special Rapporteur on the promotion and protection of human rights while countering terrorism, 'Intervention in the Case of Shamima vs. Secretary of State for the Home Department, UK Court of Appeal (2020)'. para 19
[567] UN Special Rapporteur on the promotion and protection of human rights while countering terrorism. para 19
[568] Shai Lavi, 'Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel', *New Criminal Law Review: An International and Interdisciplinary Journal* 13, no. 2 (2010): 404–26, https://doi.org/10.1525/nclr.2010.13.2.404.

provisions would allow would extend wider than that afforded by criminal law."[569]

Citizenship deprivation measures, though administrative, can give rise to a risk of ne bis in idem, due to the fact that the deprivation decision is often made on the basis of suspected criminal conduct and the "severely punitive impact of deprivation and the consequences on other human rights"[570]. Additional concerns have been raised of nationality deprivation for the purposes of rendition, specifically to the USA for criminal prosecution[571]. As previously discussed, PACE has suggested that the existence of a criminal conviction prior to deprivation of citizenship could be a useful safeguard against the arbitrariness through the avoidance of ne bis in idem, as the deprivation would be a conscious consideration in the sentencing aspect of criminal convictions. However this is in the context of serious terrorist offences and convictions that have been taken place in a state in which the offender was a non-resident national. PACE recommends that the resident state of the offender should not seek to deprive the individual of citizenship, even where the conviction has taken place on that state's territory, recognising that it is the state of residence that is best placed to understand precisely what the conditions were that led to the commission of the terrorist acts.

In the context of criminal trials, Article 14(1) ICCPR creates a right to equality of arms before courts and tribunals, while Article 14(3) states that individuals have the right to be informed promptly of the charge, to have time to prepare a defence, including communication with legal counsel, and to be present at their trial. While citizenship deprivation is an administrative measure, in its General Comment to Article 14(3) the HRC stated that although the article relates "in principle" to acts that were criminal under domestic law, "the notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity"[572]. The consequences of deprivation that results in statelessness are severe, and even for deprivation of multinationals the effect is substantial just through its permanence alone. This General Comment opens the door to ICCPR considerations of the inequality of arms within the SIAC.

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[569] Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives.* 187

[570] Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women and girls, 'Communication to the United Kingdom', 11 February 2022. 5

[571] Said, 'The Destabilizing Effect of Terrorism in the International Human Rights Regime'. 1813

[572] Human Rights Committee, 'CCPR General Comment No. 32 : Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)' (United Nations Human Rights Committee, 23 August 2007), https://digitallibrary.un.org/record/606075. para 15

Within SIAC proceedings themselves, the high degree of statutory discretion that is awarded to the Secretary of State in making deprivation orders ensures that the illegality of any decision is difficult to prove through domestic proceedings. Additionally, within CMPs, the executive is able to present national security experts that put forward the justification for the deprivation decision. Special advocates, by contrast, are unable to present witnesses, and can only cross-examine the executive's witnesses. However, the existence of special advocates in particular has been held as a significant safeguard that allows the individual to challenge evidence against them while maintaining the confidentiality of proceedings. General Comment to Article 14 ICCPR emphasises that "the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant"[573]. Under domestic and European jurisprudence, the reliance upon secret evidence makes the SIAC process a fundamentally unfair procedure, even with the safeguard of special advocates. Whether there is an objective and reasonable justification for using this procedure requires an examination of the grounds upon which it can be triggered.

The risk associated with revealing the secret evidence that is relied upon in SIAC proceedings generally fall into one or more of the following categories: revealing the identity of a human source with potentially dangerous consequences for that person, revealing a method of surveillance unknown either generally or to the deprived individual in particular, and intelligence provided by the intelligence services of other states[574]. Under s40A(2) BNA1981, appeals to the SIAC occur where the Secretary of State determines that certain material relied upon should not be made public because it is in the interests of national security, but also if it is in the interests of the relationship between the UK and another country or otherwise in the public interest. While it has been accepted that national security can provide a "reasonable and objective" justification[575], the latter two grounds potentially raise issues under Article 14 ICCPR. The second ground can be interpreted as relating to inter-state intelligence sharing; without a relationship of confidence, foreign states will not be so willing to provide the UK with information gathered by their own security services. The Joint Parliamentary Committee on Human Rights was critical of the introduction in Clause 9 of the NBB2021 of grounds with the exact same wording as s40A(2) BNA1981. The Committee noted that there was no legal definition of 'national interest' and domestic law dictated that the determination of whether national interest was a relevant concern was "a matter of judgment and policy entrusted to the executive". Despite this, the Committee stated that the terms 'national security', 'foreign relations', and 'public interest' were "far too broad and grant a dangerous discretion to the Secretary of State", and that "there will almost always be issues of national security at play in

[573] Human Rights Committee. para 13
[574] David W. K Anderson, 'Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005 : Presented to Parliament Pursuant to Section 14(6) of the Prevention of Terrorism Act 2005' (London: TSO, March 2012). 3.69
[575] Institute on Statelessness and Inclusion, *Global Seminar Series on Ciitzenship Stripping. Lecture 5.*

deprivation of citizenship cases"[576]. While s40A(2) BNA1981 concerns the initiation of a secret procedure that has at least some procedural safeguards and so is not a strictly analogous situation to the situation examined in Clause 9, which would have had the effect of *removing* a procedural safeguard, the Committee raises an important issue of the dangers of combining a wide executive discretion with reliance upon broad, undefined terms in the citizenship deprivation appellate procedure.

Even if the imbalance of rights under the SIAC process is to be accepted as reasonable in light of national security considerations, the effect of the law must be foreseeable[577]. Under international human rights law, this goes beyond the written statute to substantive consideration of the grounds for deprivation itself. The UK government has in the past demonstrated action that is contrary to its own legislation, such as in the case of *D4* where the SIAC found there to be insufficient notice of a deprivation decision. The subsequent attempts to enact Clause 9 of the NBB2021 show the measures taken by the executive to ensure that such actions, although contrary to principles of legal certainty, are justified through the promulgation of domestic law. Were Clause 9 to be passed, the actions of the executive in *D4* would remain illegal under international human rights law for violating the principle of legal certainty and potentially the individual's rights under Article 14(3) ICCPR[578], but would be ruled legal by the SIAC due to the wide discretionary power awarded to the Secretary of State.

The issue with the Secretary of State's discretion is largely seen through the broadness of the grounds upon which cases can be brought to the SIAC. Terrorism charges under domestic UK legislation cover not only violent conduct but also the dissemination of information of a terrorist nature. As has been discussed, this type of conduct certainly does not reach the high threshold of acts that would threaten the vital interests of the UK, and even individual conduct which does amount to violence is not by any means necessarily guaranteed to "threaten the foundations and organisation of the state"[579]. In the context of the lower conducive to the public good test, the UK has in practice applied its deprivation powers also to cases of non-terror related serious crime. In 2012, the Secretary of State deprived of their citizenship the perpetrators of an organised sex ring in Rochdale, who had committed a series of rapes of young white women between 2008 and 2010. The broadness of the conducive to the public good test allowed the Secretary of State to deprive the Rochdale offenders on the vague basis of "serious organised crime"[580]. This example shows the broadness of this test in practice through its application to criminal conduct that lacks an inter-state character.

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[576] Joint Committee on Human Rights, 'Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4 – Asylum, Home Office Decision-Making, Age Assessments, and Deprivation of Citizenship Orders)'. para 234

[577] Institute on Statelessness and Inclusion, 'Commentary to the Principles on Deprivation of Nationality as a National Security Measure'. Paras 89, 94

[578] Institute on Statelessness and Inclusion. Para 98

[579] United Nations High Commissioner for Refugees, 'Guidelines on Statelessness No. 5'. paras 61-2

[580] Ahmed and Others v. Secretary of State for the Home Department, 118 (UKUT (IAC) 2017). para 58

A recent joint report issued through the mandate of several Special Rapporteurs, including for the promotion and protection of human rights while countering terrorism, states that widespread citizenship deprivation is contrary to the spirit and intention of the ICCPR and 1961 Convention. Referencing the conducive to the public good test of s40(2) BNA1981, the report states that any deprivation "on broadly defined and imprecise national security grounds, given the capacity of the misuse of such terminology and its inherent lack of precision and clarity is presumptively arbitrary"[581]. This is in accordance with the principle of legality. Where the deprivation measure is provided for by law, necessary, proportionate, and in accordance with procedural safeguards, this presumption can be overridden. However, as was discussed in the context of the substantive aspects of Article 15(2), there are strong arguments that citizenship deprivation measures will not be able to rebut this presumption. The Special Rapporteurs furthermore state that deprivation decisions should have suspensive effect while appeals are ongoing, as "[a]ccess to the appeals process may become problematic and related due process guarantees nullified if the loss or deprivation of nationality is not suspended and the former national, now alien, is expelled"[582]. This can be seen through the example of *Begum*, where despite assertions to the existence of the effective remedy through the right to appeal to the SIAC, the UKSC determined that it was not possible for Begum to actually exercise this right from her location. The UKSC also held that it was not obliged to order the executive to allow her into the country, even if this were the only way by which she could exercise her appeal right. Had the suspensive effect provision from the AITC2004 not been repealed, this particular issue of access to justice would not have occurred. As it stands, Article 12(4) ICCPR allows individuals not to be arbitrarily deprived of the right to enter one's own country, regardless of nationality status. In combination with Article 14(3)(d) ICCPR which permits individuals to be present for legal proceedings against them, it seems that the UK has breached its ICCPR obligations by not permitting Begum to enter the UK to conduct her appeal.

This avoidance of international human rights obligations through recourse to statutorily coded procedures, the broadness of eligibility grounds and the lowered standard of deprivation tests are arguably the sort of conduct caught by the wider net of justice and fairness under

[581] Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women and girls, 'Communication to the United Kingdom', 11 February 2022. 3

[582] Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women and girls. 8

international human rights law, thus rendering the UK deprivation system contrary to the procedural requirements of Article 15(2).

4.3.3 Discrimination

Any measure that fulfils the requirements of Article 15(2) must also be interpreted in accordance with non-discrimination principles[583]. In recent Resolutions, the HRC has also recognised that "arbitrary deprivation of nationality disproportionately affects persons belonging to minorities"[584]. The statistics regarding the disproportionate eligibility of specific ethnic groups to deprivation measures has been highlighted in previous Chapters of this thesis. Furthermore, Special Rapporteurs and UN human rights experts have addressed the normative impact of the counter-terrorism agenda in the UK, voicing concerns that it has "created an atmosphere of suspicion towards members of Muslim communities" [585]. In particular, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance highlighted "the large role that mainstream political responses have played in amplifying and legitimating anti-Muslim panic, and even Islamophobia, through rhetoric and policies rooted in the national framework for countering non-violent extremism"[586]. The conflation of Islam and terrorism is not isolated to UK politics, as the international counter-terrorism framework, as driven by the UNSC and in particular the agenda of the USA, is predicated on a definition of terrorism that is essentially focussed on Islam[587]. The CERD highlights specifically that states must ensure there is no discrimination "in purpose or effect, on the grounds or race, colour, descent, or national or ethnic origin" in the context of the fight against terrorism[588]. A relevant consideration to the counter-terrorism agenda is furthermore the potential alienation of minority communities through discriminatory measures that can only have a destabilising effect on national communities.

In reality, most deprivations against multiple nationals that have occurred by virtue of the NIA2006 have been against naturalised, as opposed to born, British citizens, generally of a

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583 Human Rights Council, 'Resolution 32/5 Human Rights and the Arbitrary Deprivaiton of Nationality'.
584 Human Rights Council, 'Human rights and arbitrary deprivation of nationality'; Human Rights Council, 'Resolution 26/14 Human Rights and the Arbitrary Deprivation of Nationality'.
585 Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women and girls, 'Communication to the United Kingdom', 11 February 2022. 8-9
586 Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Working Group on discrimination against women and girls. 8-9
587 Said, 'The Destabilizing Effect of Terrorism in the International Human Rights Regime'. 1807
588 Committee on the Elimination of Racial Discrimination, 'CERD General Recommendation XXX'. II.10

Muslim background[589]. Evaluating the UK system in law and in practice, Gibney assess that "it seems that the imaginative leap required to justify turning a citizen into an alien still requires that the individual in question be part of a group already viewed as less than full citizens" [590]. The permeation of the rhetoric of 'foreignness' throughout deprivation practice can be seen through Shamima Begum's case. While Begum had parents of Bangladeshi heritage, she was born in the UK and was not a citizen by naturalisation[591]. Yet her nationality was deprived even where it would render her stateless, in apparent contravention of s40(4A) BNA1981 which only applies to naturalised citizens. Begum's appeal has not been heard yet and is unlikely to be heard in the foreseeable future following the UKSC decision of 2021, meaning that this point has not yet been litigated and so it is not clear why the UK government felt they had authority to render her stateless or if they simply made a mistake in assuming she had another nationality. Without venturing into speculation, it seems difficult to imagine that such a mistake could have been made in the case of a British mononational with ethnic British heritage.

In the passing of the IA2014, the UK government assessed that limiting the scope of s40(4A) BNA 1981 to naturalised citizens was justified under the ECHR on the basis that it had an "objective and reasonable justification". This justification was achieved through invoking a contractual relationship between individual and state that arose through naturalisation only: ""[n]aturalised citizens have chosen British values and have been granted citizenship on the basis of their good character"[592]. However, the measure introduced in the IA2014 is justified on national security grounds, and the UK does not provide any evidence as to a greater risk to national security from naturalised as opposed to born British mononationals[593]. Furthermore, this assessment does not take into the diverse practice of states regarding acceptance of multinationals. For example, a born British mononational living in the Netherlands, a country that does not permit multiple nationality, may choose to maintain British nationality but in practice has very few remaining ties with the UK. By contrast, a Dutch born mononational may move to the UK, live there for many years, forming close social ties and subsequently become naturalised, renouncing their Dutch nationality to become a British mononational[594]. Despite the latter individual having a seemingly much stronger tie to the UK, they are at risk of losing their British nationality where the former individual is not. Furthermore, s40(4A) BNA1981 assumes that it will be a simple process for a naturalised British mononational to acquire another, presumably their former, nationality. This is not necessarily the case, as acquisition

589 Gibney, 'Denationalisation and Discrimination'. 28
590 Gibney. 29
591 Institute on Statelessness and Inclusion, *Inaugural Lecture of the UK Seminar Series on Citizenship Stripping with: Professor Devyani Prabhat*, 2021, https://www.youtube.com/watch?v=jMNmjPR3Q4s.
592 Home Office, 'Immigration Bill. European Convention on Human Rights. Supplementary Memorandum by the Home Office'. Para 15
593 Zedner, 'Citizenship Deprivation, Security and Human Rights'. 14
594 Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 'Becoming a Dutch National - Dutch Nationality - Government.Nl', onderwerp (Ministerie van Algemene Zaken, 14 December 2011), https://www.government.nl/topics/dutch-nationality/becoming-a-dutch-national.

rules vary from country to country. It may in fact be easier for a born British mononational to become naturalised than it would be for a naturalised British mononational to regain their former nationality.

Another example shows how the discrepancies in different states' nationality laws impact deprivation. An individual born in the UK with a Syrian father and British mother is entitled to both Syrian[595] and British[596] nationality by descent. Syrian nationality has been described as 'clinging', in the sense that while it is theoretically possible for an individual to renounce it, in practice the Syrian authorities actively make renunciation nearly impossible. The Syrian Information Office states that renunciation "is so complicated that it is best not to attempt the process"[597]. The effect is that this individual, who would otherwise be able to renounce their nationality to become a born British mononational and be protected from deprivation, is instead subject to the standards of multinationals, placing them in a disadvantageous position to any other born British multinational who is able to voluntarily renounce their other nationality. If the contractual framework is applied, both individuals may have shown intent to preference British nationality, but, due to the variation in nationality laws internationally, only the latter is able to do so while the former is subject to the risk of deprivation.

Despite the conducive to the public good test applying to both born and naturalised British citizens, Gibney argues that the Rochdale case shows that once counter-terrorism strategy becomes intertwined with the narrative of adherence to 'British values', the conducive to the public good test becomes a test of successful integration and 'serious criminal activity' is a sign of failure. This is the case for all who hold naturalised citizenship. The Rochdale case demonstrates that no length of time will cure this fault in nationality as one of the perpetrators had been a naturalised citizen for over 40 years[598]. In this way,

> "the Pakistani origin of the [Rochdale offenders] meant that the crimes were not simply discrete acts of individual moral turpitude; they were evidence of a deeper threat to liberal values by an ethno/cultural group considered suspect holders of British citizenship"[599].

The language of the conduciveness to the public good test permits the UK executive to apply a social contract understanding to deprivation; where deprivation is justified because through naturalisation the individual voluntarily chooses to adhere to certain values, such as conformity with the law. Where the naturalised individual commits a serious crime they are in breach of

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[595] 'Syrianationality | Syrian Nationality Law', accessed 11 May 2022, http://www.syrianationality.org/index.php?id=18.
[596] British Nationality Act 1981. S1(1)(a)
[597] Alice Edwards and Carla Ferstman, eds., *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2010), http://ludwig.lub.lu.se/login?url=https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=cat07147a&AN=lub.2030543&site=eds-live&scope=site. 447
[598] Gibney, 'Denationalisation and Discrimination'. 26
[599] Gibney. 27

the contract made through naturalisation. As this reasoning is fundamentally rooted in deprivation only of naturalised citizens, the application of such measure can either have the consequence of being applied in a rhetorically incoherent fashion to born citizens, who did not voluntarily commit to British values, or being applied discriminatorily only to naturalised citizens. Employing a 'value based' justification for citizenship deprivation will thus inherently discriminate against naturalised citizens, which could be considered ethnic discrimination under international human rights law.

Through discriminating on paper between mono- and multinationals as well as born and naturalised citizens, the UK security-based deprivation measures disproportionately affect those who are not ethnically British in contradiction to prohibitions against indirect discrimination.

4.3.4 Conclusion

The deprivation system in the UK thus violates the prohibition against arbitrary deprivation of nationality under Article 15(2). Employing deprivation as a counter-terrorism measures in any circumstance violates the substantive requirement that the deprivation be necessary in a democratic society. The UK appellate system for such decisions violates the requirements of justice and predictability for the broadness of its grounds and low standard tests for deprivation decisions. On paper the measures have discriminatory effects that disproportionately impact non-white ethnic communities within the UK.

4.4 Chapter conclusion

States can lawfully deprive multinationals of citizenship without violating statelessness prohibitions and so the UK is able and incentivised to use denationalisation practice to enforce its conception of what constitutes a 'good citizen'. Once the 'good citizen' criteria for nationality have been constituted, it must be entrenched as a freestanding requirement of British nationality for it to be viable as the normative base of British citizenship. To do otherwise would be to admit that there is nothing inherently special about British citizenship. In this way the 'good citizen' becomes a defining characteristic of 'Britishness', and more than just an ancillary consequence of legal deprivation resulting from acceptance of multinationals. Once this definition of citizenship is constituted and the door opened to denationalisation, the consequence is that where an individual defies this definition, the UK will attempt to deprive them of citizenship.

If it is accepted that nationality remains within the reserved domain of states' prerogative powers, then there is nothing wrong with the state determining the criteria for nationality in this way. But since the 1961 Convention, there is a recognised floor to what states are able to do. They cannot render a person stateless. Regardless of whether the UK has retained its power under Article 8 of the 1961 Convention, it still implicitly recognises this prohibition through

the requirement that the Secretary of State must reasonably believe the person is able to acquire another nationality.

It is not possible in international human rights law to treat all nationals equally through the exercise of deprivation powers where the statelessness prohibition exists. Under the current UK legislation, the Secretary of State needs only reasonable belief that the person has the possibility of acquiring another nationality. This will never be the case for ethnic British mononationals, and so the only group fully protected from deprivation is ethnic British mononationals. As has been established, international human rights law prohibits indirect discrimination along ethnic lines.

For as long as there are prohibitions against statelessness and against discrimination, the effect of the combination of these two norms ensures that it is not possible under international human rights law to have a legal system that allows nationality deprivation as a security measure.

5 CONCLUSION

Statements by the UK executive have sought to portray the image that citizenship deprivation measures as they are practised today are merely business as usual. The executive points to the existence of the deprivation power for over a century, as well as the ECtHR approved appellate procedure, to isolate the exercise of deprivation powers from the political motivations behind their use. Just as nationality deprivation is the site of struggle between the interests of the individual and the interests of the state, the right to nationality shows the tension between individual-centric international human rights law, and state-centric international law. Both represent the imbalance of power between individual and state. But the purpose of the international human rights law is to prevent individuals being vulnerable to the abuse of state power. Through reconnecting the legal use and the political purpose of deprivation powers, this thesis has sought to highlight the extreme vulnerability to state power created through nationality deprivation, and in doing so prove the illegality of the UK deprivation system under international human rights law.

The *Nottebohm* case and the subsequent endorsement of its genuine link test, have created a definition of nationality that permits states like the UK to adopt a social contract approach to nationality deprivation. Such a position does not equate to the reality of the modern system of international law, where prohibitions against statelessness and discrimination prevent differential treatment between nationals in the exercise of deprivation powers. While the genuine link test could be recognised as part of the basis for the *creation* of nationality and the potential *effect of* its removal, it should not be equated with a *definition* of nationality for the purposes of justifying deprivation, to do so would make nationality conditional and uncertain. To recognise nationality through anything other than a strict legal assignation only makes it less secure as a status. This not only renders it less valuable as an organising tool for the purposes of international law, it undermines its fundamental nature as part of an individual's identity. In the words of Hannah Arendt:

> "The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world which makes opinions significant and actions effective. Something much more fundamental than freedom and justice, which are the rights of citizens, is at stake when belonging to the community into which one is born is no longer a matter of course and not belonging no longer a matter of choice."[600]

It is beyond the scope of this thesis to examine the ways in which nationality forms part of an individual's social identity and community. But the profound and permanent impact of deprivation shows that it is not enough to claim that nationality measures are within the

[600] Arendt, *The Origins of Totalitarianism*. 388

sovereign domain of states, there must be an individual rights focus in nationality deprivation that recognises international human rights law obligations. The Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms While Countering Terrorism has stated:

> "I fundamentally maintain that rights and security are not at odds. Rather, it is only through the meaningful enforcement of rights that security in all its dimensions will be realised for states and individuals."[601]

Recent important work[602] has been done on how to reconcile the interests of national security and of individuals within the nationality deprivation laws. But the first step is to recognise that these measures do not just affect 'terrorist criminals', but have implications for everyone in the exercise of their human right to nationality. It is when faced with these extreme cases that we test the limits of democratic principles, and it is precisely at these limits where those principles should have greatest effect.

[601] Institute on Statelessness and Inclusion, 'Principles on the Deprivation of Nationality as a Security Measure' (Institute on Statelessness and Inclusion, February 2020).
[602] Institute on Statelessness and Inclusion.

6 Appendix

Section 40 British Nationality Act 1981, as in force 19 May 2022

(1)In this section a reference to a person's " citizenship status " is a reference to his status as—

(a)a British citizen,

(b)a British overseas territories citizen,

(c)a British Overseas citizen,

(d)a British National (Overseas),

(e)a British protected person, or

(f)a British subject.

(2)The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.

(3)The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—

(a) fraud,

(b) false representation, or

(c) concealment of a material fact.

(4)The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.

(4A)But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—

(a) the citizenship status results from the person's naturalisation,

(b) the Secretary of State is 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, any of the Islands, or any British overseas territory, and

(c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

(5)Before making an order under this section in respect of a person the Secretary of State must give the person written notice specifying—

(a)that the Secretary of State has decided to make an order,

(b) the reasons for the order, and

(c)the person's right of appeal under section 40A(1) or under section 2B of the Special Immigration Appeals Commission Act 1997 (c. 68).

(6)Where a person acquired a citizenship status by the operation of a law which applied to him because of his registration or naturalisation under an enactment having effect before commencement, the Secretary of State may by order deprive the person of the citizenship status if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—

(a)fraud,

(b)false representation, or

(c)concealment of a material fact.

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