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The Legality of the Citizenship Deprivation of UK Foreign Terrorist Fighters

Dr Paul Arnell

Introduction

The deprivation of citizenship in UK law and practice has come to the fore in recent years. Foreign terrorist fighters have been a notable target. The case of Shamima Begum is one of the latest examples.¹ Less recently is the case of Hilal Al-Jedda.² The increased scale of deprivations and the profile of those affected have brought the subject into public consciousness. The numbers of persons who have lost their citizenship between 2006 and 2016 is 373, a marked increase on previous periods.³ The renown of certain affected individuals has led to their stories making the front pages, including those of Begum, Al-Jedda, and Abu Hamza.⁴ These cases raise a number of questions. Has there been a permanent change in perceptions of immigration and Britishness?⁵ Is deprivation an effective tool in the fight against terrorism?⁶ And, perhaps more technical but no less important, is UK law and practice in accordance with international law? This latter question is the focus of this article. It is important simply because the deprivation of citizenship has severe consequences for the individual concerned. Further, the issues raised have to-date not been internationally litigated.⁷ An answer to the question may provide the basis of a remedy for individuals affected by deprivation or indeed lead to a change in the law. It is argued that there are five grounds that can be put forward in opposition to UK law and practice. The first is jurisdictional. Here

¹ The Special Immigration Appeals Commission (SIAC) decided several preliminary issues against Begum on 7 February 2020, in *Begum v Secretary of State* [2020] HRLR 7, cited at <https://www.judiciary.uk/wp-content/uploads/2020/02/begum-v-home-secretary-siac-judgment.pdf>. An appeal is pending.

² The Secretary of State lost her appeal against the decision of the Court of Appeal quashing the order depriving Al-Jedda of his citizenship in *Secretary of State v Al-Jedda* [2013] UKSC 62. Hereinafter *Al-Jedda*. He was eventually deprived on new facts coming to light.

³ Weil, P., and Handler, N., *Revocation of Citizenship and Rule of Law: How Judicial Review defeated Britain's First Denaturalization Regime*, (2018) 36(2) *Law and History Review* 295 at p 352.

⁴ The attempt to deprive Hamza of his UK citizenship was ultimately unsuccessful. See *Abu Hamza v SSHD* [2010] SIAC 23/2003 (05 November 2010), cited at www.refworld.org/docid/4ce2a8022.html.

⁵ See Mantu, S., *Terrorist Citizens and the Human Right to Nationality* (2018) 26 *Journal of Contemporary European Studies* 28 at p 32.

⁶ See Zedner, L., *Citizenship Deprivation, Security and Human Rights*, (2016) 18 *European Journal of Migration and Law* 222 at p 240 et seq.

⁷ In *K2 v UK* (No. 42387/13) 7 February 2017 the ECtHR did consider citizenship deprivation in an admissibility decision. It is mentioned below. A summary is cited at https://www.echr.coe.int/Documents/FS_Citizenship_Deprivation_ENG.pdf.

the UK's claim that deprivation of an individual outside its territory will only exceptionally come within the jurisdiction of the ECHR appears questionable. Secondly, the rules prohibiting discrimination and arbitrariness in human rights law are arguably contravened by UK law and practice. Thirdly, the UK may be in breach of its obligations under the Convention on the Reduction of Statelessness 1961. Fourthly, the customary international law obligation upon the UK to readmit its citizens appears set to be violated in certain deprivation cases. Fifthly and finally, UK deprivation practice may violate its treaty obligations to extradite or prosecute individuals in certain cases. This article analyses UK citizenship deprivation law and practice as applied to foreign terrorist fighters under public international law.⁸ It concludes that there are arguments of considerable strength that can be made in opposition to it.

Citizenship

In order to fully appreciate the deprivation of citizenship⁹ in the UK the nature and origins of citizenship, the effects of deprivation and the development of UK law in the area require introduction. The subject of citizenship within the UK, and more generally, is vast and complex.¹⁰ It has both international and national dimensions.¹¹ It is at once existential to statehood and fluid and disposable. As to the former, the Montevideo Convention on the Rights and Duties of States 1933 provides that a criterion of statehood is a permanent population, implying citizenship.¹² In contrast, as we will see, the UK (and many other states) unilaterally deprives persons of that status. It also allows the acquisition of citizenship, *inter alia* through naturalisation. The International Court of Justice has defined nationality as a legal bond which has as its basis "... a social fact of

⁸ Goodwin-Gill, G.S., discussed the legality of the power under the then Immigration Bill 2014 to deprive citizenship leading to statelessness in three submissions to Joint Select Committee on Human Rights in 2014 titled Mr Al-Jedda, Deprivation of Citizenship and International Law, Deprivation of Citizenship Resulting in Statelessness and its Implications in International Law, and Deprivation of Citizenship, Statelessness, and International Law More Authority, all found at <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/legislative-scrutiny-2013-14/immigration-bill/>. Hereinafter Goodwin-Gill Al-Jedda, Deprivation, and More Authority respectively.

⁹ As to terminology, the law governing the area, the British Nationality Act 1981, refers to the deprivation of 'citizenship'. It will be used. The 'deprivation of citizenship' will henceforth be referred to simply as 'deprivation'.

¹⁰ Amongst a voluminous literature see Fransman, L., *British Nationality Law: Immigration and Nationality Law*, Third Edition, Bloomsbury Professional, London 2011.

¹¹ It also has, of course, an EU dimension. Generally, however, EU law provides that the loss and acquisition of citizenship is a matter for national law. The European Council's Edinburgh Decision provides that whether an individual possesses the nationality of a Member State will be settled solely by its national law, [1992] OJ C 348/1. See also *Rottmann*, Case C-135/08 [2010] ECR I-1449.

¹² In article 1, cited at https://avalon.law.yale.edu/20th_century/intam03.asp.

attachment, a genuine connection of existence, interests and sentiments".¹³ Within the UK the origins of the concept are found in the notion of subjecthood. It was over the 14th-19th centuries that British subject status "... emerged as the gateway to formal community membership".¹⁴ This necessarily included the origins of the distinction between British subjects and aliens, with the former holding various privileges denied the latter. Emerging as a defining characteristic of subjecthood was allegiance. In 1608 in *Calvin's Case* Lord Coke likened it to "... the ligatures or strings [that] knit together the joints of all the parts of the body, so doth ligeance join together the Sovereign and all his subjects".¹⁵ The relationship between the state and the subject was reciprocal – with the subject owing allegiance and the state owing a duty of protection. Coke termed this a "mutual bond and obligation between the King and his subjects".¹⁶ A binary conception of subjects or citizens on the one hand and aliens on the other does not reflect modern practice. Today there are a variety of relationships between the state and persons connected to it. This is germane because deprivation can turn on the type of citizenship one has. Similarly, whether an individual is capable of acquiring a second citizenship is also relevant. Modern day deprivation and indeed acquisition of citizenship reflects a commodification and transience of the relationship far removed from its origins. Coke described allegiance as being "... indefinite, and without limit, 'from this day forward'".¹⁷ This is anachronistic. The UK today is increasingly seeking to disburden itself of perceived troublesome citizens by way of deprivation. In contrast, international law acts to protect and govern citizenship and citizens in a number of respects. The resultant conflict is the focus of this examination.

The Deprivation of Citizenship

The deprivation of citizenship entails the withdrawal of that status from an individual.¹⁸ In UK law it occurs in different circumstances and for different reasons. As to circumstances, the power can be applied to naturalised citizens

¹³ *Nottebohm Case (Liechtenstein v. Guatemala)*, (1955) ICJ Rep. 4, 6 April 1955, at p 23.

¹⁴ Pillai, S., and Williams, G., *Twenty-first Century Banishment: Citizenship Stripping in Common Law Nations*, (2017) 66(3) ICLQ 521 at p 523.

¹⁵ (1608) 77 Eng Rep 377, at p 382. The case concerned the allegiance of a Scot to the King following the Union of the Crowns in 1603.

¹⁶ *Ibid* at p 382.

¹⁷ *Ibid* at p 385, citing an oath of allegiance.

¹⁸ The UK is by no means the only European state to deprive citizenship. The former official reviewer of terrorism law in the UK, David Anderson, has noted that research indicated that 14 of 33 European states studied provided for deprivation for actions contrary to the interests of the state, in Anderson, D., *Citizenship Removal Resulting in Statelessness*, First Report of Independent Reviewer on the Operation of the Power to Remove Citizenship Obtained by Naturalisation from Persons who have no Other Citizenship, April 2016, at para 3.3, cited at <https://www.gov.uk/government/publications/citizenship-removal-resulting-in-statelessness>.

alone, naturalised and registered citizens, or British born, naturalised and registered citizens. It can also be applied to certain sole UK citizens and those with two or more citizenships. Deprivation can be applied to persons within and outside the UK. It can take place in conjunction with deportation or on its own. The grounds upon which a deprivation can be made also vary considerably. Fraud, a criminal conviction and trading with the enemy have been long standing grounds. We are only concerned presently with the deprivation of foreign terrorist fighters. The basis in these cases generally is that it is conducive to the public good. In all cases, though, deprivation is life changing. Removed are a number of vital benefits arising from belonging to the UK.¹⁹ The SIAC has stated "Citizenship is the fundamental civic right. It is not necessary to go as far as Warren CJ in *Trop v. Dulles* 356 U.S. 86 in evaluating the importance of its loss as 'the total destruction of the individual status in organised society'; but on any view, its loss, for the citizen, is a very serious detriment".²⁰ The effect of deprivation has been said to be the:

"... loss of the right of abode... is the main consequence... The affected subject also suffers the loss of associated and consequential rights, duties, duties and opportunities – in particular voting, standing for election, jury service, military service, eligibility for appointment to the Civil Service and access to state benefits, state financed healthcare and state sponsored education. Fundamentally, the relationship between the individual and the State, which lies at the heart of citizenship and nationality, is extinguished".²¹

Relevant UK Law

Governing deprivation in the UK is section 40 of the British Nationality Act 1981 (BNA 1981). When enacted section 40(3) provided for deprivation on the grounds of disloyalty or disaffection towards Her Majesty, unlawful trading or communication with an enemy in war or being sentenced to imprisonment in any country to a term not less than one year. Notably, the British Nationality Act (No. 2) 1964 had previously limited the power to deprive in cases where an individual had been convicted of an offence where it appeared to the Secretary of State that that person would become stateless. This amendment was made so that the UK comply with the Convention on the Reduction of Statelessness 1961, discussed further below. In contrast to this restriction the BNA 1981 extended the power to deprive to cover those who had become citizens by registration, i.e. citizens of

¹⁹ Gibney notes that "The loss of citizenship transforms the citizen into an alien in the eyes of the state, stripping them of all rights held qua citizen and making them vulnerable to deportation power. An individual might even be rendered stateless", in Gibney, M., '[A Very Transcendental Power': Denaturalisation and the Liberalisation of Citizenship in the United Kingdom](#), (2013) 61 *Political Studies* 637 at p 638.

²⁰ *Al-Jedda v Secretary of State*, SC/66/2008, 7 April 2009 cited at http://siac.decisions.tribunals.gov.uk/Documents/outcomes/Al_Jedda_SubstantiveOpenJudgment_07Apr09.pdf at para 4.

²¹ *Ahmed and others* (deprivation of citizenship) [2017] UKUT 00118 (IAC) at para 27.

former colonies who acquired citizenship following residence in the UK. This extension did not signal an increase in the exercise of the power. Indeed "... by the end of the 20th century, deprivation power in the UK appeared to be moribund. By 2002, not a single individual had lost his or her citizenship (other than under fraud provisions) for thirty years".²²

A notable development related to the legality of UK deprivation was the enactment of the Nationality, Immigration and Asylum Act 2002. The 2002 Act provided that the 'natural-born', and not just the naturalised and registered, could lose their citizenship. The applicable test was also changed. The Secretary of State now had to be satisfied that the individual acted in a way that was "seriously prejudicial to the vital interests" of the UK. From a procedural perspective, the 2002 Act replaced the system of deprivation committee review of decisions with the possibility of an appeal to a tribunal or SIAC.²³ Finally, and most importantly from a legality perspective, the 2002 Act provided that a deprivation could not take place if it would make an individual stateless in all cases except fraud, false representation or concealment of a material fact. Together these changes have been described as an "odd combination of expansion and contraction... explained by the government's desire to stay on the right side of the European Convention on Nationality".²⁴ In 2006 the law was further amended, with the 'conducive to the public good' test returning in place of 'prejudicial to vital interests', purportedly because the latter threshold was considered too high.²⁵ The 2006 Act did not alter the statelessness limitation, with section 40(4) of the BNA 1981 continuing to provide that the Secretary of State could not make a deprivation order if she was satisfied that that the order would make a person stateless. What did change following the 2006 Act was the emergence of an enhanced political desire to exercise the existing power, and with that a degree of frustration at the limits of the law as it then stood.

The legislative response to the perceived limitations in the power to deprive following the amendments in 2002 and 2006 was the Immigration Act 2014. Reintroduced into UK law was the power to deprive where it results in statelessness. This change can be traced, at least in part, to the Government's failed appeal to the Supreme Court in the case of *Al-Jedda*.²⁶ The 2014 Act inserted section 40(4A) into the BNA 1981. It provides that the obligation not to make an

²² Gibney, M., [The Deprivation of Citizenship in the United Kingdom: A Brief History](#), (2014) 28(4) *Immigration, Nationality and Asylum Law* 326 at p 330. Hereinafter [A Brief History](#).

²³ As to the committee see Weil and Handler, *supra* note 4.

²⁴ Gibney, [A Brief History](#), *supra* note 22 at p 332. The powers under the 2002 Act were exercised only once, ultimately unsuccessfully, as regards Abu Hamza. The UK has not ratified the European Convention on Nationality 1997.

²⁵ Goodwin-Gill, [Al-Jedda](#), *supra* note 8 at p 6, citing Baroness Ashton in the House of Lords, H.L. Deb, 14 March 2006, col 1190. The change was affected by the Immigration, Asylum and Nationality Act 2006 section 56.

²⁶ *Supra* note 2.

individual stateless does not prevent deprivation of a naturalised citizen where it is conducive to the public good because the individual conducted himself in a manner seriously prejudicial to the vital interests of the UK. This is limited to circumstances where 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".²⁷ Accordingly, the position as regards statelessness reverted to that existing prior to 2002.²⁸ The amendment was controversial. Its passage generated "... the most lively and extended parliamentary discussion of denaturalisation powers since the 1918 Act".²⁹ The debates were rightly contested, section 40(4A) forms the basis of two of the five arguments that UK deprivation law and practice may be contrary to international law.³⁰ Overall, then, there are two provisions which can be invoked to deprive a foreign terrorist fighter of UK citizenship; section 40(2) under which a conducive to the public good test must be met and the power is restricted to cases where the individual will not be made stateless and section 40(4A) as just described.

Analysis – Legality

International law does not prohibit the deprivation of citizenship. There is not a justiciable right to a citizenship, nor a general prohibition on citizenship deprivation even where it leads to statelessness.³¹ Accordingly, arguments that UK law and practice in the area is unlawful must relate to considerations in one sense or other tangential to deprivation itself. There are five such features that arguably fall foul of international law.

Applicability of the ECHR over UK Extraterritorial Deprivation

²⁷ This limitation was included late in the legislative process following opposition in the House of Lords to the Bill. Also included was a requirement for the periodic review of the power, under s 40B. The first review was published in April 2016 by David Anderson, supra note 17. For a description of the passage of the Immigration Act 2014 see Harvey, A., Recent Developments on Deprivation of Nationality on Grounds of National Security and Terrorism Resulting in Statelessness, (2014) 28(4) *Journal of Immigration, Asylum and Nationality Law* 336.

²⁸ That power, however, had not been exercised after 1973, see Anderson, supra note 18 at para 2.22.

²⁹ Gibney, A Brief History, supra note 22 at p 334. The British National and Status of Aliens Act 1918 widened the grounds upon which deprivation could take place. The power itself was introduced into UK law for the first time in 1914.

³⁰ This is because two of the five concern the reintroduction of the power to make an individual stateless and that power's purported effects. The other three do not.

³¹ This is perhaps surprising and not uncontroversial. See, for example, Zedner, supra note 6, and Foster, M. and Lambert, H., Statelessness as a Human Rights Issue - A Concept Whose Time Has Come, (2016) 28 *International Journal of Refugee Law* 564.

A first rule arguably infringed by UK deprivation law and practice is jurisdictional. This argument concerns the scope of human rights protection under the ECHR, and in particular the view of the UK Government that it only applies in limited and exceptional extraterritorial circumstances. Prior to considering the ambit of the ECHR it is necessary to note the application of Convention rights to deprivation generally. This is because if no rights are engaged then, of course, its jurisdictional ambit is moot. As mentioned, there is not a free-standing right to citizenship under the ECHR, or indeed any other binding international instrument.³² The UK is not obliged to protect citizenship as a matter of international law. That noted, certain rights may be engaged by deprivation. The Joint Committee has stated:

“... deprivation of citizenship has such serious consequences for the individual concerned that it indirectly engages a number of other human rights. It may, for example, [make one] liable to be removed or excluded from the UK, which engages, for example, the right to be free of degrading treatment (Article 3 ECHR), the right to liberty (Article 5 ECHR), the right to respect for family life (Article 8 ECHR), and the right not to be arbitrarily deprived of the right to enter one’s own country (Article 12(4) ICCPR)”.³³

The ECtHR affirmed the application of the Convention to citizenship in *Genovese v Malta*.³⁴

With certain rights under the ECHR applying to deprivation cases the question arises of whether the situs of the individual at the time of the decision is relevant. The UK Home Office’s Supplementary Memorandum titled the Deprivation of Citizenship: Conduct Seriously Prejudicial to the Vital Interests of the United Kingdom *inter alia* provides “... decisions as to citizenship are capable of engaging Article 8”.³⁵ This protection, however, is limited. The Memorandum continues “... where an individual is not in the UK’s jurisdiction for the purposes of the ECHR, that person’s Article 8 rights will not be engaged by a deprivation decision”.³⁶ This unequivocal statement was explained by James Brokenshire MP, the then Minister of Immigration and Security, in a letter to the Joint Committee. He wrote “... a

³² Article 15 of The Universal Declaration of Human Rights 1948, in contrast, provides that everyone has the right to nationality, and that no one shall be arbitrarily deprived it, see Adjami, M., and Harrington, J., The Scope and Content of Article 15 of the Universal Declaration of Human Rights, (2008) 27(3) Refugee Survey Quarterly 93.

³³ Human Rights Joint Committee, Twelfth Report, Legislative Scrutiny: Immigration Bill (Second Report), February 2014, at para 159, footnotes omitted, at <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/14202.htm>. Hereinafter the Joint Committee, Twelfth Report.

³⁴ (2014) 58 EHHR 25. It was held in the case that it cannot be ruled out that “... an arbitrary denial of citizenship might in certain cases raise an issue under article 8”, at para 30. Arbitrariness is discussed below.

³⁵ January 2014, cited at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/276660/Deprivation_ECHR_memo.pdf, at paras 9-10.

³⁶ Ibid at para 13.

person's Article 8 rights may be in exceptional circumstances engaged by a deprivation decision when that person is not physically present in the UK".³⁷ Those circumstances are not stated. The letter merely iterates the view that the Convention does not routinely have extraterritorial effect and refers to a leading jurisdiction case, *Al-Skeini v UK*.³⁸ Acting upon this restrictive understanding of the ECHR's applicability the UK Government has adopted a policy whereby the facts of an extraterritorial deprivation are examined to consider "what, if any, risk of mistreatment an individual may face as a consequence of deprivation action".³⁹

The UK Government's position on the exceptional applicability of the ECHR to extraterritorial deprivations has been refuted by the Joint Committee⁴⁰ and academic commentators.⁴¹ There are, it is submitted, two somewhat related arguments that can be put forward in opposition. The first is that the Convention does apply to extraterritorial deprivations on the basis of ECtHR jurisprudence, albeit not on the basis of *Al-Skeini v UK*. That case was correctly proffered as authority for the exceptional extraterritorial application of the Convention. As is well known, it forms part of a complex body of jurisprudence extending Convention 'jurisdiction' to certain extraterritorial circumstances. These come under the 'effective control' and 'state agent authority' principles.⁴² Neither of which are of particular relevance to extraterritorial deprivation. In such cases the UK would not have effective control over the area where an individual is present, nor would its state agents have used force outside UK territory or taken her into custody. Rather, it is the rule that has developed in response to expulsions cases, starting with *Soering v UK*⁴³, that arguably applies. Here the responsibility of a state party may be engaged where an intra-territorial decision is taken in circumstances where it is aware of the real risk of a possible future extraterritorial violation. The expulsion jurisprudence accords with extraterritorial deprivations in this respect - with the admittedly not-insignificant difference that the individual is outside of the territory

³⁷ Cited at https://www.parliament.uk/documents/joint-committees/human-rights/Letter_from_James_Brokenshire_MP_200214.pdf, at page 3.

³⁸ (2011) 53 EHRR 18.

³⁹ Brokenshire, supra note 37 at p 3. The Joint Committee, Twelfth Report refers to this policy as a 'practice' not considered a 'legal requirement' by the Secretary of State, supra note 33 at para 41. In *Begum* SIAC considered the issue in line with the Government's view and assessed the case in light of the policy, see *Begum*, supra note 1. Notably, however, it also found that the conditions in the Al Roj camp would breach article 3 if it had applied to her case, at para 129.

⁴⁰ Joint Committee, Twelfth Report, supra note 33 at para 45.

⁴¹ Goodwin-Gill, *Deprivation*, supra note 8 at paras 25-28, and Zedner, supra note 6 at p 238-240.

⁴² There is a wealth of writing on this, including Milanovic, M., *Extraterritorial Application of Human Rights Treaties*, Oxford University Press, Oxford, 2011 and Arnell, P., *Law Across Borders: The Extraterritorial Application of UK Law*, Routledge, London, 2012, chapter 4.

⁴³ (1989) 11 EHRR 439.

of the UK at the time of the decision.⁴⁴ That decision, however, can undoubtedly contribute to, or lead to, an infringement of the individual's rights. Those persons, former citizens, undoubtedly have a strong link with the UK. The argument that the Convention applies to certain extraterritorial deprivation decisions, particularly of sole nationals being made stateless and facing a real risk of their human rights being infringed appears tenable.⁴⁵

The status of the individual affected is at the heart of a second argument that can be made in opposition to the UK's view of extraterritorial deprivation. Goodwin-Gill has written:

"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."⁴⁶

The Joint Committee agreed, stating "In our view, a deprivation decision must be compatible with those Articles whether the citizen concerned is abroad or in the UK at the time of the deprivation decision".⁴⁷ 'Jurisdiction' in the sense used here by Goodwin-Gill differs from that commonly conceived in analyses of the ambit of ECHR protections. As noted, the latter generally equates to extraterritorial effective control or state agent authority, whilst the former centres upon the relationship between the individual and the state party. Integral to that relationship is the lawful power of a state to control and affect its citizens, perhaps most relevantly in this context by way of extending its criminal law to crimes committed anywhere on that basis alone.⁴⁸ In this sense citizens remain within the jurisdiction of the state of their nationality regardless of their situs. It is arguable that this rationale, either alone or in conjunction with that underlying *Soering v UK*, forms a basis upon which opposition to the UK's position can be

⁴⁴ The Grand Chamber admissibility decision of *MN v Belgium*, App. no. 3599/18, 5 March 2020, is arguably equivocal on this point. On the one hand it rules out an analogy with *Soering v UK* where the applicants are outside the territory of the state party (at para 120), yet it confirms jurisdiction is a question of fact turning on the nature of the link between the applicants and the state in order to ascertain whether it effectively exercised authority or control over them (para 113), cited at <http://hudoc.echr.coe.int/eng?i=001-202468>. In an extraterritorial deprivation the UK undoubtedly exercises authority over the individual in putatively removing their citizenship.

⁴⁵ In *K2 v UK*, supra note 7, the ECtHR declared an application manifestly unfounded where a naturalised British citizen holding Sudanese citizenship was deprived for nationality security considerations. Amongst the reasons was his dual nationality.

⁴⁶ Goodwin-Gill, *Al-Jedda*, supra note 8 at p 13. Emphasis in original.

⁴⁷ Joint Committee, Twelfth Report, supra note 33 at p 4.

⁴⁸ See Arnell, P., *The Case for Nationality Based Jurisdiction*, (2001) 50 ICLQ 955.

founded.⁴⁹ This might be thought of as 'functional jurisdiction', arising through the "... exercise of public powers, such as those ordinarily assumed by a territorial sovereign, taking the form of policy delivery and/or operational action translating into 'situational control'".⁵⁰ Admittedly, the arguments put forward here are moot, and indeed conflict with certain dicta, but there are, it is submitted cogent considerations in their favour.

Discrimination and Arbitrariness

Discrimination and arbitrariness form the basis of further arguments that can be put forward in opposition to UK deprivation law and practice. These grounds are linked in part to the jurisdictional point in that they are attendant to the substantive rights under the Convention. Article 14 of the ECHR prohibits discrimination in the application of human rights on the basis of, *inter alia*, national or social origin, birth or other status. This is germane in the deprivation context because UK law differentiates between persons on the basis of national origin, birth and the number of nationalities one has. Simply, naturalised and dual national citizens are treated differently than British-born sole nationals. The former are subject to possible deprivation in circumstances the latter are not. In other words, the manner of acquisition of one's citizenship and the possession of more than one are conditions precedent for deprivation not, say, the risk an individual poses to national security.⁵¹ This position gave rise to disquiet during the passage of the 2014 Act. Jacob Rees-Mogg MP, for example, stated "Once any one of us has a passport that says we are British, we are as British as anybody else, whether they were born here or got their passport five minutes ago. It is incredibly important that there is equality before the law for all Her Majesty's subjects who are living in this country...".⁵² As regards dual nationals, a review of section 40A of BNA 1981 stated that deprivation of naturalised citizens leads to

⁴⁹ In contrast, in *S1, T1, U1 and V1 v Secretary of State* an argument that an extraterritorial deprivation was an exercise of personal jurisdiction was rejected by SIAC. The rationale being that it was not within the power of the UK to uphold the applicant's right not to be subjected to torture in Pakistan, Appeal No's: SC/106/107/108/109/2012, 21 Dec. 2012, cited at <http://siac.decisions.tribunals.gov.uk/Documents/S1-T1-U1-V1-open-judgment-21-12-12..pdf> at para 28. Further, at the point of deprivation there was no threat to the applicants, *ibid* at para 29.

⁵⁰ See Moreno-Lax, V., The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the "Operational Model", (2020) 21 German Law Journal 385 at p 387.

⁵¹ The distinction is 'random', says Yeo, with the proviso that black and ethnic minority children being more likely to be eligible for citizenship deprivation than others, Yeo, C., Some Citizens are More Equal than Others, 2019, Counsel, 24, cited at <https://www.counselmagazine.co.uk/articles/some-citizens-are-more-equal-than-others>.

⁵² House of Commons Hansard, 30 January 2014, Vol. 574, col. 1086, at <https://hansard.parliament.uk/Commons/2014-01-30/debates/1401305800001/ImmigrationBill?highlight=once%20one%20us%20passport%20that%20says%20british#contribution-1401306100019>.

those who have immigrated to the UK and retained their citizenship of origin not having the same security within the country as those who have always been citizens.⁵³ More dramatically, it has been written that "... it is indefensible to discriminate against [naturalised citizens] in this way".⁵⁴ The UK Government has said in response to this argument that there was an "... objective and reasonable justification for treating naturalised citizens differently than others".⁵⁵ This was that, it argued, naturalised citizens have chosen British values and been naturalised on the basis of their good character.⁵⁶ ECtHR jurisprudence provides that a difference in treatment will be discriminatory where it does not have objective and reasonable justification, which means that it does not pursue a legitimate aim or that there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.⁵⁷ It appears arguable that, due to the severe consequences of deprivation and the seemingly remoteness between it and meaningful action against the threat of terrorism, the UK's justification for the discriminatory treatment would fall foul of article 14.⁵⁸

The prohibition of arbitrariness is a second human rights-related basis that can be put forward in opposition to UK law and practice.⁵⁹ As noted, the ECtHR has held that arbitrary deprivation decisions might raise an issue under article 8.⁶⁰ The UN's Human Rights Council has provided that the arbitrary deprivation of nationality, especially on discriminatory grounds, is a violation of human rights.⁶¹ This argument was made by the Joint Committee in 2005 as regards the amendments to the deprivation power in the Immigration, Asylum and Nationality Bill. It noted "... insufficient guarantees against arbitrariness in its exercise in light of (i) the significant reduction in the threshold, (ii) the lack of requirement of objectively reasonable grounds for the Secretary of State's belief, and (iii) the arbitrariness

⁵³ Anderson, D., supra note 18 at para 3.5.

⁵⁴ Zedner, supra note 6 at p 239.

⁵⁵ As noted in the Joint Committee, Twelfth Report, supra note 33 at para 50.

⁵⁶ Zedner notes that this view appears to rest on a "quasi-contractarian notion that naturalisation depends on a contractual agreement between state and foreigner" whereby the individual promises to abide by the law, supra note 6 at p 238.

⁵⁷ See *Abdulaziz v UK* (1985) 7 EHRR 471, and generally the Council of Europe's Guide on Article 14, 1st Edition, Dec. 2019, at https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.

⁵⁸ In *K2 v UK*, supra note 7, the discrimination point does not appear to have been considered.

⁵⁹ Interestingly, deprivation was accepted as legitimate by philosophers including Kant, Constant and Beccaria as long as it was not arbitrarily applied, see Gibney, supra note 19 at p 641.

⁶⁰ *Genovese v Malta*, supra note 34. Admittedly, this case concerned the denial of citizenship, rather than its deprivation.

⁶¹ Resolution Adopted by the Human Rights Council 30 June 2016 on Human Rights and Arbitrary Deprivation of Nationality, cited at <https://www.refworld.org/docid/57e3dc204.html>.

of the definition of the class affected...".⁶² These criticisms subsist today. As seen, there is no judicial involvement in the deprivation decision making process. This contrasts with other terrorism-related measures such as Temporary Exclusion Orders. Additionally, concerns have been expressed about aspects of the appellate procedures at the SIAC as well as the fact that affected persons are not permitted to return to the UK to appeal deprivation.⁶³ As to the review of decisions it is notable that in 2002 the system of Deprivation Committee review was abolished and replaced by an appellate system, including to the SIAC where nationality security concerns etcetera are accepted by the Secretary of State as being involved.⁶⁴ The UK Government's position as to arbitrariness and the present law was iterated by Theresa May in a debate leading to the 2014 Act. She said affected individuals "... will continue to be afforded an independent right of appeal, retaining an avenue of judicial redress. This is not about arbitrarily depriving people of their citizenship; it is a targeted policy that will be used sparingly against very dangerous individuals who have brought such action upon themselves through terrorist-related acts. [The new clause]... is a proportionate and necessary measure".⁶⁵ Notably, in response to a query from the Joint Committee the Government stated that it would adopt the approach advocated by the UNHCR in its 2010 Report Preventing and Reducing Statelessness. This included considering the proportionality of the measure taking in the full circumstances of the case.⁶⁶ In spite of this concession, in light of the effect of deprivation in the particular circumstances of cases such as Begum's it appears arguable that it is not an objectively proportionate move in all cases.

Violation of the Convention on the Reduction of Statelessness 1961

The terms the Convention on the Reduction of Statelessness 1961 form the basis of a third argument in opposition to UK deprivation law and practice. This argument relates to section 40A of the 1981 Act, the provision that may lead to statelessness. Entering into force in 1975, the 1961 Convention obliges state parties to avoid causing statelessness. Article 8(1) provides "A Contracting State

⁶² Joint Committee, Third Report, Session 2004-05, 28 Nov. 2005, at para 164, at <https://publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/7507.htm>.

⁶³ SIAC is discussed by the Joint Committee, Twelfth Report, supra note 33 at paras 72-77. In regard to appealing whilst abroad, in *Begum v Secretary of State* SIAC agreed that Begum could not play a meaningful part in her appeal in her circumstances and, to that extent, it would not be fair and effective, supra note 1 at para 143. It held, however, that his did not mean her appeal must succeed. It held she could, amongst other things, seek to stay her appeal, at para 191.

⁶⁴ Weil describes the positive effect of the Deprivation Committee procedure in mitigating the excesses of the power, supra note 3 at p 352.

⁶⁵ House of Commons Hansard, 30 Jan. 2014, at col 1050, cited at <https://publications.parliament.uk/pa/cm201314/cmhansrd/cm140130/debtext/140130-0002.htm>.

⁶⁶ Joint Committee, Twelfth Report, supra note 33 at para 61.

shall not deprive a person of his nationality if such deprivation would render him stateless". Article 8 also iterates exceptions to this rule. Of these, article 8(3) is especially relevant. It contains a condition that permits state parties to retain their right to engender statelessness. This is where a person conducted himself in a manner seriously prejudicial to the vital interests of that state. The UK exercised this right upon becoming a party, declaring:

'... the United Kingdom retains the right to deprive a naturalised person of his nationality on the following grounds, [they] being grounds existing in United Kingdom law at the present time: that... the person... (ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty".⁶⁷

This accorded with the terms of the 1961 Convention. UK law then contained that ground of deprivation. It is the subsequent evolution of UK law that can be argued gave rise to a contravention of the treaty. Particularly, this was the introduction of the prohibition of deprivation leading to statelessness under the 2002 Act and then the withdrawal of that ban by the 2014 Act. The issue that arises in these circumstances is the meaning of the phrase a "... State may *retain* the right to deprive a person of his nationality, if at the time... it specifies its retention".⁶⁸ Specifically, does the right to retain the ability to make an individual stateless exist *ad infinitum* or, rather, can it be extinguished or waived through subsequent action by a state party.

There are conflicting views on whether the UK permanently waived its right to render a person stateless in 2002. Fripp suggests it did:

"The new provision might reasonably appear to breach the obligations of the UK under Article 8(3) CRS, because while this allowed a state to 'retain' the power to deprive an individual of nationality, the conception of 'retention' of a particular power, interpreted according to established principles, does not self-evidently coincide with 'regaining' or 'recreating' the power after it has been removed by the amendment of domestic law".⁶⁹

Bucken and de Groot agree, and note that "... there are multiple legal arguments to make a strong case that the reintroduction of a ground on the basis of Article 8(3) violates international law in general and the obligations of the United Kingdom under the 1961 Convention in particular".⁷⁰ The then Home Secretary Theresa May, on the other hand, said in the debate over the new power that the proposal was completely consistent with the Convention, "We put a declaration into the original UK convention, and we are taking the position back to what it was

⁶⁷ Cited in Goodwin-Gill, Al-Jedda, supra note 8 at p 4.

⁶⁸ Emphasis added.

⁶⁹ Fripp, E., *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship*, 1st Edition, Hart Publishing, 2015 at p 410.

⁷⁰ Bucken, L., and de Groot, R., Deprivation of Nationality under Article 8(3) of the 1961 Convention on the Reduction of Statelessness, (2018) 25(1) Maastricht Journal of European and Comparative Law 38 at p 49.

set out in that declaration”.⁷¹ Illuminating this difference of opinion is a change in the description of the reintroduced power in the Explanatory Notes accompanying the 2014 Bill and Act. Prior to its enactment it is described as “... *intended to be consistent*” with the 1961 Convention.⁷² After becoming law the Explanatory Notes had been changed to read that it “... is intended to *be more closely aligned*” with the treaty.⁷³ Clearly, the authors of the Explanatory Notes had reservations whether the section complied with the 1961 Convention.

The legality of the UK’s reintroduction of the power to make persons stateless centres upon the meaning of ‘retain’ in article 8(3). The Vienna Convention on the Law of Treaties 1969 is of some relevance here.⁷⁴ Article 31(1) provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The meaning of ‘retain’, according to the Cambridge Dictionary, is “to keep or continue to have something”. As to the context, object and purpose of the Convention it is axiomatic in that the instrument seeks to reduce statelessness. Its pithy preamble includes the statement that the state parties considered “it desirable to reduce statelessness by international agreement”. On the other hand, the 1969 Convention generally requires the withdrawal of reservations to be made in writing.⁷⁵ There is also no set limit in time on article 8(3) within the Convention, a state’s declaration may operate indefinitely. Accordingly, there are arguments for and against the legality of the UK’s position. The view that the reintroduction of the power to make an individual stateless in 2014 was unlawful is therefore, at the very least, tenable.⁷⁶

Violation of Obligation to (Re)admit (Deprived) Citizens

The obligation to readmit citizens is a fourth rule of international law arguably infringed by UK deprivation law and practice. This applies to the exercise of the

⁷¹ House of Commons Hansard 30 Jan. 2014 at col 1047, at <https://publications.parliament.uk/pa/cm201314/cmhansrd/cm140130/debtext/140130-0002.htm>. The Joint Committee, Twelfth Report agreed with the Government, stating the 2014 amendment did not “... in strict legal terms” breach the UK’s obligations under the 1961 Convention, *supra* note 33 at p 3.

⁷² At para 382, cited at <https://publications.parliament.uk/pa/bills/lbill/2013-2014/0084/en/14084en.htm>.

⁷³ At paragraph 406, cited at <http://www.legislation.gov.uk/ukpga/2014/22/notes>.

⁷⁴ Although the Convention does not have retrospective effect, by article 4, it codified the customary international governing treaties, see *Fothergill v Monarch Airlines* [1981] AC 251 at p 282 per Lord Diplock.

⁷⁵ In article 23(4). Article 8 declarations are not formal ‘reservations’, however.

⁷⁶ The Open Society Justice Initiative’s Opinion on Clause 60 of the Immigration Bill and Article 8 of the UN Convention on Reducing Statelessness concluded it was unlawful, cited at <https://www.justiceinitiative.org/publications/opinion-clause-60-uk-immigration-bill-and-article-8-un-convention-reducing>.

section 40A power alone, in that it is the provision that can lead to an individual being made stateless. This illegality may arise where the UK deprives an individual of citizenship where she does not, or may not, hold the nationality of a third state, and then deports and refuses to readmit her. Equally it may occur where the UK deprives a citizen of their nationality whilst abroad in such circumstances and refuses to readmit him. The law as to the admission of citizens is clear. In *R v Secretary of State for the Home Department, ex parte Thakrar*, Lord Denning generally accepted the argument that the applicant "As a British national, if he is expelled from the land where he is living, he is entitled as of right to come into the United Kingdom. This right... is given by international law".⁷⁷ Williams states:

"The proposition that a state can of its own sole authority sever the link which binds it to its own nationals in such a way as to be no longer compellable to receive back the person denationalized if another state should wish to deport him, involves then the consequence that a state has it in its power by unilateral action to deprive other states of a right which they now possess in relation to particular individuals. It seems contrary to positive international law to admit that an international right can be thus destroyed. The duty of a state to receive back its nationals is laid down by the accepted authorities in the most general terms and is in accordance with the actual practice of states".⁷⁸

In a similar vein but from a practical perspective is Anderson who states that there is "... something of a mismatch between the popular perception that citizenship stripping enables or equates to banishment and the reality... that legal or practical reasons will tend to prevent the removal (or make it impossible to resist the return) of a single national whose UK citizenship has been taken away".⁷⁹

The lawful ability of states to control their borders is founded in state sovereignty. This includes, of course, the right of states to control the entry and presence of non-nationals to and within their territory. The necessary corollary of this universally accepted entitlement is the obligation on states to admit their nationals.⁸⁰ As Hailbronner notes "A state's duty to respect the sovereignty of other states and their sovereign right to decide on the admission of foreigners implies a duty to accept a responsibility of a state's own citizens including an

⁷⁷ [1974] QB 684 at p 701. Lord Denning qualified the right in the circumstances of the case, the mass expulsion of individuals of Asian heritage from Uganda. Cited in support of the rule was *Oppenheim's International Law*, 8th ed. Vol. 1, p 645-646 where it is provided "The home state of expelled persons is bound to receive them on the home territory".

⁷⁸ Williams, J.F., *Denationalization*, (1927) 8 British Yearbook of International Law 45 at p 55-6. The passage is quoted by Goodwin-Gill, *More Authority*, supra note 8 at para 7.

⁷⁹ Anderson, supra note 18 at para 3.14.

⁸⁰ Goodwin-Gill notes that where a deprived citizen is denied entry the principle of 'returnability' would be breached and the UK would be breaking its obligation to the receiving state, Goodwin-Gill, *More Authority*, supra note 8, at p 1.

obligation to allow their return".⁸¹ The spectre of extraterritorial deprivation being the mechanism whereby the UK could bar a former citizen's return worried the Joint Committee. It said "We would be very concerned if the Government's main or sole purpose in taking this power is to exercise it in relation to naturalised British citizens while they are abroad, as it appears that this carries a very great risk of breaching the UK's international obligations to the State who admitted the British citizen to its territory".⁸² Describing the duty in another way is Fripp who states that "The admission of a British citizen to the territory of another state on the basis of British nationality, where he or she is not a national of that state and so does not have a general right of entrance and residence to it, creates a relationship between the two states within which the UK has a duty not to impinge upon the sovereignty of the other state by frustrating its ability to expel an alien who entered its territory as a British citizen".⁸³ The underlying point here is that a decision to deprive a sole UK national of his citizenship does not affect the UK's international legal obligation to readmit him to its territory. Were the UK to refuse to accept the return of such an individual it would be in breach of its obligation to the state where the individual is then present.

Power in Breach of Extradite or Prosecute Obligations

Extradite or prosecute obligations within criminally-related treaties to which the UK is party form the basis of the final argument in opposition to UK deprivation law and practice to be made.⁸⁴ Relevant treaties include the International Convention for the Suppression of Terrorist Bombings 1997 and the International Convention for the Suppression of the Financing of Terrorism 2000. In these and a number of other conventions are provisions that oblige state parties to 'take appropriate measures' where the circumstances require.⁸⁵ Appropriate measures include establishing criminal jurisdiction over the acts of one's nationals wherever committed and ensuring an individual's presence for extradition or prosecution where she is within its territory and an investigation satisfied the authorities that the circumstances so warrant.⁸⁶ The deprivation of an individual could prevent or affect the UK's ability to comply with these provisions. This could happen directly by deportation subsequent to deprivation, or in a way that defeats the object and purpose of the provisions by depriving an individual suspected of applicable crimes

⁸¹ Hailbronner, K., Nationality in Public International Law and European Law, in Baubock, R., et al (eds) *Acquisition and Loss of Nationality*, Vol 1., Amsterdam University Press, Amsterdam, 2006, at p 46.

⁸² The Joint Committee, Twelfth Report, supra note 33 at p 4.

⁸³ Fripp, supra note 69 at p 385. Article 3(2) of Protocol Four to the ECHR provides that "No one shall be deprived the right to enter the territory of the state of which he is a national". The UK has not ratified Protocol Four.

⁸⁴ Goodwin-Gill address this issue in Deprivation, supra note 8 at paras 29-37.

⁸⁵ See generally, van Steenberghe, R., The Obligation to Extradite or Prosecute: Clarifying its Nature, (2011) 9(5) *Journal of International Criminal Justice* 1089.

⁸⁶ For example, in article 7 of the 1997 Convention.

whilst abroad. By engaging in deprivations in spite of these obligations Goodwin-Gill suggests that the UK "... intends to ignore many of its obligations in relation to those who may be alleged to have committed, or otherwise been involved in, terrorist-related acts, and to seek to off-load them unilaterally".⁸⁷ Of course the UK's possible responsibility here turns on several factors, not least of which is the nature of the act the individual allegedly committed. To give rise to an extradite or prosecute obligation the act must of course fall under an applicable treaty. Further, an investigation may well result in the threshold for a UK prosecution not being met and there being no request for the individual's extradition. These factors noted, the possibility remains that in certain cases a deprivation decision will directly or indirectly frustrate, and so contravene, an extradite or prosecute obligation.

Conclusion

UK law and practice governing the deprivation of citizenship arguably conflicts with five different rules of public international law tangential or related to it. The possible illegality is particularly pronounced where foreign terrorist fighters have been affected. This is because they are more likely to be abroad at the point of deprivation and/ or to have committed an act falling under an extradite or prosecute obligation than others affected by the process. The question of whether foreign terrorist fighters are more likely to be naturalised UK citizens and/ or amenable to acquiring the nationality of a third state is moot. Regardless, it is clear that a considerable proportion of those deprived of their citizenship under sections 40(2) and 40(4A) of the BNA 1981ct are foreign terrorist fighters. The exercise of power under those sections may conflict with a variety of norms. These span the jurisdictional rules within ECtHR jurisprudence to the customary rules obliging states to readmit nationals, and from the treaty provisions within the 1961 Convention and a number of criminally-related treaties to rules attendant to ECHR rights. The UK has developed its powers of deprivation in the face of these rules – they are not new. Its position is misplaced and antithetical to statelessness and international law more generally. Its misconception is illustrated by the belief that the 1961 Convention obliged the UK to re-introduce a power to create statelessness. Theresa May has stated "... the position the United Kingdom had prior to 2003... *is the position that we are required to have under the United Nations convention*".⁸⁸ This is clearly not the case. More worryingly, the UK Government appears set to make deprivation even easier, promising in 2015 to

⁸⁷ Goodwin-Gill, Deprivation, supra note 8 at para 36.

⁸⁸ House of Commons Hansard, 30 Jan. 2014 at col 1044, at <https://publications.parliament.uk/pa/cm201314/cmhansrd/cm140130/debtext/140130-0002.htm>. Emphasis added.

further "... review rules on citizenship... and how we can more easily revoke citizenship from those who reject our values".⁸⁹

The UK has a history of working towards the abolition of statelessness and of generally adhering to its international legal obligations. In recent years both have been tested. It can only be hoped that the country changes course and adheres to the international rule of law either of its own initiative or following an adverse judgment by an international or national court. This is a priority. As things stand, sadly, UK law and practice on deprivation is not too distinct from those "... autocrats and dictators who habitually have rendered people stateless".⁹⁰ Tragically, not only is UK law and practice arguably unlawful it is almost certainly ineffective in meeting its purported goal of playing a part in addressing the scourge of terrorism both within the country and abroad. The words of Voltaire ring true today:

"Not long ago one banished outside the sphere of jurisdiction a petty thief, a petty forger, a man guilty of an act of violence. The result was that he became a big robber, a forger on a big scale, and murderer within the sphere of another jurisdiction. It is as if we threw into our neighbours' fields the stones which incommode us in our own".⁹¹

⁸⁹ HM Government Counter Extremism Strategy 2015, at para 104, cited at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/470088/51859_Cm9148_Accessible.pdf.

⁹⁰ Lord Brown, in the House of Lords debate on the 2014 amendments, at col 1175, at <https://hansard.parliament.uk/Lords/2014-04-07/debates/14040716000863/ImmigrationBill>.

⁹¹ Voltaire, *The Philosophical Dictionary*, Dover Publications, New York, 2010 at p 59, under 'Banishment', the book is found at <https://history.hanover.edu/texts/voltaire/volindex.html>.